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Review of the ACCC Annual Report 2003

House of Representatives Standing Committee on Economics, Finance and Public Administration

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Foreword

The Committee's review of the ACCC (Australian Competition and Consumer Commission) *Annual Report 2003* has occurred at a particularly fortuitous time, given that it has coincided with a number of key events related to competition policy in Australia, including Telstra's recent changes to its broadband retail and wholesale pricing regime. In addition to this, the review has addressed several other matters of considerable importance to Australian society, including fuel pricing, telecommunications and banking.

During the review process a public hearing was conducted on 5 March 2004 in Melbourne. This hearing was the first occasion on which the recently appointed Chairman of the ACCC, Mr Graeme Samuel AO, had publicly appeared before the Committee in his new role. The hearing provided Committee members and the public with a considerable insight into a range of issues and challenges currently facing the competition watchdog, including problems posed by jurisdictional limitations, spiralling litigation costs and the maintenance of competition in rural and regional Australia.

The Committee intends to continue carrying out annual report reviews of this nature with the ACCC into the future. These will be based on the highly successful Reserve Bank of Australia hearings which the Committee conducts biannually. The Committee feel that this approach not only helps to ensure that the ACCC remains accountable to the Parliament for its actions, but also provides an excellent opportunity for the public to gain a greater understanding of the role and policies of the Commission.

On behalf of the Committee I would like to express our appreciation to the ACCC, in particular the Chairman Mr Graeme Samuel and the CEO Mr Brian Cassidy, for their considerable assistance in the review process. Finally I would like to acknowledge the efforts of Deputy Chair Anna Burke MP and our fellow Committee members for their participation in the review. We look forward to continuing our valuable dialogue with the ACCC at future hearings.

David Hawker MP
Chairman

Membership of the Committee

Chairman Mr David Hawker MP

Deputy Chair Ms Anna Burke MP

Members

Mr Anthony Albanese MP
Mr David Cox MP
Ms Teresa Gambaro MP
Mr Alan Griffin MP
Mr Peter King MP
Mr Gary Nairn MP
Hon Alex Somlyay MP
Dr Andrew Southcott MP

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Secretary	Mr Russell Chafer
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Terms of reference

The Standing Committee on Economics, Finance, and Public Administration is empowered to enquire into and report on any matter referred to it by either the House or a Minister including any pre-legislation proposal, bill, motion, petition, vote or expenditure, other financial matter, report or paper.

Annual Reports of government departments and authorities tabled in the House shall stand referred to the relevant committee for any inquiry the committee may wish to make. Reports shall stand referred to committees in accordance with a schedule tabled by the Speaker to record the areas of responsibility of each committee.

The Australian Competition and Consumer Commission *Annual Report 2003* was tabled in the House of Representatives on 16 October 2003. On 4 December 2003 the Committee resolved to review the Report.

List of abbreviations

ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
ATM	Automatic Teller Machine
CEO	Chief Executive Officer
EFTPOS	Electronic Funds Transfer Point of Sale
RBA	Reserve Bank of Australia

List of recommendations

ACCC and ASIC jurisdictional matters

Recommendation 1

The Committee recommends that the Government investigate bringing investment property advisors under a similar regulatory regime as financial planners.

Sanctions

Recommendation 2

The Committee recommends that the Government give serious consideration to introducing criminal sanctions for participants in hard core cartels.

Telecommunications and rural areas

Recommendation 3

The Committee recommends that further work be done by the ACCC to determine the extent to which competition can accelerate access to new telecommunications technology in regional Australia.

Bank fees and charges

Recommendation 4

The Committee recommends that the ACCC produce a public report at least annually detailing bank fees and charges.

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Introduction

Background

Role of the ACCC

1.1 The Australian Competition and Consumer Commission is an independent statutory authority, established in 1995 as part of the national competition policy reform program. It is the only national government agency dealing with competition matters.

1.2 The primary responsibility of the ACCC is to ensure that individuals and businesses comply with competition, fair trading and consumer protection laws, in particular the *Trade Practices Act 1974 (Cth).*

1.3 The ACCC administers these laws with the objective of ensuring that competition within Australia is both efficient and fair. In achieving this outcome the Commission:

- promotes effective competition and informed markets;
- encourages fair trading and protects consumers; and
- regulates infrastructure service markets and other markets where competition is restricted.

The Current Review

1.4 The Committee's review of the ACCC's Annual Report is provided for by the Standing Orders of the House of Representatives which

empower the Committee to inquire into and report on the annual reports of several government departments, authorities and agencies, one of these being the ACCC.

1.5 In a similar fashion to the highly successful reviews which the Committee conducts biannually into the Reserve Bank of Australia, it will continue to hold regular public hearings with the ACCC and other key regulators.

1.6 The focus of this report is primarily on matters discussed at the public hearing. The report does not reiterate in detail the commentary in the ACCC's *Annual Report 2003*. This document is publicly available on the official website of the ACCC.[1]

Scope and Conduct of the Review

1.7 The *Annual Report 2003* of the ACCC was tabled in the House of Representatives on 16 October 2003. The Committee resolved on 4 December 2003 to conduct a review of the Report.

1.8 A public hearing was held at the Victorian State Parliament in Melbourne on 5 March 2004. The transcript of the hearing is available on the Committee's website.[2]

1.9 This inquiry is the fourth to be conducted into the ACCC by the Committee, the last review being held in 2001.

1.10 The Melbourne hearing was of particular significance as it was the first occasion that recently appointed Chairman Mr Graeme Samuel AO publicly appeared before the Committee[3] following the retirement of his predecessor Professor Alan Fels AO on 30 June 2003. The Committee was pleased by the strong media interest as well as that shown by ACCC staff.

1.11 The Committee feels that regular reviews of the Annual Report of the ACCC are extremely important as this not only helps to ensure that the Commission remains answerable for its actions but also provides an opportunity for the public to gain a more comprehensive understanding of the role and policies of the ACCC.

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1 http://www.accc.gov.au/content/index.phtml/itemId/387849/fromItemId/3737

2 http://www.aph.gov.au/hansard/reps/commttee/R7282.pdf

3 Mr Samuel had appeared previously in his role as President of the National Competition Council.

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Management Issues

Funding

2.1 In relation to the budgetary situation of the ACCC, the Chief Executive Officer Mr Brian Cassidy noted that in the previous financial year (2002-03) the Commission had an operating deficit of $10.2 million, whereas estimates this year indicate that the operating deficit will be over $8 million as a result of numerous factors, including the AGL case[1] which cost over $2 ½ million.

2.2 In analysing the expenditure that led to last year's budgetary outcome, the ACCC commented that it was primarily due to an overrun on litigation expenses of $9 million. Furthermore it advised that the blow-out in litigation costs would also likely be repeated this financial year.

> We are looking at an overrun on our litigation expenses this financial year of about the same order of magnitude – about $8 million or so.[2]

2.3 The Chairman, Mr Samuel, stated that the reasons behind this increase in litigation costs are several, including litigation becoming progressively more expensive in addition to 'big business' becoming more willing over recent years to fight the Commission in the courts.

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1 This case involved a bid by AGL to buy a stake in the Victorian Loy Yang power station. The ACCC contested this move by arguing that it breached the Trade Practices Act by substantially lessening competition. The Federal Court in deciding this matter, ruled on December 19 2003 that AGL's intended purchase did not breach the Act.

2 *Official Hansard*, 5 March 2004, Melbourne, p. 25.

The complexity of cases was also cited as a factor behind this cost increase, as such matters often require expensive solutions, an example being seen with cases involving an 'international dimension' as these often require the ACCC to 'send people offshore to obtain evidence – witness statements and so forth'.[3]

2.4 The Commission stated that in the event of it not receiving an increase in funding levels, it will examine the option of rationalising its discretionary activities, including enforcement actions. However, it did emphasise that many of its functions are not discretionary in nature and as such will not be able to be cut back, an example of these compulsory activities being the assessing of mergers. The Chairman in qualifying this approach did however stress that regardless of what occurs, the Commission will not in any way be reluctant to enforce the law via litigation.

> We are absolutely determined that the sharp point of the pyramid I talked of before is enforcement and we would without any hesitation litigate if we think that that is the means of bringing about proper behaviour and correcting misbehaviour.[4]

2.5 In respect to the rationalisation of discretionary activities such as enforcement actions, the Committee made the observation that this approach coupled with the increased willingness of big business to challenge the ACCC in the courts could have significant implications in terms of the ACCC's capacity to litigate if it is not adequately budgeted.[5] The Committee also expressed concern about big business utilising litigation against the Commission in order to drain the ACCC budget and as such reduce the capacity of the Commission to take legal action.

> When you are dealing with a situation where bigger businesses are keener to take you on and in effect trying to dry you up in relation to litigation action, if you [have] not been budgeted to actually deal with that then there are real implications for your operation at that pointy end. [6]

2.6 This concern relating to funding may explain recent media reports that the ACCC asked Telstra's rival internet service providers if they

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3 *Official Hansard*, 5 March 2004, Melbourne, p. 27.

4 *Official Hansard*, 5 March 2004, Melbourne, p. 26.

5 *Official Hansard*, 5 March 2004, Melbourne, p. 26.

6 *Official Hansard*, 5 March 2004, Melbourne, p. 26.

'would contribute to court costs in the event of court action'[7] following Telstra's recent wholesale and retail pricing changes to its broadband internet service.

2.7 Finally, in response to a Committee query relating to costs in those cases where the ACCC successfully litigates an action, the Chairman noted that these funds are directed to consolidated revenue. Mr Samuel stated that he felt that this approach is not entirely ideal as it forces the Commission to shoulder the heavy burden of costs on an already stretched budget even when it successfully contests a case.

> I do understand that of course we are budgeted to undertake a certain range of enforcement and other activities each year and we should not get the windfall of costs, but it certainly goes against the grain when you win a case and you have spent several million dollars to bring about a win and then you suddenly find that it doesn't matter if you get costs because it goes to consolidated revenue.[8]

2.8 The 2004/2005 Federal Budget has increased funding for the ACCC by an extra $47million over four years, including $10 million to the Commission's litigation contingency fund. The Committee expects that rising litigation costs will continue to be expressly considered by government in future budgets.

ACCC and ASIC jurisdictional matters

2.9 In March 2003, as a result of the Wallis inquiry, financial services were removed from the ACCC's consumer protection jurisdiction and transferred to the Australian Securities and Investments Commission (ASIC). Following this shift there has been considerable debate as to whether it has led to more effective regulation in this area. In response to commentary from the Committee that this transfer of credit powers to ASIC has led to increased confusion as to which agency is actually responsible for this area, Mr Samuel responded by asserting that whilst confusion has occurred it is largely due to the fact that this jurisdictional handover has only recently occurred.

> The confusion between the two regulators is probably more at the margin than at the core, but there is some confusion,

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7 AAP, Canberra Times, Saturday 20 March 2004, p.12.

8 *Official Hansard*, 5 March 2004, Melbourne, p. 26.

> particularly transitory confusion resulting from changes that were instituted last year.[9]

2.10 In tackling the issue of jurisdictional confusion between both agencies, Mr Samuel commented that the ACCC was in the process of remedying this situation with ASIC via the use of a number of strategies, including:

- senior management meetings between both agencies in order to deal with this cooperation issue at a 'high level';
- regular meetings and discussions at the working level between ASIC and officers of the ACCC;
- joint exercises, as seen with the issue of surcharging for using credit cards as both organisations issued a joint publication and 'undertook a joint education program'; and
- the establishment of specific arrangements whereby the ACCC can refer complaints that it receives over to ASIC through dedicated arrangements that ASIC has set up.

2.11 In spite of attempts to combat confusion and a lack of cohesion between both agencies, it was noted that there are still a number of areas where greater attention is required. One such area is property investment seminars (page 15 also refers) as it has considerable jurisdiction overlaps between both agencies.

> the way the property investment seminars are advertised is probably [ACCC] jurisdiction and what is said in the seminars is probably ASIC's jurisdiction. Unconscionable conduct in consumer financial transactions is exclusively ASIC's jurisdiction and unconscionable conduct in business financial transactions is a shared jurisdiction.[10]

2.12 The Governor of the Reserve Bank of Australia (RBA), Mr Ian Macfarlane, had previously advised this Committee in relation to this matter that:

> I think there is a regulatory gap there. It is clearly a problem if there is one group of people who are holding seminars on how to invest your money who are regulated – the financial planners – and there is another group who are doing almost exactly the same thing, although doing it within the one asset

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9 *Official Hansard*, 5 March 2004, Melbourne, p. 14.

10 *Official Hansard*, 5 March 2004, Melbourne, p. 14.

> class, which is property, who are unregulated. So I think there is a need to extend the capacity for ASIC to do that.[11]

2.13 The Committee will continue to pursue this issue with all relevant agencies to ensure that the practices described by the RBA and the ACCC are properly scrutinised.

Recommendation 1

The Committee recommends that the Government investigate bringing investment property advisors under a similar regulatory regime as financial planners.

11 *Official Hansard*, 6 June 2003, Melbourne, p. 55 and 59.

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Compliance and Enforcement

Internet scams and enforcement

3.1 In combating the growing problem of cyberspace scams, the Commission has developed and implemented a number of strategies. One of the most effective has been the utilisation of greater international cooperation via treaties and memoranda of understanding.[12] This approach has improved ACCC enforcement in this area considerably, by better enabling the Commission to enlist the assistance of foreign regulators in bringing about enforcement against many of the overseas based internet frauds operating within Australia.[13]

3.2 One of the most challenging aspects of targeting this area is the issue of jurisdiction. Currently the ACCC's authority is limited to parties that are incorporated in Australia, resident in Australia or carrying on business in Australia. Mr Samuel advised the Committee that the first two of these criteria are relatively straightforward to satisfy; but the latter criteria is slightly more complicated given that if the party concerned is resident outside Australia, there is a judicially untested issue as to whether business transactions entered into by Australians with these overseas parties via the internet would constitute the carrying on of business in Australia.

3.3 The limitations of legal remedies in the area of internet scams were noted by the Chairman at the public hearing in the following terms.

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12 An example of this being seen with treaties entered into with the United States as well as cooperation agreements with New Zealand.

13 *Official Hansard*, 5 March 2004, Melbourne, p. 12.

> You can get all the injunctions and court orders in the world, but it is very difficult to enforce them when you are dealing with parties outside the jurisdiction of Australian courts.[14]

Public education and warnings

3.4 Following a Committee query as to whether greater emphasis should be placed by the ACCC on educating and cautioning the public in relation to scams and cons, the Chairman, in stating his desire to better inform the community, noted the key limitation associated with the use of public warnings and education campaigns; namely that regardless of how effective an education strategy is, there will always be an element of society which will disregard cautionary advice and fall prey to fraudulent activities.

> …all of us would wish we could inform and educate the Australian public about these scams and the merits of ignoring them. But as we all know there is always a section of the public that will ignore warnings; there are always going to be those that will make their bank accounts available to the Nigerian money scam.[15]

3.5 In relation to the funding of education programs, the ACCC advised the Committee that it does allocate financial resources to this important function but that these are limited given that there are a number of competing demands on available funds.

3.6 The Chairman further stated that two of the Commission's best educative tools in informing society are enforcement and compliance. He noted that the ACCC information centre has been integral to fulfilling the Commission's education function given that it has fielded 53,500 complaints and inquiries, as well as approximately 80,000 phone calls each year.

Sanctions

3.7 The Dawson review of the Trade Practices Act recommended that the courts should have the option of sending to prison those involved in hard core cartels. The government accepted this proposal in principle, setting up a working group to examine this issue further. Mr Cassidy

14 *Official Hansard*, 5 March 2004, Melbourne, p. 12.

15 *Official Hansard*, 5 March 2004, Melbourne, p. 12.

informed the Committee that the working group is nearing completion of its task, following which a report will be submitted to the Treasurer for consideration.

3.8 The merits of attaching criminal sanctions to the Trade Practices Act in order to combat cartel behaviour were also discussed at the public hearing, with the Chairman noting that such an amendment would offer a far more effective deterrent than the current penalty regime in tackling this type of behaviour.

> The cost-benefit analysis at the moment is: millions of dollars to be earned from the cartel as against millions of dollars that you might have to pay in a fine. The cost-benefit analysis is changed when on the latter side there are several years in jail, even when it is risk weighted very significantly indeed.[16]

3.9 The Committee has previously commented that serious consideration should be given to the concept of introducing criminal sanctions for participants in hard core cartels.[17] The current Committee continues to hold that view.

Recommendation 2

The Committee recommends that the Government give serious consideration to introducing criminal sanctions for participants in hard core cartels.

3.10 In relation to the Dawson recommendation that there be an increase in penalties for corporations involved in anti-competitive conduct,[18] Mr Cassidy advised that the ACCC would wholeheartedly support such a move, as the current pecuniary penalty system would appear to be somewhat insignificant in the context of punishing large corporations.

> …to be quite honest, if you are dealing with a large company, even if they get the maximum fine of $10 million, that is

16 *Official Hansard*, 5 March 2004, Melbourne, p. 5.

17 Standing Committee on Economics, Finance and Public Administration, *Competing Interests: Is there a balance? Review of the Australian Competition and Consumer Commission Annual Report 1999-2000*, September 2001, p.55.

18 Dawson recommended that the fine be increased to be the greater of $10 million of three times the gain from the contravention or, where the gain cannot be readily ascertained, 10 per cent of turnover.

neither here nor there for them. We would certainly support the increase.[19]

Cartels and the leniency policy

3.11 As of 5 March 2004, the ACCC had 31 suspected cartels under investigation, ranging from small town price fixing arrangements through to large international cartels. These cartels involve a variety of illegal conduct ranging from price fixing and market sharing through to collusive tendering - particularly that for government contracts. In addressing this problem, which was characterised by the Chairman as 'a cancer on the economy', the Commission advised that it has been 'substantially assisted by the leniency policy [that it] announced last year'.[20] The reason being that the policy has encouraged a number of insiders to inform on cartels, by providing a path of leniency for the first whistleblower to assist the Commission in its investigations.

3.12 The ACCC's leniency policy is designed to break the shroud of secrecy which has long existed in illegal cartels. The Commission has previously had a history of working with whistle blowers via its cooperation policy. However, the new leniency policy is far more effective due to the fact that it grants informants greater certainty should they cooperate, by guaranteeing legal immunity if they are the first to inform on a particular cartel. The company concerned will still have to pay compensation to any victims of its actions that can be identified.

Mergers

3.13 The Dawson Report's recommendation that the merger approval system be formalised was also discussed by the Commission at the Melbourne public hearing. The Chairman commented 'that to proceed down the Dawson formal voluntary clearance process will not bode well for the future conduct of merger hearings and merger matters in this country'.[21]

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19 *Official Hansard*, 5 March 2004, Melbourne, p.33.

20 *Official Hansard*, 5 March 2004, Melbourne, p. 5.

21 *Official Hansard*, 5 March 2004, Melbourne, p. 6.

3.14 Mr Samuel, in countering the push to formalise the current clearance process, noted that:

> at a seminar held last year involving most, if not all, of the leading practitioners –both legal and economic –in the merger arena, the practitioners spent nearly an hour and a half lauding the informal iterative merger process that we currently engage in.[22]

3.15 The Chairman also suggested the perceived reasons behind the shift to formalise the merger approval process, these being:

- a desire to ensure greater accountability on the part of the ACCC; as well as
- potentially, a way of putting more pressure on the Commission to approve some of the proposed mergers which have been blocked by the current informal clearance system.

3.16 In response to the call for greater accountability on the part of the ACCC in terms of its merger approval procedure, the Commission countered that this need is already met by the Federal Court's power to grant a declaration that section 50[23] of the Trade Practices Act would not be breached by a proposed merger. In illustrating the effectiveness of this accountability mechanism the Chairman noted that in the case of AGL and the Loy Yang power station purchase, AGL had been able to obtain a declaration 'in a matter of something like six to eight weeks' with a minimum of legal costs.

3.17 The Chairman advised the Committee that should a more formal clearance system be introduced as proposed by the Dawson review, then it would be highly likely that in a similar fashion to the New Zealand experience, the informal approach will diminish significantly and potentially cease to exist altogether.

3.18 On a related matter, on 28 May 2004 the ACCC announced proposed changes to its informal merger clearance guidelines. The additional guidelines would include factors such as timeframes and information requirements, as well as public reasons for a decision. In outlining these planned measures Mr Samuel commented that they would 'engender a greater level of accountability, transparency, efficiency

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[22] *Official Hansard*, 5 March 2004, Melbourne, p. 5.

[23] This section relates to a prohibition of acquisitions that would result in a substantial lessening of competition.

and timeliness in merger decisions, which would be to the advantage of both business and the Commission'.[24]

Litigation and negotiated settlements

3.19 One of the key elements of the ACCC's enforcement process is the use of litigation. The Chairman advised that litigation will be employed:

> without any question where we know or detect that we have a problem that can only be resolved through the litigious process.[25]

3.20 The ACCC informed the Committee that on occasion litigation is also applied to bring about a negotiated settlement on behalf of the relevant parties, provided they acquiesce. In utilising this approach, the Commission stressed that no negotiated settlement is ever 'done in secret'.

3.21 In terms of the rationale behind the ACCC's use of negotiated settlements, the Chairman advised that the primary reason behind their use is the effectiveness of outcomes which they offer, when compared to traditional remedies available through the courts.

> The reason… is that often you can achieve more by negotiating a settlement, particularly in the context of restitution for consumer harm, than you could otherwise achieve through the courts.[26]

3.22 The ACCC noted that of the 53,500 complaints and inquiries last year, only 262 matters were escalated to serious investigation, with only 39 court cases commenced.[27] Hence, as Mr Samuel commented, 'you can therefore imagine that a vast number of these issues were resolved by reaching some form of negotiated settlement'.[28]

3.23 In qualifying the use of negotiated settlements, the Chairman stated that the ACCC will be reluctant to utilise this approach in those cases where there has been a serious breach of the Trade Practices Act, in addition to those situations where there is clearly a non-compliance culture or attitude on the part of the alleged offender.

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24 'ACCC Moves to increase transparency, certainty and accountability in merger decisions', 28 May 2004, http://www.accc.gov.au/content/index.phtml/itemId/510651

25 *Official Hansard*, 5 March 2004, Melbourne, p. 3.

26 *Official Hansard*, 5 March 2004, Melbourne, p. 3.

27 *Official Hansard*, 5 March 2004, Melbourne, p. 4.

28 *Official Hansard*, 5 March 2004, Melbourne, p. 4.

Speed of enforcement

3.24 The Chairman, in his opening address at the hearing, noted that speed is one of the key principles underlying the ACCC's enforcement policy, given that it is often essential to achieving appropriate and effective outcomes. Mr Samuel drew attention to the recent Danoz Direct case which involved the selling of alleged electronic muscle stimulants. Even though the Commission obtained a 'very successful court outcome' in this case, the overall result was undermined by the fact that because the result took over 18 months to achieve, it led to thousands of consumers being defrauded as by that time over 94,000 units had been sold, with the company taking over $15 ½ million from consumers.

3.25 Following the experiences of the Danoz Direct case, the ACCC has focused greater attention on achieving swiftness in enforcement. The Commission cited as an example its recent action against investment property promoter Henry Kaye.

> from the beginning of the investigation to the institution of court proceedings and an effective stopping of the alleged misleading advertising…took about 3 ½ weeks.[29]

Negotiating penalties

3.26 The Chief Executive Officer, in response to the view that perhaps some of the ACCC's agreed penalties have been on the 'low side', stated that the Commission is examining this matter as a general proposition. Moreover, Mr Cassidy stressed that all proposed penalty agreements are judicially accountable, as they are subject to being overruled by the court should it determine an agreement to be inappropriate; a power which has been exercised on ACCC negotiated penalties on a number of occasions.

> It is open to any law regulatory agency to put an agreed penalty to the court, although there is no obligation on the court to accept it. It is up to the court to decide whether they think it is right or not. On occasion we have had our penalties both increased and decreased by the court.[30]

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29 *Official Hansard*, 5 March 2004, Melbourne, p. 4.

30 *Official Hansard*, 5 March 2004, Melbourne, p. 28.

3.27 The status of agreed penalties has recently been decided before the full bench of the Federal Court in the case of *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd.*[31] Given the importance of this class of penalty to the ACCC, particularly in the context of combating cartels, the Commission successfully sought leave to intervene in the hearing. The outcome of the case in relation to agreed penalties was successful from the perspective of the ACCC in that the court approved the current negotiated settlement system, subject to the overruling power of the court to strike down any agreement should it determine it to be inappropriate.

Voluntary codes of practice

3.28 The ACCC recently issued draft guidelines on voluntary codes of conduct to a number of stakeholder interests, ranging from consumer groups through to representatives of both small and big business. Following this release, interested parties met to discuss the guidelines. This meeting revealed three differing opinions:

- the consumer movement suggested that codes of conduct will never be able to combat rogues in each industry / sector;
- sections of business indicated that they felt that the proposed guidelines were too tough and that they imposed too significant an obligation on business, which could lead to them not being adopted;
- whilst other elements of the business community stated that they would like to pursue this option and attempt to develop codes of practice as they felt that it might assist the operation of their business activities within their respective industries.[32]

3.29 The Chairman also outlined the various rationales behind the institution of voluntary codes in Australia, these being:

- assisting with compliance with the Trade Practices Act, an example being seen with orange juice codes and labelling codes as they underpin the legislative requirements under the Act, in particular those relating to misleading and deceptive conduct;
- improving dealings between business, industry sectors and consumers. This is principally because a code of practice could potentially pressure companies / businesses to improve standards

31 *Minister for Industry, Tourism and Resources v Mobil Oil Australia Pty Ltd* [2004] FCAFC 72

32 *Official Hansard*, 5 March 2004, Melbourne, p. 30.

of conduct, as non conformity with the code may lead to them facing a consumer boycott of their product/service. In qualifying this factor Mr Samuel noted that it will only have the desired impact 'if the vast majority of industry concerned is prepared to comply with [a] code of conduct';[33] and

- creating a framework to deal with how behaviour might be conducted to 'meet tensions, community expectations and evolving aspirations on the part of producers, processors and retailers'.[34]

3.30 The ACCC further advised that there are a number of problems which could potentially undermine the establishment and use of voluntary codes of practice. One of the most significant is that some industries may be opposed to such an approach given that it 'would impose on them certain standards of behaviour that they are simply not willing to engage in'.[35] A further problematic issue associated with the use of a code of practice was outlined by the Committee at the Melbourne hearing:

> if a code of conduct is not strong enough in terms of what it does then there is the potential for a business to have it as a seal of approval that will in fact misrepresent what is does. [36]

3.31 In endorsing industry and sector voluntary codes of conduct, the ACCC stressed that it exercises a high degree of caution. Indeed, when the Commission authorised the mortgage industry code of conduct, it drew attention to the fact that it was not endorsing the code of conduct; rather, it ensured that the code passed a statutory test under the Trade Practices Act.

Media

3.32 According to the Chairman, the ACCC will work with the media to bring about behavioural change in industry. The Chairman did however stress that the Commission will only do so if the media's use is consistent with a range of principles, including:

- being very public about the issues i.e. the behaviour that in the Commission's view is in breach of the Act, in addition to how the said behaviour ought to be rectified;

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33 *Official Hansard*, 5 March 2004, Melbourne, p. 30.

34 *Official Hansard*, 5 March 2004, Melbourne, p. 30.

35 *Official Hansard*, 5 March 2004, Melbourne, p. 30.

36 *Official Hansard*, 5 March 2004, Melbourne, p. 30.

- not participating in rumour, innuendo and allegation or in other words refraining from improperly damaging reputations; as well as
- maintaining the confidentiality of the parties involved.[37]

3.33 The application of these principles was illustrated when the Commission recently tackled the real estate industry. In this case it did not name, either by background briefing or media release, any particular offender; instead the ACCC stated that it was concerned about specific questionable activities which were occurring in the industry, in particular dummy bidding, under/over quoting, two-tier marketing and property investment scams. Following on from this, the Commission issued a brief media release indicating both the behaviour in question that was to be targeted, in addition to the fact that a task force was to be assigned to combating these practices.

3.34 Following a Committee query as to what safeguards the ACCC has implemented to protect the confidentiality of parties under investigation, the Chairman commented that it would be highly unlikely that even industry insiders would have any knowledge of parties under investigation. Only relevant participants are involved in inquiries (complainant and witnesses etc) and ACCC investigation information is generally not permitted to be publicly disseminated. In relation to this final matter the Committee noted that some elements of society have contended that it would be better if the ACCC were to publicise investigations, in order to reduce the number of scams and frauds perpetrated. Mr Cassidy remarked that this view has to be balanced against the possible damage to a party's reputation should the ACCC announce an investigation where ultimately it cannot substantiate a breach of the Trade Practices Act.[38]

Section 46 of the Trade Practices Act 1974

3.35 Section 46 of the Trade Practices Act deals with misuse of market power. The question of whether section 46 provides small business with sufficient protection against misuse of market power by big business has been a controversial issue in recent years.

3.36 A recent Senate Economics References Committee report into the Trade Practices Act handed down unanimous recommendations dealing with the issues of market power and purpose. However, in

37 *Official Hansard*, 5 March 2004, Melbourne, p. 9-11.

38 *Official Hansard*, 5 March 2004, Melbourne, p. 11.

relation to the topic of taking advantage of market power, the CEO noted that there was a lack of agreement. Mr Cassidy stated that the ACCC believed that this issue had been clarified by the High Court in the Melways case,[39] which held that 'take advantage' means 'to use'. Yet, he noted that this outcome appeared to have altered considerably in light of the subsequent Rural Press case[40] which also went to the High Court. In this case the court, whilst acknowledging its ruling in Melways, appeared to apply a different test, namely the 'could test' which revolves around determining whether a firm *could* still have conducted the subject behaviour in a competitive market. If yes, then it has not been utilising market power. Following this ruling the ACCC commented that it is now quite concerned that the court has left the interpretation of 'take advantage' in an ambiguous state.

3.37 Given the confusion which has surrounded this section, in conjunction with the fact that the High Court has held that this provision does not mean what Parliament intended it to,[41] the ACCC has recommended that the section be redrafted and clarified.[42]

3.38 The need for a redrafting of this section was also justified by the Chief Executive Officer who noted that besides 'the Commission never winning a section 46 case that has gone to a full hearing',[43] each case potentially poses it with considerable financial costs:

> We are finding section 46 as it is currently drafted a challenging section to work with, and the costs of cases to us, particularly if we lose, can be double digit million dollar figures.[44]

However, in qualifying this remark Mr Cassidy stated that in the Safeways case,[45] which dealt with breaches of section 46, the ACCC has been relatively successful in that the full bench of the Federal Court found in favour of the Commission on a number of counts.

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39 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (trading as Auto Fashions Australia)* (2001) ATPR 41-805

40 *Rural Press v ACCC* [2003] HCA 75

41 In *Boral Besser Masonry v ACCC* (2003) 77 ALJR 623 the High Court held stated that parliament's drafting of s.46 had not achieved its objective.

42 ACCC Submission to Senate Economics References Committee Inquiry into '*the effectiveness of the Trade Practices Act 1974 in protecting small business*', March 2004.

43 *Official Hansard*, 5 March 2004, Melbourne, p. 23.

44 *Official Hansard*, 5 March 2004, Melbourne, p. 21.

45 *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Limited* [2003] FCAFC 149

3.39 The Senate Economics References Committee's report contained a number of significant recommendations on these matters, including that:

- the Act be amended to state that the threshold of 'a substantial degree of power in a market' is lower than the former threshold of substantial control; and to include a declaratory provision outlining matters to be considered by the courts for the purposes of determining whether a company has a substantial degree of power in a market;
- the Act be amended to include a declaratory provision outlining the elements of 'take advantage' for the purposes of s.46(1); and
- that s.46 of the Act be amended to state that, in determining whether or not a corporation has a substantial degree of power in a market for the purpose of s.46(1), the court may have regard to whether the corporation has substantial financial power. 'Financial power' should be defined in terms of access to financial, technical and business resources.

3.40 The Government has yet to respond to the report. This Committee will further consider its position once that response is tabled.

4

ACCC and Key Sectors

Telecommunications

Broadband internet services and competition

4.1 The recent issue of Telstra undercutting its commercial rivals in relation to its retail pricing for broadband internet services was raised at the Melbourne public hearing. The ACCC advised that it was displeased with Telstra's conduct due to a range of factors including:

- there was no prior consultation with the Commission as the ACCC was only made aware of this matter after it had 'received a volume of complaints from Telstra's wholesale customers saying that the retail prices were below the wholesale prices being charged by Telstra to its customers';[45]
- at least ten days transpired before Telstra informed the Commission that it would consider reducing its wholesale pricing;
- Telstra was slow in notifying its wholesale customers of the change as they were only informed the day before the commencement of the new broadband retail pricing strategy; and
- it created a significant issue as to whether this pricing change would enable the continuation of a competitive environment where wholesale customers are able to compete with Telstra's retail price regime.

4.2 In addressing this matter, Mr Samuel noted that the ACCC began by issuing to Telstra an advisory notice that by itself did not have any

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45 *Official Hansard*, 5 March 2004, Melbourne, p. 18.

legal power, but which did notify the company that it should desist in engaging in this particular anticompetitive behaviour. Upon receipt of this notice Telstra advised the Commission that 'they would bring about certain reductions in their wholesale prices which would apply as from the day after'.[46]

4.3 The provision of this advice by Telstra did not conclude the ACCC investigation into this matter. Mr Samuel commented at the Melbourne public hearing that if the Commission has reason to believe that Telstra has not ceased in engaging in anticompetitive conduct, then the ACCC would consider taking a number of actions including instigating court proceedings for injunctions and / or issuing a competition notice that:

> has the prospect of giving rise of up to a $10 million fine…plus ongoing fines of $1 million per day, backdated in respect of ongoing conduct.[47]

4.4 The ACCC has since issued a 'Part A' competition notice to Telstra, indicating that the company is engaging, or has engaged, in anti-competitive conduct in relation to its broadband pricing. Following this development, Telstra backed down by drastically reducing its wholesale pricing for broadband internet services. On 31 March 2004 the corporation unveiled two new pricing packages for internet service providers.

4.5 The fact that regulation in the area of telecommunications is fundamental in creating a more competitive marketplace was stressed by the Chairman, as was the point that this objective is being hindered by the current market structures in place. These structures effectively ensure that one incumbent dominant player has control over most of the current telecommunication networks including the copper wire network as well as the major coaxial cable, which 'is the other element of broadband availability in this country other than wireless, which is still at its incipiency stage'.[48]

4.6 These issues will be revisited at the next ACCC hearing.

Telecommunications and rural areas

4.7 In response to Committee questioning on competition within the telecommunication sector in rural and regional areas, the Chairman commented that the current market structure is not conducive to the

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46 *Official Hansard*, 5 March 2004, Melbourne, p. 18.

47 *Official Hansard*, 5 March 2004, Melbourne, p. 19.

48 *Official Hansard*, 5 March 2004, Melbourne, p. 19.

proper efficient operation of competition or of normal market forces, due to there being a 'bottleneck' in terms of ownership with the bulk of telecommunication infrastructure in Australia lying with Telstra. Mr Samuel advised that in addressing this complicated issue there are two options, namely altering the current market structure or providing for greater regulation. In regards to the latter alternative the Chairman stressed that it is wrought with complication and difficulty.

> Regulation is a slow, difficult means of bringing about competition and the incumbent has the ability and the incentive to game the process, and does.[49]

4.8 The Committee feels that further work should be done by the ACCC on a third alternative, namely determining the extent to which competition can accelerate access to new technology in regional Australia.

Recommendation 3

The Committee recommends that further work be done by the ACCC to determine the extent to which competition can accelerate access to new telecommunications technology in regional Australia.

Banking

Bank fees and charges

4.9 Whilst the ACCC cannot set or regulate interest rates or fees charged by banks and credit unions, it does maintain an informal oversight of bank fees and charges. In explaining this further Mr Cassidy stated that:

> the banks have a habit of notifying us when they are proposing changes to their fees and charges…we basically monitor the fees and charges that are particularly relevant to the average person: personal transaction accounts, basic bank accounts and credit cards.[50]

4.10 When questioned by the Committee as to whether this data is examined to determine if the new price regimes are reasonable, Mr

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49 *Official Hansard*, 5 March 2004, Melbourne, p. 20.

50 *Official Hansard*, 5 March 2004, Melbourne, p. 28.

Cassidy responded by noting that it does not rigorously consider their 'reasonableness'.

> I could not say that we spend a significant amount of time thinking about their reasonableness. We do look at them in terms of understanding what is going on.[51]

4.11 In reply to an assertion by the Committee that bank fees and charges are increasing, the Commission advised that the issue of bank fee increases is far from a straightforward matter. Whilst some fees have markedly increased, other bank charges have been reduced, particularly those associated with electronic banking.

4.12 Finally, in response to a query as to whether the ACCC produces any reports on this topic, Mr Cassidy informed the Committee that the Commission produces internal reports detailing 'bank fees and charges as well as what is happening and the results of [its] monitoring'.[52]

4.13 The Reserve Bank currently produces an annual survey of bank fees and changes. Given the more comprehensive information available to the ACCC the Committee feels that it should do the same.

Recommendation 4

The Committee recommends that the ACCC produce a public report at least annually detailing bank fees and charges.

Interchange fees for EFTPOS

4.14 "Interchange" fees are paid between financial institutions of persons receiving payments and persons making payments in the four party credit card systems (Bankcard, MasterCard and Visa), the EFTPOS system, ATM networks and in BPay.

4.15 In a joint study in 1999-2000, the ACCC and the RBA examined the economic case for interchange fees in ATMs, EFTPOS and credit card services. These systems were chosen because they account for a very large proportion of retail payments in Australia and all have interchange fees. After analysing detailed data on costs and revenues,

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51 *Official Hansard*, 5 March 2004, Melbourne, p. 28.

52 *Official Hansard*, 5 March 2004, Melbourne, p. 29. The RBA also publishes an annual survey of bank fees.

the study concluded that there was no justification for an interchange fee in the EFTPOS system.[53]

4.16 The Governor of the Reserve Bank, Mr Ian Macfarlane noted at a 2003 hearing into the RBA's *Annual Report 2002* that the banks had put to the ACCC a proposal to abolish wholesale EFTPOS interchange fees. Mr Macfarlane referred to this proposal as "a very constructive step", and expressed hope that the "elaborate procedures" that the RBA had been through in relation to credit card reform, involving formal designation of payment streams, could be avoided.[54]

4.17 However, in August 2003 the ACCC rejected the banks' proposal, stating that:

> The ACCC is concerned that the EFTPOS proposal addresses only one element of reform in this area – that is, the setting of wholesale fees. Without reforming access to the network and making it easier for new groups to enter and compete, consumers and small business may be disadvantaged by the proposal…
>
> The ACCC is concerned that the proposed agreement is likely to increase the barriers faced by new entrants seeking to compete against the banks and other financial institutions in the EFTPOS network. It may also act to further entrench the already high level of concentration in the EFTPOS network (currently the four major banks issue about 70% of debit cards and provide about 85% of merchant services)…
>
> The ACCC considers that a proposal that included reform of access that would increase competition between banks in the EFTPOS network would be more likely to be in the public interest.[55]

4.18 The decision to reject the proposal by the banks to scrap the interchange fee for EFTPOS purchases was further discussed at the Melbourne public hearing. The Commission informed the Committee that this proposal was ultimately approved on the basis that it had become satisfied that there would be improvements on access reform.

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53 House of Representatives Standing Committee on Economics, Finance and Public Administration, *Review of the Reserve Bank of Australia Annual Report 2002*, November 2003, pp. 28-9.

54 House of Representatives Standing Committee on Economics, Finance and Public Administration, *Review of the Reserve Bank of Australia Annual Report 2002*, November 2003, p. 29.

55 ACCC, "ACCC Proposes to Deny EFTPOS Price-Fix" (media release, 8 August 2003) at *http://203.6.251.7/accc.internet/digest/view_media.cfm?RecordID=1088* (as at September 2003).

The reason behind this shift was a submission from the RBA stating that it was considering using its authority to designate the EFTPOS scheme under the Payments Systems Act, or in other words under its jurisdiction, in order to pressure change in access arrangements. Following the handing down of the ACCC's decision it was appealed to the Australian Competition Tribunal by groups of retailers who stand to lose from the proposed reforms.

4.19 The Australian Competition Tribunal ruling on this matter handed down on 25 May 2004, disagreed with the ACCC, holding that any public benefits are clearly outweighed by the detriments. The Tribunal was not satisfied on the available evidence that the proposed agreement would result in a significant increase in the use of EFTPOS. Moreover, it held that there is real public detriment in the likelihood of a flow on of costs to consumers generally. Hence the Tribunal ruled that the authorisation should be set aside.

Petrol and competition

4.20 Petrol pricing in rural and regional areas is complicated by a range of issues. One of the most significant is population demographics:

> Competition requires at least two players to be competing against each other. Two or more players require enough consumers to warrant two or more players being available to participate in the market…in many rural areas there is not a sufficient concentration of population to warrant two pharmacies, two supermarkets, two petrol stations or two of anything.[56]

4.21 In reply to a Committee query as to whether the major petrol retailers are participating in price undercutting of independent operators to a greater extent in certain states, the ACCC responded by stating that according to its data, this occurrence is no more prevalent in one state than another. It further advised that price undercutting is often due to quite legitimate reasons including the dynamics of international oil prices and exchange rate movements.

4.22 The ACCC also noted that following a number of complaints, it has investigated several allegations of predatory behaviour involving company owned retailers targeting independents or branded independents. Following intensive monitoring of prices in particular

56 *Official Hansard*, 5 March 2004, Melbourne, p. 15.

areas over a particular time it typically found that the pricing behaviour was not predatory in nature, but rather a response to 'what an independent…[was] doing in the area'.[57] Despite the outcome of these investigations the Commission stressed that given the vulnerability of independent petrol station owners it will continue to examine allegations of predatory behaviour rigorously.

> …where an allegation of predatory behaviour is involved, we will always look at it fairly carefully, because we are conscious of the vulnerability of independent petrol station owners.[58]

4.23 Following detailed research and analysis into competition in the retail petroleum sector the ACCC has found that:

> The leaders of price discounting are not the small independent players but the independent chains. The small independent players …are generally the price followers rather than the price leaders in the discount moves and discount cycles that occur in retail petroleum.[59]

4.24 In looking into the future the ACCC advised that commercial competition in rural Australia will continue to be challenged should there be further population reductions within these communities. The more this situation is exacerbated, the less people there will be to support the number of marketplace participants necessary to bring about effective competition.

Petrol and shopper dockets

4.25 In relation to petrol shopper docket schemes, the Commission informed the Committee that at present there is 'no reason to suggest that these schemes will lead to any significant lessening of competition in the marketplace'.[60] However, it did stress that there have been a range of developments which have reduced the competitiveness of a number of these programs considerably. One of the most prominent examples is the introduction of revised fuel standards on 1 January, as this removed a source of cheap imported fuel which was frequently the main supply of discounted fuel for many of the independent petrol retail chains involved in shopper docket arrangements.

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57 *Official Hansard*, 5 March 2004, Melbourne, p. 17.

58 *Official Hansard*, 5 March 2004, Melbourne, p. 17.

59 *Official Hansard*, 5 March 2004, Melbourne, p. 8.

60 *Official Hansard*, 5 March 2004, Melbourne, p. 15.

4.26 The existing shopper docket arrangements between Coles and Shell and Woolworths and Caltex were also discussed at the Melbourne public hearing. The ACCC advised that the potential ascendancy of these commercial arrangements has been somewhat overstated given that only about 25 percent of Caltex fuel stations are involved in the Woolworths joint venture whilst Shell has only incorporated approximately a third of its sites into its arrangement with Coles. The Commission further noted that British Petroleum and Mobil are also entering into the shopper docket marketplace, with both companies 'in the process of establishing…schemes with independent grocery outlets not associated with Coles and Woolworths'.[61] Metcash, in contrast to the above approaches, has not aligned itself with any of the major petrol retailers, preferring instead to provide a rebate on grocery prices when customers produce a petrol voucher from any of the major petrol retailers.

4.27 In addition to the major corporations, an increasing number of smaller retailers are also participating in shopper docket programs. According to Mr Cassidy the ACCC has received over 100 notifications of exclusive dealing from significantly smaller schemes, with many involving local grocery retailers from country towns entering into arrangements with local service stations. The Commission asserted that this development is not only an indication that these programs are occurring outside of major metropolitan centres but also that the 'competitive market is working'.[62]

4.28 In terms of future trends the ACCC advised that there is likely to be a considerable evolution in petrol retailing, with a reduction in the smaller independent petrol outlets in favour of the larger retailers, such as those located on major highways.

> We have indicated that we think there are likely to be fewer of the smaller independent outlets, in favour of a move towards, a consolidation of petrol retailing into those larger outlets on major highways.[63]

4.29 The Committee will continue to monitor this issue at future hearings with the ACCC.

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61 *Official Hansard*, 5 March 2004, Melbourne, p. 16.

62 *Official Hansard*, 5 March 2004, Melbourne, p. 16.

63 *Official Hansard*, 5 March 2004, Melbourne, p. 16.

David Hawker MP
Chairman

June 2004

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Appendix A: Submissions

No.	From
1	Australian Competition & Consumer Commission *Responses to questions on notice taken during the House of Representatives Standing Committee on Economics, Finance and Public Administration public hearing on 5 March 2004.*

B

Appendix B – Hearings and witnesses

Friday, 5 March 2004 - Melbourne

Australian Competition and Consumer Commission

Mr Graeme Samuel AO, Chairman
Mr Brian Cassidy, Chief Executive Officer
Mr Joe Dimasi, General Manager (Regulatory Affairs)
Mr Timothy Grimwade, General Manager (Adjudication Branch)
Ms Helen Lu, General Manager (Corporate Management Branch)
Mr Mark Pearson, General Manager (Mergers and Asset Sales)
Mr David Smith, Executive General Manager