

Introduction

Background

- 1.1 The Australian Competition and Consumer Commission (ACCC) is the Commonwealth's major competition watchdog and consumer protection agency. It was established on 6 November 1995 as a result of the reforms set out in the *Competition Policy Reform Act 1995*. That policy was endorsed in April 1995 by the Commonwealth Government in cooperation with all state and territory governments operating through the Council of Australian Governments (COAG).
- 1.2 The Reform Act established the ACCC by the merger of the Trade Practices Commission and the Prices Surveillance Authority.
- 1.3 The ACCC was to be responsible for:
 - ...enforcement of the competition and consumer protection provisions of the Trade Practices Act and the provisions of the Competition Code. It will also make determinations under the new access regime, and be responsible for prices surveillance, inquiries and monitoring under the Prices Surveillance Act.¹
 - [Price monitoring was a new function.]
- 1.4 The ACCC is an independent statutory authority. It administers the *Trade Practices Act 1974* (TPA), State and Territory Application Acts, the *Prices Surveillance Act 1983* and has responsibilities under several related pieces of legislation.²

1 Australia. Parliament. Senate. 29 March 1995. Competition Policy Reform Bill 1995: Second Reading Speech. Senator Crowley. *Parliamentary Debates*. Canberra, AGPS, p 2441.

2 For a list of that legislation see: *ACCC annual report 1999-2000*. 2000. Canberra, ACCC, p 7.

- 1.5 The Governor-General appoints members of the ACCC for a maximum term of 5 years.³ Appointments may be terminated by the Governor-General only in limited circumstances such as, physical or mental incapacity, bankruptcy and misbehaviour. The Minister's powers to direct the Commission are restricted by the TPA. For example, the Minister cannot direct the ACCC in relation to the exercise of its powers in relation to access regimes, restrictive trade practices, authorisation of anti-competitive behaviour or telecommunications regulation.
- 1.6 The ACCC describes its major roles as to seek to:
- ...improve competition and efficiency in markets, foster adherence to fair trading practices in well informed markets, promote competitive pricing wherever possible and restrain price rises in markets where competition is less than effective. It is especially concerned to foster a fair and competitive operating environment for small business.⁴
- 1.7 The ACCC is seen as the friend of consumers and small business.
- 1.8 In evidence the ACCC stressed that its role is to apply the TPA and some other legislation without fear or favour. It said with only a few exceptions it is not involved in advocacy of changes of law.⁵
- 1.9 There are numerous other state, territory and Commonwealth bodies involved in competition and consumer protection work. At the Commonwealth level the other major competition body is the National Competition Council.

Ongoing concerns with the ACCC's role

- 1.10 As result of the implementation of national competition policy the ACCC received new roles and power. COAG sought to aggregate regulatory responsibilities with the ACCC rather than have a number of separate public utility regulatory agencies. Australia's approach is in contrast to traditional international practice.⁶
- 1.11 Consequently the ACCC is at the centre of competition policy and consumer protection. Over the past six years of its operations many areas previously exempt are now within its scope (see Table 1.1).
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3 The instrument of appointment may specify a shorter term. Members are eligible for re-appointment.

4 *ACCC annual report 1999-2000*, op. cit. p 6.

5 Evidence p 2.

6 *ACCC annual report 1996-97*. 1997. Canberra, ACCC, p 1.

Table 1.1 Significant additions to the powers of the competition regulator since 1995⁷

1995	Prices Surveillance
	Arbitrating disputes over access to facilities of national significance
	Enforcing the TPA's restrictive trade practices provisions in relation to unincorporated entities (including the professions) under the competition code
	Enforcing the TPA in relation to Government business enterprises
1997	Telecommunications Industry: Competition Regulation and Access Regimes
1998	Unconscionable conduct in small business transactions
	Industry codes
1999	Price exploitation in relation to the New Tax System
	Monitoring prices in the transition to the New Tax System
2000	Misrepresentations about the effect of the New Tax System
2001	Representative actions for most of restrictive trade practices provisions (except section 45D and 45E)
	Right to intervene in private proceedings instituted under the TPA

- 1.12 Questions have been asked about whether these roles have been thrust upon the ACCC or whether some have, or are being, sought by it.⁸
- 1.13 The ACCC's powers now directly impact on the commercial operations of business in almost every market. It has become a very powerful regulatory body.
- 1.14 The ACCC has always acknowledged that there will inevitably be resistance to its role and powers and big businesses in particular, especially monopolies, will resist using every available means.⁹
- 1.15 The ACCC points out that it is subject to administrative and judicial review. The Australian Competition Tribunal is established by Part III of the TPA. The Tribunal may review decisions of the ACCC relating to authorisation, notification and arbitrations relating to essential facilities. Decisions of the Commission are also subject to review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.
- 1.16 Some of these criticisms come from well-resourced companies who choose to take these matters to the media rather than avail themselves of the legal

⁷ The ACCC did lose some jurisdiction in 1998 when the Australian Securities and Investment Commission (ASIC) was given responsibility for misleading and deceptive conduct in relation to financial services. ASIC also obtained responsibility for policing the unconscionable conduct provisions in relation to financial services (except those involving small business under s51AC). ASIC has the capacity to refer responsibility back to the ACCC - it has done so in relation to health insurance and the new tax system.

⁸ Australian Chamber of Commerce and Industry. Prices surveillance and the ACCC. *Media Release MR 40/01*, 12 June 2001, 2p; and Submissions p S40 (W Pengilley)

⁹ Evidence pp 47 and 56.

measures that are available to them to challenge the view taken by the ACCC. Having said that, the volume of complaints is growing and many are coming from the small business sector.

- 1.17 In its last report on the ACCC the committee pointed to a recurring pattern of criticism pervading many of the ACCC's activities. As outlined in the following chapters the pattern is continuing. What appears to be changing is the volume of criticism, its documentation, its evaluative nature and the sources are becoming more authoritative.¹⁰
- 1.18 All of these views are being put on the table despite the fact that there are still organisations that have reported they are unwilling to express their concern publicly because they perceive they could prejudice future dealings with the ACCC.¹¹
- 1.19 Organisations that are generally supportive of the ACCC are increasingly prepared to publicly point to a specific problem area. For example, the Council of Small Business Organisations of Australia is generally supportive of the ACCC but critical of the its approach to the treatment of small business under the New Tax System arrangements.¹²
- 1.20 Some criticism also has its origin in the legislation that the ACCC administers rather than its application by the ACCC. For example, business complaining that the ACCC guidelines on mergers prevents them from achieving sufficient scale to compete internationally,¹³ would perhaps be better placed making the case to government for a return to a test based on market dominance, rather than the present test of substantially lessening competition.
- 1.21 Nevertheless, after six years of operation and the growing volume of criticism, it is now not so easy for the ACCC to dismiss such criticism as

10 For example see concerns raised in: House of Representatives Standing Committee on Financial Institutions and Public Administration. June 1997. *Review of the Australian Competition and Consumer Commission 1995-96 annual report*. Canberra, AGPS, xi 25p; House of Representatives Standing Committee on Financial Institutions and Public Administration. March 1998. *Review of the Australian Competition and Consumer Commission 1996-97 annual report*. Canberra, AGPS, xiii 51p; Gledhill, J. June/July 2001. Rating the regulators. *Global Competition Review*, pp 10-33; Hewson, J. Lets watch the watchdog. *Australian Financial Review*, 15 June 2001; Productivity Commission. March 2001. *Review of the Prices Surveillance Act 1983: Draft report*. <http://www.pc.gov.au/inquiry/psa/draftreport/psa.pdf> XXIII and 88p; Pengilley, W. April 2001. Competition regulation in Australia: A discussion of a spider web and its weaving. *Competition and Consumer Law Journal*, vol 8, no 3, pp 255-310.

11 Southgate, L. Watchdog overawes retailers. *The Australian*, 15 March 2001; and Submissions p S37 (W Pengilley)

12 Southgate, L. Watchdog overawes retailers. *The Australian*, 15 March 2001.

13 Gray, J and Kitney, D. Why business loathes Fels. *Australian Financial Review*, 16 February 2001.

the critics reflecting only the views of 'big business' or views based on one particular experience.

- 1.22 The ACCC is a well-funded and resourced enforcement agency (see Table 1.2). Few government agencies have received the boosts in funding that the ACCC has received over the past six years, even allowing for its additional roles.

Table 1.2 ACCC resourcing 1996-97 to 2000-01

Date	Budget allocation		Approved staffing level
	\$m	% change	
1996-97	33.899		305
1997-98	37.422	10	337.5
1998-99	39.007	4	336
1999-2000	57.453	47	372
2000-01*	75.627	32	-
2001-02*	83.4	10	-

Source ACCC annual reports 1996-97 to 1999-2000 and *Agency resourcing 2001-02: Budget paper no.4. 2001. Canberra, CanPrint, p 166. (for 2000-01 and 2001-02 figures)

- 1.23 The ACCC has to be transparent and accountable in its operations. Some consider the ACCC has become so powerful that it increasingly seems accountable to no one.
- 1.24 As well, the ACCC has demonstrated the ability to gain the media high ground and public opinion in a way that creates considerable additional influence for the stands it decides to take. Some suggest the ACCC's media influence can on occasions inhibit proper business decision making and create unnecessary fear particularly amongst small business. The recent Federal Court decision on the Electricity Supply Association of Australia vs ACCC highlights these concerns:

"The stances so taken may constitute good public theatre," Justice Finn said. "The stance taken by the ACCC, in at least some of the instances in which threats were made against [the association] and the suppliers, could quite reasonably be interpreted as simply an attempt to stifle debate."¹⁴

14 Campbell, R. Federal Court censures watchdog. *Canberra Times*, 13 September 2001; and see *Electricity Supply Assoc of Australia Ltd v Australian Competition and Consumer Commission* (2001) FCA 1296 per Finn J, file:///C:/WINDOWS/TEMP/Electricity Supply Assoc of Australia Ltd v Australian Competition and Consumer Commission 2001 FCA 1296 (12 September 2001).htm, paras 141-142; Hopworth, A. ACCC chairman under fire from judge. *Australian Financial Review*, 17 September 2001; and ACCC. Federal Court dismisses ESAA claims against ACCC. *Media Release MR 225/01*, 14 September 2001, 1p.

Continuing the watch on the watchdog: The review

- 1.25 In 1997 and 1998 the House Economics Committee reviewed the operations of the ACCC. The current review builds on the committee's earlier reports. Both of those reports focused on merger issues.
- 1.26 The basis for those reviews and the current one is House of Representatives' standing order 324(b) whereby annual reports within a committee's area of portfolio responsibility stand referred for any inquiry the committee may wish to make.
- 1.27 The annual report of the ACCC for 1999-2000 was tabled in the House of Representatives on 31 October 2000. On 1 March 2001, the committee agreed to carry out a review of that annual report.
- 1.28 The committee's review of the annual report is a public process. However, it is not as comprehensive as an inquiry into a specific reference, since the review is not formally advertised, and submissions generally are sought only from those organisations directly involved in the review process.
- 1.29 The current review is wider than the committee's earlier work. As well as examining merger issues it looks at other anti-competitive behaviour and prices oversight matters. It attempts to get more of an overview on how the ACCC is performing.
- 1.30 The current review is part of the committee's wider program of reviews of annual reports of major regulators. That work started with the committee's review of the Reserve Bank of Australia (RBA) and the hearings with the RBA have become a major avenue of accountability and transparency for the RBA.
- 1.31 Evidence by the ACCC was given at public hearings held in Canberra on 30 March and 25 June 2001. Details of those hearings as well as a list of private briefings with industry groups are provided at Appendix C. The hearings were also telecast live on the Parliament House Monitoring System in Canberra and covered by an audio webcast on the Parliament's internet site. On the 23 August 2001 the committee also took evidence from Professor Pengilley at a private briefing. The committee was pleased that Professor Pengilley agreed to make the transcript of the briefing publicly available.

- 1.32 The list of submissions the committee received is at Appendix A and the exhibits received are listed at Appendix B.¹⁵

Structure of the report

- 1.33 This report is structured to reflect the major concerns with the performance of the ACCC. Chapter 2 focuses on the Commission's administration of anti-competitive conduct particularly mergers, cartels and measures to protect small business; Chapter 3 examines the ACCC's current prices oversight work and highlights the Productivity Commission's proposals for change to the Prices Surveillance Act and the ACCC's reactions to those proposals; and Chapter 4 looks at the ACCC's enforcement activities and draws together the committee's conclusions on the ACCC's performance.

15 The hearing transcripts and submissions have been incorporated into a volume that is available for inspection at the National Library of Australia, the Commonwealth Parliamentary Library and the committee's secretariat. They are also available on the committee's internet site: <http://www.aph.gov.au/house/committee/efpa/>

