2

ACCC's role in preventing anti-competitive behaviour

Background

2.1 Anti-competitive practices are covered by Part IV of the Trade Practices Act (TPA). They include a wide range of restrictive trade practices, which include: most price agreements, agreements containing exclusionary provisions (primary boycotts), secondary boycotts (other than consumer boycotts) which lessen competition or result in substantial loss or damage, misuse of market power to damage another business, retail price maintenance and mergers and acquisitions which substantially lessen competition.[1]

2.2 The ACCC's role is to use these provisions to enhance the welfare of Australians by promoting competition and fair trading. It is also required by government to provide safeguards for consumers.[2]

Mergers

ACCC approach to mergers

2.3 The Committee has noted in the past that the ACCC's approach to mergers is a sensitive issue. It, in essence, opposes mergers which it determines would have an anti-competitive effect on the Australian

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1 Australian Competition and Consumer Commission. Nov 1999. *The ACCC role and functions.* Canberra, ACCC, pp 10-11.

2 ACCC. Nov 1999, op. cit. p 8.

economy. It does, however, have the authority to authorise such mergers if the parties can demonstrate that there is sufficient public benefit to outweigh the anti-competitive aspects of the proposal.[3]

2.4 Under the terms of the TPA, assessment of potential public benefit requires:

> … a significant increase in the real value of exports and significant import substitution. … The Commission must also take into account all relevant matters relating to the international competitiveness of Australian industry. They include where a proposed merger would have an adverse impact on the ability of smaller companies to expand or develop export markets.[4]

2.5 The ACCC uses a series of benchmarks to determine which merger applications are likely to give rise to concerns over the level of competition in the industry concerned:

- the market involved must be substantial;
- the combined market share of the four (or fewer) largest firms is at least 75 per cent and the merged firm will supply at least 15 per cent of the relevant market; or
- the merged firm will supply at least 40 per cent of the relevant market.[5]

2.6 If these benchmarks are exceeded, the ACCC then assesses the likelihood of imports imposing an effective competitive discipline or, failing that, the likelihood of effective competition from new entrants to the market. If neither of these is likely, it examines a range of factors relating to the structure and conduct of the market, to determine whether the proposed change would substantially reduce competition. Factors which might be considered include: availability of substitute products, whether the merger would remove a vigorous competitor, whether the market conditions are conducive to coordinated conduct, the nature and extent of vertical integration and the dynamic characteristics of the market such as growth, innovation and product differentiation.[6]

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3 ACCC a*nnual report 1999-2000*. 2000. Canberra, ACCC, p 38.

4 Fels, A. Chairman, ACCC. Mergers and market power. *Speech to Australia-Israel Chamber of Commerce Boardroom Lunch, 15 March 2001, Sydney*. http://accc.gov.au/speeches/2001/fels_Israel_15_3_01.htm p 2.

5 Miller, RV. 2001. *Miller's annotated Trade Practices Act 2001*. 22nd Edition. Sydney, LBC Information Services, p 318.

6 Miller, RV. 2001, op. cit. p 318.

Criticism of ACCC approach

2.7 The sensitivity surrounding the mergers policy arises from accusations levelled at the ACCC, notably by the Business Council of Australia (BCA), that it has obstructed mergers and takeovers unnecessarily. The ACCC's response to these claims has been that proposals are only opposed if there is likely to be an anti-competitive effect in the market. It has commented that none of the companies protesting about ACCC's policies have had mergers or takeovers rejected.[7] The BCA, however, said in a television interview:

> … in many cases, the evidence isn't public. I think in many cases it's the possible mergers, or possible acquisitions that didn't take place, didn't reach the light of day, because it was determined that the process was one, too long and then secondly, too uncertain.[8]

2.8 The ACCC said that it opposed only about five per cent of mergers and that many of those cases were resolved by the parties entering into agreements to address the anti-competitive aspects of their proposals. Those agreements, under section 87B of the TPA, are enforceable in court.[9] The BCA felt that it is just as important to take account of proposals which did not proceed but acknowledged also that other powerful factors are involved, e.g. taxation issues.[10]

2.9 The committee noted that while the ACCC could claim that it only intervened in a small proportion of merger cases – it had an interest in almost all of them. This lends weight to the BCA's claim that many proposals are simply abandoned, rather than face the long and uncertain process of seeking the ACCC's blessing.

2.10 In its analysis of merger proposals, the ACCC said it examines competitive conditions in four separate categories: local, regional, national and international. In each of these sectors, import competition is an important component. The ACCC annual report states that the ACCC has not rejected any merger where import competition represented at least ten per cent of the total market.[11] In evidence before the committee, the ACCC said that it '… did not block mergers where there is import competition'. It added that the merger law's focus was on areas where there was no

7 Fels, A. Global need or market greed? *Business Review Weekly*, 15 March 2001; and Australian Competition and Consumer Commission. April 1999. Global mergers – ACCC approach. *ACCC Journal*, no 20, p 1.

8 Moore, A. Interview with John Schubert, Business Council of Australia. *Business Sunday Transcript*, 25 February 2001, p 1.

9 Evidence pp 11-12.

10 Moore, A. Interview with John Schubert, Business Council of Australia. *Business Sunday Transcript*, 25 February 2001, p 1.

11 *ACCC annual report 1999-2000*, op. cit. pp 38-39.

import competition and was not an obstacle where such competition did exist.[12]

2.11 The annual report noted that the argument has been used that, by opposing mergers, the ACCC prevents companies attaining a 'critical mass', i.e. a size that enables them to compete on an international scale. It responded to this argument by commenting that:

> … Size is not always necessary to enable firms to compete in world markets and a merger may not necessarily increase a firm's export potential. Further, there is substantial evidence that successful export performance is enhanced by domestic competition which stimulates efficiency and innovation rather than by domestic market power and monopoly.[13]

2.12 In evidence, the ACCC noted that Qantas had used this argument when the ACCC raised objections to the terms of the Qantas bid for Hazelton Airlines. Qantas had claimed that it was being denied the chance to become '… a major force in world markets'. This conflicted, however, with its initial argument, at the time the bid was made, that the takeover was insignificant in the overall scheme of things.[14]

2.13 In a newspaper article on management by David Uren, the ACCC's policy received some support. The article commented that:

> … behind sustainable advantage in world markets is strong competition at home. Companies benefit from having strong domestic rivals, aggressive home-based suppliers and demanding local customers. These are the pressures that force companies to innovate.[15]

2.14 Closely related to the 'critical mass' argument is another, widely publicised by the BCA, that the ACCC is allowing Australia to become a 'branch-office' economy.[16] When asked about this idea, it said the problem was not related to mergers but mainly to taxation policy. It also said there were other advantages to locating offshore and prominent among them was the desire of a globalised business to get closer to the majority of its customers.[17]

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12 Evidence p 11.

13 *ACCC annual report 1999-2000,* op. cit. p 39.

14 Evidence p 12.

15 Uren, D. Merger mania scorns competition imperatives. *The Australian*, 24 February 2001.

16 Smith, M. ACCC taken to task. *Canberra Times*, 26 February 2001; and Davidson, K. HQs to go offshore? Don't be bluffed. *The Age*, 26 February 2001.

17 Evidence p 11.

2.15 Professor Warren Pengilley of Newcastle University, a former Commissioner of the Trade Practices Commission, disagreed with the ACCC's assessment of this argument. He said that for mergers, if the previous test of market dominance were restored it would help to overcome the problem. He added that it would provide greater certainty than the current test and is well suited to the era of globalisation.[18]

2.16 In evidence to the committee, the ACCC stated that it would not like to see any weakening of the merger provisions in the Act.[19] Professor Pengilley commented that the ACCC saw any change to this part of the law as 'giving in' to big business and took it as axiomatic that competition in Australia would automatically suffer. He said this reasoning was contrary to his own view and the views held by others, including, for example, two former chairmen of the Trade Practices Commission.[20]

2.17 In a recent speech, the Chairman of the ACCC made the comment that since the merger provisions of the TPA involve 'an attempt to enact economics as law', the Commission's interpretation, whatever it might be, is likely to attract criticism and spark debate. He added that:

> … the Commission is the administrator and enforcer of an Act of Parliament introduced to protect the public against anti-competitive forces. The Courts are the final arbiters on whether breaches of the Act have occurred. Further, the Commission's authorisation decisions can be appealed to the Australian Competition Tribunal. There are ample safeguards for businesses who disagree with the Commission, in terms of appeal rights to courts and the Australian Competition Tribunal. Indeed in the former, that is the courts, the onus is on the Commission to prove its case if a business wishes to proceed with a merger considered anti-competitive by the Commission.[21]

2.18 Professor Pengilley addressed this point in his paper, when he commented that, while rights of appeal do exist, commercial realities often put them out of practical reach:

> Rights of appeal can exist as a matter of law but often are commercially useless when time is of the commercial essence.[22]

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18 Submissions pp S48 and S50 (W Pengilley)

19 Evidence p 68.

20 Submissions pp S48-S49 (W Pengilley)

21 Fels, A. *Mergers and market power*, op. cit. pp 4-5.

22 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, p 279.

Case studies

2.19 A number of particular merger cases were discussed with the ACCC by the committee. It asked particularly about the sale of Franklins' supermarkets. The ACCC said that when the proposed sale was announced, it was already concerned about the market shares held by the major chains but had no power to break up existing monopolies.[23]

2.20 Subsequently, early in June 2001, the ACCC announced that its reservations over the proposed sale of Franklin's supermarkets had been resolved. Legally-enforceable undertakings had been accepted from Dairy Farm Management Services Ltd, Franklins and Woolworths Limited, on the anti-competitive aspects of the sale which had been of concern to the ACCC. The final agreement provided that Woolworths will purchase 67 stores, half the number originally sought.[24] Most of the stores will go to independent retailers, through an arrangement with a grocery retailer. It said its concern over the earlier proposal, had been due to the intention to sell a larger number of stores to Woolworths.[25]

2.21 To avoid Woolworths gaining too large a proportion of the market in particular areas, the company is required to sell its supermarkets in several Sydney suburbs.[26] The committee asked what would happen to local residents if these stores closed. In the areas affected, many residents do not own cars and being forced to shop in another area would cause difficulties for them.[27] If no other buyer can be found, the committee does not accept that Woolworths should be forced to close stores where there is no alternative supermarket in the shopping centre.

2.22 The ACCC said that Woolworths is required to make every effort to sell the stores, preferably to independent operators – the ACCC will audit those efforts.[28] To a further question about the prospects for employees of Franklins warehouses, the Commission said it was hoped that the facilities will either be taken over by independent operators or that they will set up their own equivalent facilities.[29]

2.23 The committee asked why the ACCC had decided that no action was necessary in the case of the proposed takeover of Woodside Petroleum by

23 Evidence pp 12-13.

24 ACCC. ACCC gets legally-enforceable undertakings from Dairy Farm, Franklins and Woolworths. *Media Release* MR 129/01, 7 June 2001.

25 ACCC. ACCC to examine Franklins sale. *Media Release* MR 87/01, 18 April 2001.

26 ACCC. ACCC gets legally-enforceable undertakings from Dairy Farm, Franklins and Woolworths. *Media Release* MR 129/01, 7 June 2001.

27 Evidence pp 64-66.

28 Evidence pp 64-66.

29 Evidence p 70.

the Shell group. The ACCC said it had found no evidence that the merger would substantially reduce competition in the Australian market. It commented that for the purposes of the TPA, it was irrelevant that the bid was from a foreign company and that the question of whether foreign ownership should be allowed was one for the Foreign Investment Review Board to address.[30] (The Treasurer announced on 23 April 2001 that the takeover had been prohibited on national interest grounds under the *Foreign Acquisitions and Takeovers Act 1975*.)[31]

2.24 There was discussion also on the very important case of the takeover of Hazelton, the regional airline, mentioned above. Both Ansett and Qantas had made bids to take over Hazelton but the ACCC had raised queries with both companies over the terms of those bids. The most significant issue was that the bids did not address the question of the allocation of take-off and landing slots at Sydney airport in peak periods, particularly Mondays and Tuesdays. When Ansett returned to the Commission with a modified proposal which addressed this issue and made a large number of those slots available to regional operators, the ACCC's objection was withdrawn.[32]

2.25 Regional banking was another issue of interest to the committee during the discussion of mergers. The main question was whether a rumoured takeover of the Western Australian regional bank BankWest by one of the major banks, would be approved if it proceeded to a formal bid. The ACCC indicated that it would have very strong concerns about such a move. BankWest was described as an extremely important player in Western Australia.[33]

2.26 During the discussion, a comparison was drawn between the idea of a BankWest takeover and the takeover of the Bank of Melbourne by Westpac which was approved by the ACCC. The Commission described the Bank of Melbourne takeover as probably its most unpopular decision. The difference in the two cases, it said, was the strength and market share of BankWest by comparison with the Bank of Melbourne. The ACCC said that BankWest is a much bigger, more substantial bank, with a market share estimated at 30 per cent; whereas the Bank of Melbourne had only about 10 per cent of the market.[34]

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30 Evidence p 11.

31 Costello, P. The Hon. Treasurer. Foreign investment proposal – Shell Australia Investments Limited's acquisition of Woodside Petroleum Limited. *Press Release* no. 25, 23 April 2001.

32 Evidence pp 13-14.

33 Evidence p 17.

34 Evidence p 17.

2.27 Also falling in the period under consideration was the takeover of Colonial Limited by the Commonwealth Bank. That merger was allowed to proceed when the Commonwealth Bank agreed to significant undertakings to reduce the anti-competitive effects of the change.[35]

2.28 When the Australian Stock Exchange and the Sydney Futures Exchange proposed to merge, the ACCC's market inquiries revealed that the two exchanges would be strong competitors in the future for new products. It judged therefore that a merger would reduce the level of competition in Australia. It was considered unlikely that foreign companies would offer significant competition and, in addition, barriers to entry into the industry were high. The Commission indicated to the two parties that it was likely to oppose the merger and the proposal was withdrawn.[36]

2.29 The main telecommunications issue presently under consideration, is the proposal by Singapore Telecom to take over the assets of Cable and Wireless Optus. As in the case of Woodside Petroleum, mentioned above, the essential question on this proposed merger lay with the Foreign Investment Review Board, rather than the ACCC. The Treasurer announced on 22 August 2001 that no objection would be raised to that takeover on foreign investment policy grounds.[37] The ACCC's role will now be to determine whether the proposed arrangements would significantly reduce competition in the Australian market.

2.30 The ACCC has referred to the low proportion of mergers that it has queried and the fact that many of those proposals later proceeded when undertakings were given on anti-competitive issues, as an indication that it does not unnecessarily oppose mergers. The committee is not convinced that this approach tells the full story. It still has concerns about reports that many merger proposals lapse, because the process of getting ACCC approval is seen as too long and the outcome too uncertain.

2.31 The committee also queried the ACCC's reliance on undertakings to deal with anti-competitive aspects of proposed mergers. Generally, the provisions of these undertakings include a nominated time period, during which it is agreed that specified anti-competitive actions will be avoided. When that time limit expires, however, there is nothing to stop those practices being brought into play. The committee believes that if practices are considered anti-competitive, they should be stopped, not simply delayed.

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35 *ACCC annual report 1999-2000*, op. cit. p 44.

36 *ACCC annual report 1999-2000*, op. cit. p 43.

37 Costello, P. The Hon. Treasurer. Singapore Telecommunications Limited – Application for Foreign Investment Approval to Acquire Cable & Wireless Optus. *Press Release* no. 060, 22 August 2001.

Cartels

2.32 The ACCC has also been active in the identification of price fixing activities by cartels. As part of this process it has cooperated with its international counterpart organisations to identify hard core international cartels. It reported that there is evidence of increased activity by these groups[38] and that they are becoming more complex and harder to detect.[39]

2.33 The TPA does not refer directly to cartels, but their activities are dealt with under section 45 of the Act, which covers restrictive trade practices. The OECD has defined hard core cartels as:

> An anti-competitive agreement, anti-competitive concerted practice or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.[40]

2.34 The ACCC said that the United States and Europe have been very helpful in sharing information with Australia on international cartel operations that they have uncovered. This is particularly true of the United States, as Australia's treaty with the US allows for the free exchange of confidential information, except for some restrictions on information about mergers.[41]

2.35 The ACCC told the committee that it had achieved some successes in dealing with the actions of cartels. A recent case resulted in a fine of $26 million for price fixing on vitamins for animal food. In another, it has proposed a fine of $7 to 8 million to the court and is awaiting the outcome. Similarly, a case involving a local cartel produced a fine of $16 million on the Queensland fire protection industry.[42]

2.36 The committee asked what powers the ACCC had to take action against an international cartel acting to Australia's disadvantage. It said that in all but a few rare cases, if it affects the local market, it falls within the ACCC's jurisdiction. To act on the problem, it would deal with the cartel's local operations.[43]

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38 Evidence pp 3-5.

39 ACCC. ACCC calls for stronger criminal sanctions including jail sentences for price-fixing offences under Trade Practices Act. *Media Release* MR 131/01, 8 June 2001, p 3.

40 Organisation for Economic Cooperation and Development. Recommendation concerning effective action against "hard core" cartels. *News Release*, Ministerial Meeting, Paris, 27-28 April 1998, p 2.

41 Evidence p 5.

42 Evidence pp 3, 5 and 6.

43 Evidence p 5.

2.37 The ACCC said that since the TPA was amended in 1995, it had applied more widely to professional organisations and the Commission had been devoting an increasing proportion of its enforcement resources to this area. While most professional organisations had so far been relatively unaffected, a number of cases of cartel-like behaviour had arisen, especially in the health sector.[44]

2.38 The ACCC commented that a court case is under way in Western Australia in which it has charged Mayne Nickless and the Australian Medical Association with price fixing. In addition, orthopaedic surgeons had been advised that restrictions on entry into that profession are considered by the ACCC to be anti-competitive and in breach of the Act. The surgeons are in the process of seeking authorisation for the restrictions.[45] The Commission added that other problems had included issues such as boycotts of country hospitals by doctors, boycotts of bulk billing, cases of price fixing and boycotts by anaesthetists.[46]

2.39 Using the case of anaesthetists in Sydney as an example, the ACCC explained that they had made a written agreement to put up their prices, 'so that was just straightforward price fixing'. They had also, as a group, told some hospitals that they would not attend operations unless they got the requested increases, 'so that is a collective boycott, unlawful.'[47]

2.40 The ACCC went on to explain:

> They should not have done that collectively. Individually, they can. That is the point. They can do all these things; they can withdraw their services, individually. It is only having an agreement between them that raises issues under the Trade Practices Act. They can talk about certain things, as long as they do not reach agreements. Then they have to seek authorisation.[48]

2.41 The ACCC Chairman had previously commented on the monopoly position enjoyed by the medical profession and the consumer protection problems which would be raised if that position were exploited. He said the profession had reserved large areas of work to itself, restricted entry to the profession and restricted competition between members by, for example, restrictions on pricing and advertising. While there may be justification for some of these restrictions – adequate return on their investment in education, generation of high quality services and

44 Evidence p 3; and *ACCC annual report 1999-2000*, op. cit. p 30.

45 Evidence p 3.

46 Evidence p 31.

47 Evidence p 36.

48 Evidence p 36.

protection of the public from unqualified practitioners – it was clear, the ACCC said, that this should not grant immunity from competition law.[49]

2.42 The issues arising in the health care profession have obvious implications for other professions also. For example, the circumstances surrounding the legal profession are very similar. The ACCC has noted, however, that the legal profession has not been nearly as successful in restricting access to the profession or maintaining income levels.[50] The Commission advised that it has recently established a Professions Unit, dedicated to enforcement of the competition and consumer protection provisions of the TPA in the various professional sectors.[51]

2.43 The committee said that the signs of increased activity by international cartels were disturbing. The ACCC was asked to keep the committee informed of any major developments in this area.

Authorisation

2.44 The Trade Practices legislation seeks to ensure that opportunities are not lost through rigid application of guidelines to technical breaches of the TPA. To provide the flexibility to achieve this, the ACCC has been given the power, under section 88 of the Act, to authorise practices or conduct (other than misuse of market power) which would otherwise be in breach of the TPA. Before granting an authorisation, however, it must be satisfied that there is sufficient public benefit to justify overriding the anti-competitive effects [52] or that there is such an obvious public benefit that the practices or conduct should be permitted.[53]

2.45 Practices which may be authorised in this way include: anti-competitive agreements, primary and secondary boycotts, price agreements, anti-competitive covenants, exclusive dealing arrangements, resale price maintenance, and mergers that would lead to a substantial lessening of competition in a market.[54]

2.46 The ACCC said that this power to, in effect, authorise companies to be in breach of the TPA and exempt them from prosecution in relation to the authorised practices, is unique to Australia. Such authorisations based on

49 Fels, A. What the Doctor Ordered, Left Field. *Australia's BRW*, 2 February 2001.

50 Fels, A. What the Doctor Ordered, Left Field. *Australia's BRW*, 2 February 2001.

51 Submissions p S66 (ACCC)

52 Submissions p S55 (ACCC)

53 Fels, A. Prof. *Competition policy*: *The road ahead for Egypt*. Speech, 24 May 2001, Cairo. http://www.accc.gov.au/speeches/fs-speeches.htm p 8.

54 ACCC. Nov 1999, op. cit. p 15.

public benefit are not permitted by the legislation in the USA or the European Union.[55]

2.47 To determine whether authorisation will be granted, the ACCC undertakes a public assessment process and, as part of that process, the views of interested parties are sought. The committee noted that one of the criticisms made of the ACCC, is that the authorisation process is too difficult and too expensive for small business.

Case studies

2.48 At present, the ACCC has under consideration two important applications for authorisation. The Royal Australasian College of Surgeons (RACS) has applied in respect of some conditions of entry into the profession – accreditation, training and examination procedures and its procedures for accrediting overseas trained doctors. The Dairy Farmers' Federation is seeking authorisation for a collective bargaining arrangement to assist individual dairy farmers in their price negotiations with milk processors.[56]

2.49 Using the first of these cases as an example, the ACCC is conducting the initial assessment of the RACS application and it appears that some of the College's procedures are likely to breach the anti-competitive conduct provisions of the TPA. That being so, the RACS will be required to demonstrate the justification for approving those procedures. If the ACCC is not satisfied that there is sufficient public benefit to warrant authorisation, it has the choice of refusing the application or granting authorisation conditional on specified changes being introduced.

2.50 When assessment of the application is complete and the ACCC has formed its proposals, a draft determination will be issued. The draft will set out the proposed action and the ACCC's reasons for reaching its conclusions. Interested parties will then be given the opportunity to comment on the draft proposals, prior to the Commission's final determination.[57] Determinations by the ACCC are, however, subject to appeal to the Australian Competition Tribunal.[58]

2.51 In the case of the Dairy Farmers' application, the ACCC commented that, having found some benefits in other farm-based applications:

> We have indicated in general terms to the dairy farmers that we think there may well be public benefits, and we practically invited them to seek authorisation. It has had some improved effects on

55 Evidence pp 11-12.

56 Submissions p S55 (ACCC)

57 Submissions pp S55-S56 (ACCC)

58 Evidence p 19.

their bargaining. It prevents the exploitation of individuals, and there are some economic benefits from their doing some degree of collective bargaining.[59]

Assistance to rural medical services

2.52 There has been a considerable amount of concern in rural areas regarding the availability of medical services. Much of this concern springs from uncertainty over the types of agreements which doctors can enter without breaching the TPA. The ACCC has made it clear that it has no problems with weekend and after-hours rosters[60] but this has not allayed fears over such issues as agreements on the number of a particular type of specialist needed to service a particular area.

2.53 The Government announced on 29 August 2001, that it would review the impact of Part IV of the TPA on the recruitment and retention of medical practitioners in rural and regional areas. The review is in response to continuing concerns in those areas, about the impact of the TPA on some working arrangements.[61]

2.54 As an additional measure, the Government will also provide support for groups of general practitioners with the submission of applications for authorisation of their arrangements to the ACCC.[62]

Protection of small business

2.55 A growing area of concern for the ACCC is the misuse of market power by large companies against small business. Amendments to the TPA in 1998 and the appointment of a Commissioner to deal with small business problems, have assisted in this area. Additional amendments to the TPA, passed this year, will further enhance the ACCC's ability to deal with problems such as predatory pricing by market leaders.

2.56 Small businesses face a number of problems in dealing with big business. These fall especially in the areas of:

- lack of bargaining power for small trade and professional firms dealing with powerful corporate clients;

59 Evidence p 42.

60 Evidence p 53.

61 Howard, J. Prime Minister of Australia. Government to review impact of Trade Practices Act on doctors in rural and regional Australia. *Media Release*, 29 August 2001, p 1.

62 Howard, J. Prime Minister of Australia. Government to review impact of Trade Practices Act on doctors in rural and regional Australia. *Media Release*, 29 August 2001, p 1.

- lack of bargaining power of small producers – especially rural producers – dealing with powerful buyers;
- discriminatory pricing by suppliers and refusals to deal with small businesses; and
- the exercise of market power by big businesses in competition with small businesses.[63]

2.57 The ACCC is taking an increasing interest in ensuring that small businesses are properly informed of their rights and obligations under the TPA. This has followed the Government's decision in 1998 to strengthen sections of the Act applying to small businesses having difficulties with big companies – unconscionable conduct (section 51AC) and franchising (section 51AD). These changes add to the powers already available to the ACCC under section 46, which covers misuse of market power. The importance of this area of the Commission's work has been given recognition by the appointment of a full-time Commissioner responsible for small business matters.[64]

2.58 The ACCC told the committee that it had been more active in the small business area in the last couple of years. Five court rulings have been obtained and the ACCC won four of them. The single unsuccessful case is being appealed (as is one of the successful cases). The availability of the full-time Commissioner and the support of better funding, have also allowed it to achieve some successes in relation to unconscionable conduct.[65]

2.59 Dealing with predatory pricing by large retailers is one of the main areas of difficulty for small business. In determining whether a company is engaging in predatory pricing, the ACCC would consider factors such as, whether:

- the company is cross-subsidising discounting in one market with profits from another area of its activities;
- price cuts are selective;
- the company will be able to recoup lost profits once the competitor has been eliminated or damaged; or

63 House of Representatives Standing Committee on Industry, Science and Technology. May 1997. *Finding a balance: toward fair trading in Australia.* Canberra, AGPS, p 121.

64 *ACCC annual report 1999-2000,* op. cit. pp 3-4.

65 Evidence p 4.

- there are rational economic reasons for price cutting (e.g. seasonal factors, increasing utilisation of capacity, special promotions or disposal of superseded stock).[66]

Case studies

2.60 The ACCC referred specifically to a case involving Boral as an example of this part of its operations. When a small firm entered the market for concrete blocks, Boral responded by dropping its prices below its variable costs and, despite making a loss, increased its output. The aim was to drive the newcomer out of the market. The Full Federal Court agreed with the ACCC, that Boral had a substantial amount of market power, which it had been using to drive out a competitor.[67]

2.61 In another example of the misuse of market power, the actions of Telstra following the shut down of the One.Tel network, have led to a court injunction against the company. The ACCC sought the injunction to stop Telstra engaging in 'unlawful misleading and deceptive conduct.' It said that Telstra representatives were advising former One.Tel customers that they must transfer to Telstra or pay fees to One.Tel for the early termination of their contract. The ACCC said: 'Clearly the customer must not incur a penalty when it is the business that stopped providing its services.'[68]

2.62 On 6 July 2001, an interim court injunction was issued, restraining Telstra from continuing its representations to former One.Tel customers. The case was then adjourned but the ACCC indicated that it would continue to seek: declarations of unlawful conduct; a permanent injunction; an opportunity for consumers who were misled to rescind their Telstra contacts without penalty; corrective advertisements and a compliance program by Telstra.[69]

2.63 The committee raised several matters of concern relating to the difficulties of small businesses in the smash repair industry. The most important of these concerns claims that small panel beating businesses are being driven out of business because the National Roads and Motorists Association (NRMA) and the Royal Automobile Club of Victoria (RACV) provide a limited range of choices to members needing smash repairs. The ACCC

66 Trade Practices Commission. Feb 1990. *Section 46 of the TPA: Misuse of market power*. Canberra, Trade Practices Commission, pp 43-44.

67 Evidence p 3.

68 ACCC. ACCC institutes against Telstra for misleading One.Tel customers. *Media Release* MR 153/01, 5 July 2001.

69 ACCC. Court grants injunction against Telstra for One.Tel representations. *Media Release* MR 156/01, 6 July 2001.

said that this type of complaint has been investigated but the evidence does not indicate that what is being done is either unlawful or unconscionable.[70]

2.64 Legal advice given to the ACCC indicated that the key issue is that it is the NRMA (or RACV) that engages the contractor to repair a vehicle, not the owner. Consequently, those organisations cannot be said to have forced policy holders to use a particular firm's services and there is no breach of section 47 of the TPA.[71] Nor do they appear to have breached the unconscionable conduct provisions of the Act, even though some clients may see their actions as inflexible, unfair or unreasonable. On the basis of this legal advice, it has decided that, without additional supporting evidence, it is unable to take any action on these issues.[72]

Legislative changes

2.65 On 12 July 2001, the ACCC noted that new legislative changes introduced by the Government will further enhance its ability to assist small business. The latest amendments to the TPA include:

- court discretion to allow the ACCC to intervene in private proceedings where the issues are of public interest;
- increased maximum monetary penalties for breaches of the consumer protection sections of the Act;
- confirming that States / Territories can also use the Act's unconscionable conduct provisions;
- giving the ACCC the right to undertake representative actions and seek damages on behalf of third parties for most breaches of the Restrictive Trade provisions;
- giving the ACCC the right to seek declarations from the court on the operations of the Act – a relatively quick and inexpensive operation; and
- extending the period for lodging claims under the Act to 6 years.[73]

2.66 The committee welcomed the enhancement of the ACCC's ability to assist small business. It encouraged the Commission to increase its efforts in

70 Evidence p 7.

71 Submissions p S21 (ACCC)

72 Submissions p S21 (ACCC)

73 ACCC. Greater A.C.C.C. support for small business. *Media Release* MR 163 / 01, 12 July 2001, p 1.

this area, particularly in cases of unconscionable conduct by big business against small firms.

2.67 The committee considers that it is important that, where a clear public benefit can be demonstrated, competition policy should be flexible enough to find a solution which allows that benefit to be achieved. Small businesses, in particular, need to see a flexible approach to competition policy, which permits a rapid review of unnecessarily difficult situations and the adoption of practical solutions.