4

Enforcement issues

Allegations of 'arm twisting' by the ACCC

4.1 There is no doubt that the Parliament has given the ACCC considerable coercive powers so that it can satisfactorily perform its diverse range of functions. These include powers to: issue a notices which effectively reverse the onus of proof in relation to conduct in the telecommunications industry and price exploitation; publish guidelines on the operation of the law which may be used by the courts; and seek large financial penalties and adverse publicity orders. The committee has become aware of claims from the business community, practitioners and academics that the ACCC has a tendency to use its position of strength to 'bully' business into complying with its directives without necessarily sticking to the formal legal process. Professor Pengilley articulated this contention in a recent paper[1] and before the committee.

4.2 He stated that the ACCC sometimes employed tactics designed to convince the company involved that it would be too time consuming and expensive to fight the matter through. In this way, he said, it achieved its ends but avoided having issues tested in a court of law.[2] Examples of bullying or arm-twisting nominated included:

- continually talking up the threat of sizeable penalties even where the most minor transgression of the law is involved;

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1 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 255-293.

2 Pengilley, W. April 2001, op. cit. p 284.

- misrepresenting its views as the ‘law’ or generally overstating its powers;
- requiring voluminous disclosure from companies without any reciprocal supply details about the ACCC’s concern about a particular transaction or behaviour;[3]
- engaging in demonstration trials to induce compliance. Such proceedings are sometimes settled pre-trial; and
- using adverse publicity to imply or state that a party has breached the law.[4]

4.3 The committee asked the ACCC whether it considered Professor Pengilley’s criticism of its operations was fair. The ACCC replied that the criticism had no real basis. When the committee pointed out that a number of leading trade practices practitioners had found no fault with the propositions espoused by Professor Pengilley, the ACCC claimed that these were the lawyers who represent big business.[5] Professor Pengilley rejected this contention. He specified two particular areas of concern namely: telecommunications and price exploitation. These areas are discussed below.

Telecommunications

4.4 The Parliament has given the ACCC strong powers in Part XIB of the Trade Practices Act (TPA) to promote competition into the telecommunications sector. Section 151AK of the TPA prohibits carriers from engaging in anti-competitive conduct. This is known as the ‘competition rule’. A carrier will engage in anti-competitive conduct if they have a substantial degree of power in a telecommunications market and they take advantage of that power with the *effect or likely effect* of substantially lessening competition in a telecommunications market.[6] Section 151AL allows the ACCC to issue a ‘Part B competition notice’ setting out the details of the contravention. This notice is *prima facie* evidence in any subsequent court proceedings.[7] In effect, it shifts the onus

3 This was said to be a particular problem in merger cases. Professor Pengilley suggested that in these cases it is difficult to assess ACCC’s case or respond to it without resorting to litigation. (See Pengilley, W. April 2001, op. cit. p 294). The prospect of litigation may mean that the merger proposal in no longer considered viable. Consequently the Tribunal or the Court will not review the ACCC’s decision on the merger.

4 Pengilley, W. April 2001, op. cit. pp 284-285.

5 Evidence p 56.

6 Section 151AJ

7 Section 151AN

of proof to the carrier to prove that they did not breach the law. Under section 151BX, if the Federal Court is satisfied that a person has contravened the competition rule, the Court may impose a pecuniary penalty of up to $10 million plus $1 million for each day the contravention continued.

4.5 In the commercial churn case, which related to Telstra's customer transfer procedures, the ACCC issued a competition notice in October 1998. The matter was not ready for trial until March 2000.[8] According to Telstra's counsel, the period of delay meant that by the time the hearing was due to commence Telstra faced a penalty of up to $500 million.[9] In February 2000, Telstra and the ACCC settled the case after Telstra agreed to a $4.5 million package for service providers. Commenting on the outcome Professor Pengilley accused the ACCC of preferring '…to apply the pressure of huge and continuing penalties than to seek the resolution of issues through court process…'[10] He also contended that Commission's approach to the case restricted external scrutiny of its approach to the issue:

> …we will never know whether the ACCC's wishes that Telstra spend significant sums in assisting access to its network was a wise or efficient use of those funds or whether the ACCC, in demanding such expenditure, was engaged in regulatory error.[11]

4.6 The ACCC stated the case was one that was critical for the development of competition in the local telephony market. In its view, the anti-competitive nature of Telstra's customer transfer procedures could only be addressed by the introduction of an efficient billing system. In an implied concession that the commercial pressure of continuing penalties helped it to achieve its desired outcome, the ACCC acknowledged that:

> …A Court would not make such an order as an interlocutory injunction; in fact it would be difficult even as a final order.[12]

4.7 The committee notes that the issue of the telecommunications competition regime is currently being examined by the Productivity Commission (PC). In its draft report released in March 2001, the PC recommended that Part

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8 For an extended chronology of the 'churn' case see Productivity Commission. March 2001. *Telecommunications competition regulation: Draft report.* http://www.pc.gov.au/inquiry/telecommunications/draftreport/index.html p 5.15.

9 Roger Featherstone cited in Pengilley, W. April 2001, op. cit. p 289.

10 Submissions p S41 (W Pengilley)

11 Pengilley, W. April 2001, op. cit. p 290.

12 Submissions p S76 (ACCC)

XIB should be repealed and that telecommunication be subject to the general conduct rules in Part IV. The PC stated that:

> The competition notice regime in Part XIB increases the likelihood that a firm will modify alleged anti-competitive conduct rather than challenge the matter in the courts. This reduces the opportunities for judicial review of the ACCC's decisions.[13]

Price exploitation

4.8 As outlined in Chapter 3 section 75AU of the TPA prohibits 'price exploitation'. [14] That is, the charging of prices that are 'unreasonably high' having regard only to the new tax system changes.[15] A breach of section 75AU is punishable by a penalty of up to $10 million where the breach is committed by a corporation or $500 000 where the breach is by an individual.

4.9 The ACCC is required by section 75AV to issue guidelines about when prices may be regarded as unreasonably high. The Court can have regard to these guidelines in any litigation for price exploitation. Under section 75AW, if the ACCC regards a corporation as having engaged in price exploitation, it may issue a notice to the corporation to that effect. The notice is prima facie evidence of a breach of the law.

4.10 In 2000 the Parliament made further amendments to the TPA to prohibit conduct in connection with the supply of goods or services, that falsely represents, or misleads or deceives a person about the effect of the new tax system changes.[16]

4.11 Many of the allegations of ACCC 'bullying' arise from the application of its powers in relation to price exploitation. Examples of such comments include:

- an allegation by the Australian Retailers Association (ARA) that the ACCC had 'overreacted to inadvertent errors by retailers'. The ARA also said that retailers had been 'singled out and victimised'. These

13 Productivity Commission. March 2001, op. cit. p 5.1.

14 Due to limitations in the Commonwealth's power, all jurisdictions (except the ACT) have implemented a uniform New Tax System Price Exploitation Code (the schedule or personalised version of Part VB). The state legislation essentially gives the ACCC the same powers and functions as Part VB, but in respect of persons rather corporations.

15 To contravene the section, the price must be unreasonably high even after taking into account the supplier's costs, supply and demand conditions and other relevant matters.

16 Section 75AYA.

comments followed ACCC action against Franklins for charging 'GST' on Goods and Services Tax (GST) free goods;[17]

- the Australian Chamber of Commerce and Industry (ACCI) accused the ACCC of 'prosecution by press release'. The ACCI said that the ACCC had scared people into lower price outcomes than would have otherwise been the case resulting in lower levels of growth and lower levels of employment than would otherwise have been achieved;[18]
- Australian Business Limited said there was a reasonable amount of fear about the ACCC's price exploitation powers;[19]
- retailer Gerry Harvey accused the ACCC of acting in 'a totally un-Australian way';[20]
- former Trade Practices Commissioner Bob Baxt described the ACCC as a 'bully' for its advocacy of the view that any price rises in excess of ten per cent was unlawful;[21]
- in June 2000 *The Australian* editorialised that the ACCC was 'bullying businesses proposing price rises';[22] and
- Professor Pengilley said that the ACCC's powers were 'heavy-handed' and that in most sectors of the economy the Government could rely on competition to keep prices down.[23]

4.12 In March 2001, the ARA reported that that 55 per cent of retailers surveyed had absorbed costs and taken lower profit margins since the start of the GST. While some have argued the fear of the ACCC restrained business from raising their prices, it is by no means clear that the reluctance to raise prices was not largely the result of tough competitive conditions. The CEO of Council of Small Business Organisations of Australia, Rob Bastian, has suggested that both factors were at work.[24]

4.13 The ACCC strongly refuted such claims of 'bullying'. It pointed out that it was given a strong mandate to prevent price exploitation by

17 Australian Retailers Association. Australian Retailers Association expresses concerns about ACCC's action for inadvertent GST errors. *Media Release*, 25 July 2000. The matter was resolved when Franklins consented to discounts on 11 items for three weeks and ran full page advertisements apologising for the error.

18 Patterson, M. Industry concerns over ACCC. *Transcript ABC AM Program*, 6 July 2001.

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

20 Harvey lets fly at 'unAustralian' ACCC. *Australian Financial Review*, 14 August 2000.

21 Towers, K. Bullies, says latest critic. *Australian Financial Review*, 2 June 2001.

22 Editorial. Investigation, not bluster, is ACCC role. *The Australian*, 9 June 2000.

23 Evidence p 83.

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

Commonwealth, State and Territory Parliaments. The ACCC informed the committee that it put a lot of resources into educating small business about the magnitude of permissible price rises. It said that its guidelines gave business greater certainty during the transition to the GST.[25] The ACCC also argued that its high profile activities also helped business by increasing the confidence of consumers about the price effects of the GST. Consequently, it said, consumers spent more liberally than would have otherwise been the case.[26]

4.14 Furthermore, the Commission stated that it had avoided a heavy-handed approach in enforcing the law. The ACCC informed the committee that it could have instigated 233 actions for price exploitation. However as most cases involved small business, it pursued other remedies. The ACCC told the committee:

> Quite often the mistake, in terms of charging GST when it should not have been charged, was inadvertent. We sought other remedies in terms of refunds and discounts on goods.[27]

4.15 As stated earlier in this report, over the last two financial years the ACCC has conducted 5000 GST pricing investigations resulting in 600 administrative undertakings and 40 court enforceable undertakings.[28]

4.16 The most high profile price exploitation case to date concerned Video–Ezy. This matter was settled in April 2001 with the company consenting to court orders that it had misled its customers over the impact of the GST on new video releases. It also agreed to a range of remedial measures to compensate customers.[29]

4.17 Another major case concerned Westpac. The bank increased a large number of its fees by the full ten per cent after the introduction of the GST. The ACCC pointed out that banks are input taxed and therefore cannot claim GST credits. Consequently, the GST did have an 'impact' on their fees. After carefully examining the Westpac's fee increases the ACCC concluded that they did not seem to be in breach of the TPA.[30]

4.18 With only minimal resort to litigation the ACCC was able to report in July 2001 that most businesses have complied fully with its guidelines and that

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25 Evidence p 40.

26 AAP. Jail for price collusion: Fels call. *Canberra Times*, 14 June 2001.

27 Evidence p 48.

28 See paragraph 3.28.

29 ACCC. ACCC and Video Ezy settle litigation. *Media Release* MR 96/01, 27 April 2001.

30 Evidence pp 40-41.

the overall net effect of the new tax system on prices was 2.5 per cent.[31] This was less than the Government's estimate of around 2.75 per cent in the 2000-2001 budget. Whether this outcome is primarily attributable to the ACCC's education campaign, business fear of the Commission or competitive conditions in the market is a matter where there is insufficient evidence for the committee to draw a conclusion.

Did the ACCC overstate its powers?

4.19 On one occasion highlighted by Professor Pengilley, the ACCC stated that:

> …The ACCC can impose severe penalties for businesses that fail to pass on tax savings for lower prices - up to $10 million per offence for corporations, and up to $500 000 per offence for individuals…[32]

4.20 Professor Pengilley pointed out that in fact, such penalties can only be imposed by the Federal Court on application from the ACCC. He described the situation as one where the Commission had 'blatantly and wrongly' claimed powers that it does not have.[33] Professor Fels conceded to the committee that the ACCC had erred but stated that it was a rare mistake:

> I cannot recall any time in the last 10 years that anyone from the Commission has ever said that we can fine people, with the one exception of the statement that Pengilley—who spends his life fault-finding with the ACCC—has managed to uncover. So I congratulate him on this discovery of his. It should not have been said. We do doubt very much that anyone ever saw it, apart from Pengilley. I very much doubt that this particular publication actually reached a lot of people. We have always tried to make it clear that the level of penalties, if any, in a case are up to the courts.[34]

4.21 While the committee accepts that this was an inadvertent and uncharacteristic error by the Commission, the reaction of the Chairman suggests an intolerance for criticism, even where it is well-founded. The committee is concerned that other justified questions about the ACCC's performance are being similarly dismissed.

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31 ACCC. One year on and most businesses comply with ACCC Guidelines. *Media Release* MR 152/01, 25 July 2000.

32 ACCC. June 2000. *ACCC update.* Special GST issue, Issue 7, p 2.

33 Pengilley, W. April 2001, op. cit. p 292.

34 Evidence pp 47-48.

The 10 per cent rule

4.22 In March 2000 the ACCC revised its price guidelines to explicitly state that prices should not rise by more than 10 per cent as a result of the new tax system. The ACCC insisted that its pricing guidelines were enforceable.[35]

4.23 This claim was subject to extensive criticism. Professor Pengilley argued that the ACCC overstated the legal effect of its guidelines to intimidate business into compliance.[36] While the law requires the ACCC to develop the guidelines and states that the Court may take the guidelines into account in any litigation regarding price exploitation, the guidelines do not replace the test for price exploitation contained in section 75AU, namely: – is the price unreasonably high? Debate about the legal effect of the guidelines centred on the so called 10 per cent rule. Professor Pengilley emphasised the point that there is nothing in the law that caps price rises at 10 per cent:

> the compliance costs of some entities (in some cases on a continuing basis by virtue of legal changes forcing managerial changes) plus the imposition GST meant an increase of more than 10 % in prices if costs were to be recovered.[37]

4.24 Other academic commentators have similarly stated that:

> It is difficult to understand how section 75AU precludes a price increase of more than 10 per cent by reason of additional compliance costs if it can be shown that the price increase is justifiable.[38]

4.25 The ACCC argued that there had been a misplaced emphasis on the 10 per cent rule.

> The vast majority of price changes due to the New Tax System will be nowhere near 10 per cent. A significant number of price falls will occur due to the removal of the Wholesale Sales Tax and its replacement by the Goods and Services Tax and due to other cost savings attributable to the New Tax System.[39]

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35 ACCC. Pricing Guidelines enforceable: ACCC. *Media Release* MR 84/00, 2 May 2000.

36 Pengilley, W. April 2001, op. cit. p 290.

37 Pengilley, W. April 2001, op. cit. p 290.

38 Fisse, B, Cass-Gottlieb, G and Wijewardena, M. 2000. The New Bitter? Price exploitation under Part VB of the Trade Practices Act. *Trade Practices Law Journal,* vol 8, p 102.

39 ACCC. Pricing Guidelines enforceable: ACCC. *Media Release* MR 84/00, 2 May 2000.

ACCC's arguments for stronger trade practices laws

The effects test

4.26 The ACCC submitted that section 46 of the TPA should be strengthened by adding an 'effects' test.[40] Section 46 would then prohibit a corporation that has a substantial degree of power in a market from taking advantage of that power for the purpose or *effect* of:

- eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
- preventing the entry of a person into that or any other market; or
- deterring or preventing a person from engaging in competitive conduct in that or any other market.[41]

4.27 The committee notes that the proposal to move to an effects test has been considered on five occasions since 1989 during various reviews of the TPA.[42] All five inquiries expressed concern that the effects test would not be able to satisfactorily distinguish between desirable and undesirable competitive activity by firms.

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40 Evidence p 60.

41 The Committee notes that the Senate Legal and Constitutional References Committee is currently examining another proposal in relation to section 46, namely the reverse onus of proof test. Under this approach once the ACCC can demonstrate that a company has a substantial degree of market power and has taken advantage of that power, the onus will then shift to the company to prove that it did not use its market power for an improper purpose. The ACCC did not raise this matter with the Committee in its evidence or submissions.

42 House of Representatives Standing Committee on Legal and Constitutional Affairs. 1989. *Mergers, takeovers and monopolies: Profiting from competition?* (Griffiths). Canberra, AGPS, pp 29-30 and 41; Senate Standing Committee on Legal and Constitutional Affairs. 1991. *Mergers, monopolies and acquisitions: Adequacy of existing legislative controls.* (Cooney). Canberra, AGPS, pp 81-86 and 96; Hilmer, J. 1993. *National Competition Policy: Report by the Independent Committee of Inquiry.* Canberra, AGPS, pp 70-71 and 74; House of Representatives Standing Committee on Industry, Science and Technology. 1997. *Finding a balance: towards fair trading in Australia.* (Reid). Canberra, AGPS, p 132; and Joint Select Committee on the Retailing Sector. 1999. *Fair market or market failure.* (Baird). Canberra, Parliament, p 100.

4.28 The committee notes that there is already an effects test in telecommunications competition regime.[43] This regime is currently being reviewed by the PC. In its draft report the PC recommended the removal of the provisions containing the effects test.[44]

4.29 The ACCC informed the committee of three recent cases on section 46: *Melway*[45], *Boral*[46] and *Rural Press*[47]. It argued that *Melway* and *Boral* in particular had broadened the scope of section 46. In *Melway*, the ACCC intervened submitting the argument that a firm may take advantage of market power if it does something that is materially facilitated by the existence of the power, even though it may not have been absolutely impossible without the power. Although the small distributor seeking relief against Melway ultimately lost the case[48], the High Court accepted the ACCC's submission in *obiter* comments. Reflecting on the decision, the ACCC told the committee:

> the High Court adopted a more expansive view of section 46 than in the past. The hurdles that have to be got over have been lowered significantly by the High Court.[49]

4.30 The *Boral* case concerned an allegation of predatory pricing. The ACCC said that prior to the Federal Court's decision the ACCC faced a 'big hurdle' in that it was considered necessary to establish that the firm pricing below cost could recover its losses after eliminating its competition. The Commission stated that in *Boral* the Full Federal Court had held that section 46:

> does not have these theoretical economic doctrines written into it and, if the purpose is to drive someone out of business and it is

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43 Subsection 151AJ(2) provides: A carrier or carriage service provider engages in anti-competitive conduct if the carrier or carriage service provider has a substantial degree of power in a telecommunications market; and either:

- takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market; or
- takes advantage of that power, and engages in other conduct on one or more occasions, with the combined effect, or likely combined effect, of substantially lessening competition in that or any other telecommunications market.

44 Productivity Commission. March 2001, op. cit. p 5.1.

45 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 178 ALR 253.

46 *ACCC v Boral Ltd* (2001) ATPR 41-803

47 *ACCC v Rural Press* [2001] FCA 116

48 The small distributor failed in *Melway* because the majority of the High Court concluded that Melway had not 'taken advantage' of its market power. Therefore the imposition of an effects test would have had no impact on the outcome of the case.

49 Evidence p 2.

> connected with the misuse of market power, then it is a breach of the law. [50]

4.31 Given these breakthroughs in the interpretation of section 46 and the repeated concerns expressed by various inquiries about the move to an effects test, the committee's preference is to await the outcome of further cases on section 46 before considering any change to the law.

Cease and desist power

4.32 The ACCC also told the committee that its ability to enforce the TPA would be enhanced if it had the power to issue 'cease and desist' orders. These would be issued by the ACCC where its suspects that a breach of the Act has occurred. The recipient of such orders could not engage in the conduct specified in the notice unless it could prove in court that it did not contravene the TPA. Failure to comply would be punishable in the Federal Court. Compensation may payable if loss or damage was caused by a breach of the order. The ACCC indicated that such orders could be particularly useful in the context of cases involving an allegation of misuse of market power:

> If we, for example, form the view that there is some predatory behaviour going on then we would have to collect evidence and win a case in court which can take a long time. There needs to be some look at how quickly action can be taken. The possibility of cease and desist orders or something like may need some consideration. [51]

4.33 In a submission to the committee the ACCC suggested that cease and desist orders could be used to target 'blatant damaging anti-competitive conduct'.[52] The ACCC argued that such a power is necessary in order to ensure that corporations breaching the law do not get the benefit of removing competition while the matters are being brought to court.

4.34 There are domestic and international precedents for such powers. The ability to issue a cease and desist order is possessed by the ACCC's counterpart in the United States, the Federal Trade Commission. [53] The Australian Securities and Investments Commission can issue 'stop orders' under section 739 of the *Corporations Act 2001* where there is a misleading a deceptive statement in a disclosure document. In addition, the Minister

50 Evidence p 6.

51 Evidence p 68.

52 Submissions p S66 (ACCC)

53 See section 5 of the Federal Trade Commission Act 15 USC 45.

also has a cease and desist power under section 65F of the TPA in relation to compulsory product recalls.

4.35 The request of the ACCC for a cease and desist power is not a new one. The ACCC's predecessor the Trade Practices Commission made such a submission in 1991. At that time the Attorney-General's Department counselled against it for constitutional reasons, namely that as an administrative body, the ACCC cannot exercise judicial power[54] The proposal was also rejected by the Hilmer Inquiry in 1993.

4.36 The advantages and disadvantages of cease and desist power were considered by the Australian Law Reform Commission (ALRC) in 1993. Advantages identified by the ALRC included that it was:

- a useful tool to deal with minor infringements of the TPA;
- a more cost effective enforcement mechanism than litigation; and
- a useful device to quickly curtail or halt breaches of the TPA.

4.37 However, the ALRC stated that the value of the cease and desist orders should not be over estimated because time and resources would still be needed to gather evidence. Furthermore, the ACCC would still need to meet the requirements of natural justice, by giving affected parties a reasonable opportunity to give evidence and make submissions to the ACCC before it gives an order.

4.38 The ALRC concluded that enforcement tools such as urgent judicial injunctions and enforceable undertakings already allow the ACCC to respond quickly and effectively to contraventions of the TPA and recommended against the granting of power to issue cease and desist powers.[55] The Hilmer Inquiry reached the same conclusion. It also described such orders as being particularly harsh where complex economic matters are involved.[56]

4.39 The ACCC does have the capacity to seek an injunction or interim injunction under section 80 of the TPA from the Federal Court. Simply stated the test for the granting of an interlocutory injunction is that the Court has to be satisfied that there is a serious question to be tried. If the answer to this question is yes, then the Court must consider the balance of

54 Senate Standing Committee on Legal and Constitutional Affairs.1991, op. cit. p 131.

55 Australian Law Reform Commission. 1993. *Compliance with the Trade Practices Act 1974.* Sydney, ALRC, pp 87-88. (Discussion Paper no. 56)

56 Hilmer, J. 1993, p 168.

convenience.[57] The ALRC reported that the ACCC can obtain an interim injunction can be obtained in less than 48 hours. In blatant cases it would not seem difficult for the ACCC to obtain an injunction. Indeed no evidence has been brought by the ACCC to suggest otherwise.

4.40 In addition, the committee notes that the ACCC has the power to issue competition notices under the telecommunications competition regime in Part XIB. Such notices reverse the onus of proof and failure to comply with the notice renders the recipient liable to penalties at a $1 million a day. According to the PC these powers effectively amount to cease and desist orders. The PC has recommended their repeal.[58]

Imprisonment

4.41 The ACCC informed the committee that 'hard core' cartel activity is on the increase both domestically and at an international level. Hard core cartels include collusive arrangements to fix prices, rig bids, and share markets. [59] Such behaviour is prohibited under Part IV of the TPA (see especially sections 45, 45A). The principal sanction for contravening the TPA is the imposition of a pecuniary penalty. Presently section 76 of the Act provides for penalties of $10 million per offence and $500 000 for an individual. It is important to note that criminal penalties do not apply for a breach of the provision of Part IV. Section 76 imposes pecuniary penalties where the civil standard of proof -the balance of probabilities -applies.[60]

4.42 In response to the increase in cartel activity, the ACCC has called for the deterrent effect of the law to be strengthened by giving the courts the option of imposing the penalty of imprisonment in certain circumstances. The ACCC told the committee:

> We believe that there is now a strong case for introducing jail sentences for defined acts of hardcore collusion—not for breaches of the whole of Part IV of the Act, which covers many forms of behaviour of anti-competitive mergers, misuse of market power, and so on. The acts that we would see as being defined as fit for possible jail sentences would be price fixing agreements between

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57 *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board of Queensland* (1983) 57 ALJR 425 per Gibbs CJ.

58 Productivity Commission. March 2001, op. cit. p 5.1.

59 Eatwell, J, Milgate, M, Newman, P and Palgrave, R. 1987. *The New Palgrave: a dictionary of economics.* London, Macmillan, p 372.

60 Miller, RV. 2000. *Miller's annotated Trade Practices Act 2000.* 21st edition, LBC Information Services, p 527.

> competitors, bid rigging, probably market sharing and, quite likely, agreements between competitors to boycott.[61]

4.43 The ACCC stated that with the scale of cartel activity was so large that in some cases the penalties applicable may be exceeded by the benefits of collusion. [62] In addition, the fact that some firms have re-offended after an initial fine is further evidence that the current range of penalties are an insufficient deterrent.[63] The proposed penalty is targeted against big business. The ACCC said that trade unions and small business should be exempted from the jail penalties.

4.44 Professor Pengilley, a critic of the ACCC on a range of other matters, supported the call for the penalty of imprisonment to be available. He noted that in addition to the deterrent effect the possibility of a jail sentence may have another effect:

> …Coupled with an appropriate immunity guarantee policy, gaol sentences are a significant incentive for one party in a price fixing agreement to inform on another and avoid incarceration. The risk taking stakes are thus considerably increased. Thus all collusive activity has greater in built insecurity…[64]

4.45 Professor Pengilley argued however that further explanation was required on the scope of offences that would be potentially subject to the penalty of imprisonment. For example, he queried what the ACCC meant by 'blatant price fixing'. He also expressed great concern about any move to extend the penalty of imprisonment to cover breaches of section 46 because, in his view, that the law in that area is too uncertain.[65]

4.46 The option of providing for jail penalties in the context of the TPA has been previously debated. The ACCC informed the committee that it was considered when the TPA was enacted but was dropped after a campaign by big business.[66] While there has never been the option of a custodial sentence for breaches of Part IV, section 79 of the Act originally permitted to imposition of up to six months imprisonment for breaches of consumer protection provisions in Part V. This provision was repealed in 1977. The option of imprisonment was also considered by the ALRC in 1993 in its report into compliance with the TPA. At the time the ALRC found no

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61 Evidence p 58.

62 AAP. Jail for price collusion: Fels call.*Canberra Times*, 14 June 2001.

63 Professor Fels has cited the example of TNT subsidiary –J. McPhee and Son. Fels, A. Jail would hurt more than fines. *Canberra Times*, 5 July 2001.

64 Submissions p S46 (W Pengilley)

65 Submissions p S47 (W Pengilley)

66 Evidence p 58.

compelling reason to 'resort to the extreme sanction of gaol'.[67] In 1993 the Hilmer Inquiry reported that the current remedies provide an appropriate level of deterrence and compensation.[68]

4.47 The committee believes that the increase in cartel activity in recent years suggests that it is now time to reconsider these conclusions. As noted by the ACCC, jail sentences for cartel activity apply under the competition laws of our major trading partners such as the United States, Canada, Japan and Korea. In the UK, the Government has released a white paper setting out proposals to introduce criminal sanctions for individuals who participate in hard core cartels.[69]

4.48 It is possible that any move to introduce a penalty of imprisonment may be largely symbolic as the courts are not likely to find many cases of collusive behaviour that meet the higher standard of proof required in criminal cases.[70] Furthermore, the ACCC may not often seek such an outcome as they may be more likely to achieve results seeking penalties under the civil standard of proof.[71]

4.49 Nevertheless, the committee believes that there is a need to be vigilant against the upsurge in cartel behaviour and serious consideration should be given to amendments to the TPA to permit the imposition of a penalty of imprisonment for participants in hard core cartels. Such a penalty should only be sought by the ACCC in the most blatant cases.

Splitting the ACCC

4.50 Prior to 1995, the competition regulator, the Trade Practices Commission, was principally focused on enforcing the restrictive trade practices and consumer protection provisions of the TPA. The passage of the *Competition Policy Reform Act 1995* saw price surveillance functions formerly performed by the Prices Surveillance Authority assumed by the new competition regulator - the ACCC. In addition, the Commission was given responsibility to arbitrate on disputes about access to facilities of national significance. Since that time the ACCC has assumed the role of

67 Australian Law Reform Commission. 1993, op. cit. p 75.

68 Hilmer, J. 1993, op. cit. p 161.

69 Department of Trade and Industry. July 2001. *A world class competition regime.* London, The Stationery Office. http://www.dti.gov.uk/cp/whitepaper/523301.htm

70 Editorial. Fels well armed in new skirmish. *Australian Financial Review*, 13 June 2001.

71 McCrann, T. Tread carefully, Inspector Fels. *Herald Sun*, 14 June 2001.

AUSTEL as the telecommunications regulator, as well as powers to prevent price exploitation in the transition to the new tax system.

4.51 Professor Pengilley submitted to the committee that the Commission has too many roles and that competition policy would be better served by breaking up the regulator:

> The ACCC has far too many divergent functions. It cannot be price setter, competition enforcer, adjucator and arbitrator. Inevitably, one function runs into the other and impartiality is infringed…[72]

4.52 Professor Pengilley argued that there is a conflict of interest between the regulatory and competition roles performed by the ACCC. The example he gave was in the area of telecommunications where under the access regime in Part XIC the ACCC has to assess the rate of return in arbitration disputes. He stated that the consumer protection role that the Commission has conflicts with this function:

> Telstra would believe—and there is a lot to be said in the old adage that justice must not only be done but must appear to be done—that it could not get a fair shake out of the ACCC, because the ACCC has a consumer interest and it is going to balance it that way.[73]

4.53 All states and territories except Western Australia have established their own statutory bodies to arbitrate access disputes and regulate the pricing policies of Government owned businesses. These bodies include the Independent Pricing and Regulatory Tribunal (NSW), the Office of the Regulator General (Vic), the Queensland Competition Authority. One option to address the issues raised by Professor Pengilley would be to establish a body at a Commonwealth level that would perform similar functions. Professor Pengilley said that there seemed to be little disquiet about the performance of the State regulators. He attributed this not to the possibility that they may be better at setting prices but rather that were structurally independent so that participants in the process felt that they had obtained a fair hearing.

4.54 The committee notes the PC is examining or has examined three major 'regulatory' functions of the ACCC: namely access regimes, the PS Act and the telecommunications competition regime. The committee believes that it would premature to make any recommendations about the appropriate structure of the ACCC pending the outcome of these reports and the

72 Submissions p S53 (W Pengilley)

73 Evidence p 79.

government response. Nonetheless the committee believes that this issue should be re-examined in the next Parliament.

ACCC's performance overall

4.55 The committee considers that the ACCC has shown itself to be an effective regulatory body, as evidenced by its handling of its responsibilities relating to the introduction of the NTS.

4.56 The committee is concerned that the ACCC has been subject to considerable criticism for its tactics in some cases and allegations of a heavy handed approach. It has also exhibited a dismissive attitude toward criticism of its actions. If the public, or even a single firm, considers that there is a problem, it needs to be dealt with in a positive way. Even where the complaint has no substance, the ACCC needs to address community perceptions.

4.57 Overall, the committee would like to see the ACCC ensure that it adopts a balanced approach to its responsibilities.

4.58 Regarding the Commission's requests for further powers, the committee's assessment is that the existing powers generally seem adequate to allow the ACCC to carry out its responsibilities in an efficient manner. However, an exception to this is in relation to cartels, where the deterrent effect of the law needs to be strengthened. In this context, the committee believes that serious consideration should be given to amendments to the TPA to permit the imposition of a penalty of imprisonment for participants in hard core cartels.

4.59 The committee is aware that there have already been suggestions that the wide range of the powers administered by the Commission produces some conflict of interest. Consequently, the committee believes that very serious consideration should be given to the implications, before any further powers are assigned to the ACCC.

David Hawker MP
Chair
17 September 2001