HAWKER COMMITTEE HEARING 25 JUNE 2001

QUESTIONS ON NOTICE

Q1 ***Should the ACCC move to authorise Royal Australian College of Surgeons, how will it defend against the Australian Consumers Association's allegation that there is simply not sufficient claim to public benefit to permit authorising such extensive anti-competitive conduct as appears to be the case in relation to supply of surgeons – in other words, the barriers to entry?***

The Commission has the power to grant authorisation only where it is satisfied that public benefits will result from the conduct the subject of the application sufficient to outweigh any anti-competitive detriment, including that resulting from any barriers to entry.

In assessing any application for authorisation the Commission is required by law to follow a public assessment process. As part of this process the Commission seeks the views of interested parties on the application. The Australian Consumers Association has provided its views to the Commission as part of this process.

The Commission is currently in the process of conducting its initial assessment of the Royal Australasian College of Surgeons (the College) application for authorisation. The Commission will only form a view on the College's application after considering submissions received from interested parties. The Commission is taking into account the views of the Australian Consumers Association, along with those expressed by other interested parties, in conducting its assessment. Ultimately, the onus is on the College to satisfy the Commission that there is a public benefit arising from its processes and that the public benefit outweighs any anti-competitive detriment.

Q2 ***What guarantees is the ACCC willing to give the Committee that its authorisation processes will be effective in curtailing inappropriate anti-competitive conduct in this profession?***

Specifically, how does the ACCC propose to demonstrate results which: reduce barriers to entry and increase supply; produce some separation of the functions of standard-setting from accreditation, training and examination (in other words deal with what is effectively a complete vertical integration of a supplier), and finally, deal with the issue of accrediting overseas trained surgeons in such a manner as to eliminate the current effective restricting of supply from other sources?

The Commission is of the view that some of the College's procedures are likely to breach the anti-competitive conduct provisions of the Trade Practices Act. However, the Commission recognises that some restrictions on competition may be justified

where they have offsetting public benefits. Demonstrating such justification is what the authorisation process is all about.

The Commission is currently conducting its initial assessment of the College's application and has not as yet formed a view on whether it intends to authorise the College's conduct. As required under the Act, in assessing any application, the Commission's focus is the balance of public benefits and anti-competitive detriments of the arrangements.

To the extent that the Commission considers that some of the College's conduct is anti-competitive the College will be required to demonstrate to the Commission that there is sufficient public benefit flowing from the conduct to justify it being authorised. Where the Commission is not satisfied that there is sufficient public benefit in the College's accreditation, training and examination procedures, or in its procedures for accrediting overseas trained doctors, to outweigh any anti-competitive detriment, it has the option to deny authorisation or authorise the conduct conditional on changes being made to the College's processes to satisfy the Commission's concerns.

Once the Commission has made its assessment of the application it will be in a position to issue a draft determination stating whether or not it proposes to grant authorisation to the application and outlining its reasons. At this time interested parties will be given the opportunity to comment on the draft determination prior to the Commission issuing a final determination.

Q3 ***Considering that one in 9 compact discs sold in Australia are now believed to be counterfeit, how successful do you believe the policy of parallel importing has been for Australian consumers?***

The Commission believes that the questions of piracy and parallel importation are not related. Under parallel importation policies, importation of counterfeit product remains illegal.

Counterfeit product includes product that is illegally made in Australia as well as product that may be imported from overseas.

There are no official statistics available on the level of piracy in Australia. Reliance must be placed on industry statistics and these are often untested and incomplete. In particular, the methodology used to estimate piracy levels is often not stated. Notwithstanding, the Commission is not aware of claims by the industry that one in nine compact discs sold in Australia are believed to be counterfeit.

The Commission is aware of claims by the Australian Record Industry Association (ARIA) that the level of CD piracy has increased from 4 to 9 per cent since the introduction of parallel importation. However, it has not seen any firm evidence to support this statement. The only publicly available industry statistics of which the Commission is aware are published in the International Federation of the Phonographic Industry (IFPI's), *2001 IFPI Music Piracy Report*. This report states that

the piracy level in Australia climbed slightly in 2000 (compared with 1999) but is being contained to under 10 per cent. IFPI does not disaggregate publicly the estimated piracy figures below the 'less than 10%' classification. The same report states that piracy of CDs in New Zealand is also low (less that 10%). New Zealand also permits parallel imports.

The Commission believes that consumers have benefited from the policy of parallel importing of CDs. The Commission has been monitoring, on an informal basis, prices of top 40 CDs since the reforms in August 1998. In June 2001, the average price of a top 40 CD purchased from a specialist music store in Australia was $27.47. This is 7.6 per cent less than the average price of $29.72 that prevailed immediately prior to deregulation in August 1998. The average price at non-specialist stores such as Target and Big W in June 2001 was $23.98.

Given the general deflation of the Australian dollar since 1998, and movements in the CPI, it could be expected that CD prices would rise in Australia. However, this has not been the case. The Commission estimates that if CDs were priced in June 2001 at parity with August 1998 taking CPI and exchange rate movements into account, then current prices are conservatively $5 less than would otherwise be expected and could be as much as $12 less. The policy of parallel importation is likely to have contributed to this price suppression.

Nevertheless, the Commission believes that consumers may benefit even further as the Australian dollar appreciates and a greater range of overseas suppliers become viable, in particular US wholesalers. Similarly, the Commission is concerned that sections of the industry may be engaging in anti-competitive practices to restrict competition from parallel imports and proceedings are continuing in the Federal Court against Warner Music Australia Pty Ltd, Universal Music Australia (formerly known as Polygram Pty Ltd) and senior executives of those companies for alleged breaches of ss.45, 46 and 47 of the Trade Practices Act.

Q4 ***How do you explain the fact that the Government's own report – Cracking down on Copycats – Enforcement of Copyright in Australia, delivered by the House of Representatives Standing Committee (the Committee) on Legal and Constitutional Affairs in November 2000, argues that the percentage of pirated CDs has risen from 4% in 1995 and 1996 to over 7% after the introduction of parallel importing?***

The Commission assumes that this question refers to figures reproduced from the submission to the Committee made by the Attorney General's Department and presented on p. 9 of the Committee's report. The figures are piracy estimates from the International Intellectual Property Alliance (IIPA). As with other industry figures, there is little explanation of how the figures are derived, or for which period they apply to; for instance it is not clear whether the figures refer to calendar or financial years. Given this, it is difficult to explain any change in the reported level of piracy from one year to the next. However, on the assumption that the figures are for calendar years, it would be very unlikely that the introduction of parallel importation in Australia would have contributed to the apparent rise from 4% to 7% over two years. This is because parallel imports would have been permitted for only 4 months of 1998. The

Commission also notes that the figures for 1997 are not published. It is possible that piracy in that year was higher than 7% in which case the piracy rate may actually have fallen after the introduction of parallel importation.

Indeed, other industry statistics support the argument that piracy levels may have fallen since 1998. IFPI's *Recording Industry in Numbers 2000*, indicates that in 1998, Australia's level of CD piracy was in the '10-25% category'. In 1999, that level fell to within the 'less than 10%' category and has remained there in 2000. Reductions in piracy levels following repeal of parallel importation restrictions is consistent with the view that the lower prices that arise from increased competition reduce the profitability of piracy, and thus its incidence.

The Commission notes and agrees with the House of Representatives Standing Committee on Legal and Constitutional Affairs' conclusion that the link between parallel importation and the importation of pirated products is weak.[1]

Q5 ***The Australian Bankers' Association has recently issued a submission (4/7/2001) disputing the findings of last year's ACCC/RBA study into interchange fees. The banks are arguing that proposed reforms will hurt consumers and that Australian interchange fees are comparatively low.***

Does the ACCC agree with the criticisms of the report?

The ABA submission was lodged with the RBA as part of the consultation process currently being undertaken by the RBA following the RBA's "designation" of the credit card systems operated by Visa, MasterCard and Bankcard. The effect of "designation" is to bring these credit card systems within the RBA's regulatory oversight.

The RBA indicated in a Media Release of 12 April 2001 that following its initial consultation process, the RBA will publish a consultation document which will explain the pubic interest issues and outline the RBA's proposed standards and access regime.

A number of the issues raised in ABA's criticisms of the RBA/ACCC joint report are now the subject of this consultation process. In light of the RBA's regulatory role and in view of the fact that the ABA's submission was prepared specifically for the consideration of the RBA as part of this consultation process, it would not be appropriate for the ACCC to respond in detail to the criticisms raised by the ABA in its submission.

The ACCC considers, however, that the RBA/ACCC joint study of interchange fees identified genuine competition and efficiency concerns with the operation of Australia's credit card schemes. The ACCC also considers the findings of the Joint Study to be well founded.

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[1] House of Representatives Standing Committee on Legal and Constitutional Affairs, Cracking Down on Copycats: enforcement of copyright in Australia, The Parliament of the Commonwealth of Australia, November 2000, p. 19.

What are the likely benefits to consumers from the RBA's reform proposals on interchange fees?

The ACCC/RBA joint study of interchange fees identified a number of shortcomings in the competitiveness and efficiency of existing credit card interchange arrangements. The joint study did not make any specific recommendations for reform beyond noting that interchange fees should:

- not overcompensate financial institutions for the costs that they incur; and
- be subject to regular review as costs and other conditions in the relevant payment network change.

The RBA is yet to announce the details of its reform proposals. The RBA has indicated that it will publish a consultation document which will explain the public interest issues and outline the RBA's proposed standards and access regime.

The Commission is not in a position to comment specifically on the likely benefits to consumers from the RBA's reform proposals on interchange fees until those reform proposals are announced by the RBA.

The ACCC notes, however, that lower interchange fees should result in lower merchant service fees which should in turn result in all consumers benefiting from lower prices for goods and services than would otherwise be the case.

Is the ACCC confident that consumers will benefit from the proposed reforms.

As noted above, the RBA is yet to announce details of its reform proposals and it is not possible for the Commission to comment on those proposals until they are announced.

Q6 ***Is the ACCC liaising with the Reserve Bank in its reform of interchange fees and discussions on ATM charging?***

Yes. In accordance with the Memorandum of Understanding between the RBA and the ACCC, and consistent with the Explanatory Memorandum to the *Payment Systems (Regulation) Act 1998*, the ACCC is liaising with the Reserve Bank in its reform of credit card interchange fees. The ACCC has also written to the Reserve Bank in relation to trade practices issues associated with industry discussions in relation to ATM charging.

Is the ACCC satisfied with the consultation processes - with the ACCC and the community - that the Reserve Bank is pursuing?

Yes. The Reserve Bank's consultation process is still in the early stages. The Reserve Bank has indicated that its consultation process will be extensive. The ACCC has no reason to be dissatisfied with the consultation process that the Reserve Bank is pursuing.

Q7 ***If the banks delay on interchange fee reform, will the ACCC look to recommence legal action taken against the National Australia Bank regarding alleged breaches of the Trade Practices Act in the setting of credit card interchange fees?***

The ACCC discontinued its case against NAB following the RBA's designation of the credit card payments system. The ACCC's decision was made on the basis that the Reserve Bank, by way of its legislative powers, could progress reform of credit card interchange fee arrangements in a manner that is likely to provide greater public benefits and ensure that merchants and consumers will see the benefits of reform sooner than would otherwise be the case.

Continuing with the litigation against NAB to recover penalties and compensation for past conduct risked delaying the RBA's reform process and so delaying the benefits of that reform.

Although the ACCC discontinued its litigation, action by the ACCC forced Australia's banks to critically examine their interchange fee arrangements and highlighted the need for reform of these arrangements.

It remains open for the ACCC to re-institute legal proceedings against the banks in relation to their interchange fee arrangements. However, the ACCC does not anticipate any need to do so given the RBA's regulatory role. A decision on whether or not to re-institute proceedings would be based on a range of factors, including the likelihood that RBA regulatory action will ensure timely and sustainable reform of credit card interchange fee arrangements.

Q8 ***Is the ACCC confident that the undertakings have worked as intended? Has the ACCC reviewed the use of undertakings and their effectiveness in protecting consumers and competition in bank mergers? This question was asked in the context of the Westpac/Bank of Melbourne undertakings and concern expressed over fee increases and the length of the undertaking.***

Background

On 25 July 1997 the Commission accepted an 87B undertaking in order to allow the Westpac Banking Corporation to acquire the Bank of Melbourne.

The undertaking ran for three years and expired on 25 July 2000.

The main features of the undertaking were:

- At least 100 Bank of Melbourne branches in Victoria must remain open for eight hours on week days and for three hours on Saturdays (Clause 2);

- Personal Current Account customers continue to be offered fee free accounts throughout the period of the undertaking (Clause 3);

- Westpac must provide a debit card to Bank of Melbourne customers and there are restrictions on the account keeping fees (Clause 4);

- The management of the Bank of Melbourne is autonomous in matters such as pricing within national base or indicator rates and human resource management subject to limitations imposed by matters such as licensing requirements and the Reserve Bank rules (Clause 5); and

- Access arrangements to allow Victorian customers of deposit taking institutions carrying on business in Victoria to use the ATMs of the Westpac group and use the EFTPOS system at a reasonable price (Clause 6 & 7).

Overall, the Undertaking enabled Bank of Melbourne customers to avoid immediate upheavel in the standard and quality of financial services on offer. The Undertaking period of three years allowed sufficient time for Bank of Melbourne customers to search for different offerings of financial products.

Bank Opening Hours

Bank of Melbourne had offered extended opening hours to its customers before its takeover by Westpac. Westpac, in general, did not offer extended opening hours. The Commission accepted an undertaking which provided that at least 100 Bank of Melbourne branches would retain their extended opening hours.

The Commission understands that Westpac fully complied with the undertaking for 100 Bank of Melbourne branches in Victoria to remain open for eight hours on week days and for three hours on Saturdays. The Commission has no evidence before it to suggest that Westpac did not comply with this undertaking.

After the expiry of the Undertaking, extended opening hours by Bank of Melbourne branches was decided on a branch by branch basis. The Commission understands that there has been an overall reduction in Bank of Melbourne branch opening hours since the expiry of the Undertaking.

Personal Current Account Fees & Charges

After the expiry of the Undertaking, new fees and charges were imposed on Bank of Melbourne personal current accounts.

It is important to note that had the merger not occurred, there was no assurance that the Bank of Melbourne would not have raised fees.

Debit Cards

The Commission understands that Bank of Melbourne did make debit cards available to its customers. It is understood that the Bank of Melbourne continued to make debit cards available to its customers after the expiry of the Undertaking.

Management Of The Bank Of Melbourne

The Commission has no material before it to suggest that Bank of Melbourne did not behave in an autonomous manner as required for the duration of the Undertaking.

Access To ATM Network

The undertaking in regard to access was intended to address concerns in the transactions market, especially in respect to smaller institutions and new entrants. A problem had been identified whereby large institutions were able to access networks that are essential for effective operation of transaction accounts eg ATM's, EFTPOS. The wider access, which flowed automatically to larger banks owing to their network investment, encourages entry and competition in the transaction account market.

In confidential correspondence with the Commission Westpac has listed a number of market participants with whom access had been agreed including a number of smaller banking operations have also been granted access. It is understood that these access agreements have continued after the completion of the Undertaking. Westpac maintains the confidentiality of this information.

Review of Undertakings

The ACCC is currently undertaking a review of the Westpac/Bank of Melbourne undertaking. The review has not been completed at this time.

Q9 ***Are there areas of the credit market that the Australian Competition and Consumer Commission (ACCC) would highlight for attention in the transfer of the Trade Practices Act (TPA) credit coverage to the Australian Securities and Investments Commission (ASIC), given the ACCC's experience and actions in this area?***

Following the Financial System Inquiry (FSI) in 1997, responsibility for consumer protection in financial services was transferred from the TPA to the ASIC Act in 1998. A memorandum of understanding was subsequently formed between the two agencies to avoid regulatory gaps and overlap.

The definitions of 'financial service' and 'financial product' in the ASIC Act were drafted such that by omission, the ACCC retained responsibility for credit and foreign exchange contracts.

ASIC has referred responsibility back to the ACCC in relation to health insurance and in relation to the New Tax System. The nature of health insurance is more of a health

issue than one of insurance. Price monitoring in relation to the New Tax System required the ACCC's specific economy wide approach.

State and territory regulations continue to be the predominant form of regulation of the credit market through the Uniform Consumer Credit Code (UCCC). The UCCC is administered by state and territory consumer protection agencies.

Key areas of the ACCC's activity in consumer protection in relation to credit include:

- undue harassment in debt collection;
  - undue harassment project - a report on the structure of the industry and extent of the problem, a guideline and compliance guide for the industry, a resource kit for community workers and a brochure for consumers;
  - the Commission successfully tested section 60 in the Federal Court in 2000 when Cash Return Mercantile Pty Ltd were found to have engaged in undue harassment, coercion and misleading conduct in collecting debts from consumers;
- misleading and deceptive advertising;
  - court enforceable undertakings from the National Australia Bank Limited for misleading comparative advertising;
  - compliance action in charging issues in relation to the GST;
  - compliance action with American Express in relation to a misleading offer of a fee free credit card with fine print conditions that fees could be charged;
  - consent orders in the Federal court against HRJ Financial Services for a range of misrepresentations of the ability of consumers to obtain credit through an expensive 1900 number;
- unconscionability in securing guarantees over business loans;
  - consent orders in the Federal Court that the National Australia Bank acted unconscionably in its dealings with a woman in obtaining a personal guarantee for her husbands business;
- foreign exchange contracts;
  - in 1996 Chats House Investments were found to have misrepresented its affiliation with Bankers' Trust Australia, and enticed unsophisticated investors into investing monies. This was the first decision by the courts in respect of s. 51AA and the general principle that the Commission could bring class actions;
- codes of conduct (competition and consumer protection issues).
  - submission to the review of the Code of Banking Practice (2000).

In 1998 the Commission obtained specific responsibilities in relation to small business. The outreach activities in particular allow the Commission to educate the community about the related benefits of competition and fair-trading. Unconscionable conduct (s. 51AC) in financial services (credit and non-credit) in relation to small business is one of the ACCC's top priorities.

The Commission is the national competition regulator in Australia. The Commission's main responsibilities in relation to competition in financial services are:

- ensuring compliance with the prohibitions on anticompetitive conduct;
- authorisation of particular anticompetitive conduct with offsetting public benefits; and
- examining merger proposals that may have the affect or likely affect of substantially lessening competition.

The FSI recognised the dynamic nature of the market place and that market driven regulation should be paramount. The ACCC, in its submissions to the FSI, argued the need for an economy-wide consumer protection regulator. The ACCC takes a holistic market based approach due to issues such as technological change and the evolving regulatory framework. The ACCC's competition work and its consumer protection functions are well informed by the historical success of the ACCC as an economy wide regulator.

The Commission takes the view that in relation to any sector effective regulation requires the consideration of the impact of both competition and consumer protection issues in relation to specific market conduct. In the Commission's view excising the consumer protection role from the national regulator breaks this synergy.

Joint jurisdiction in relation to consumer protection and financial services would in the Commission's view alleviate uncertainty and the risk associated with coverage in particular with hybrid products and services. The Commission would see the effective applications of Memorandums of Understanding addressing any uncertainty between regulators in a system of joint coverage.

Q10 ***Based on the Commission's work in the past twelve months, including the experience of OneTel and Impulse, what are the major consumer and competition issues the Commission sees emerging? Are the ACCC's powers adequate in enforcing the TPA and fulfilling its consumer watchdog role?***

The forces of new technology, globalisation and trade liberalisation are transforming the modern economy. These are generally beneficial for the processes of competition, for economic growth and for consumers.

The Commission has indicated in its 2001/2002 Corporate Plan and Priorities publication that in relation to compliance a priority will be attacking hard core collusive activities such as price fixing, market sharing and pricing boycotts. This follows recent

actions the Commission has taken in relation to domestic cartels and price fixing and international cartels as they impact on Australia.

The Commission has also been successful in recent Court cases involving the misuse of market power, that is the Boral and Rural Press cases and will continue to investigate and pursue alleged misuse of market power where the conduct is blatant and has significant detriment.

With consumer protection the Commission will maintain its focus on national and interstate issues and emerging markets and new technology. Emerging issues include health insurance, e-commerce and international scams. The Commission will also target unconscionable conduct in areas such as franchising, landlord and tenant arrangements.

The Commission has also targeted specific areas where it considers compliance with the Act has diminished. One example is fine print advertising where the recent case against Target and other cases yet to be heard by the Court indicate the Commission's desire to improve compliance in the area of misleading and deceptive conduct.

The Commission is considering a number of health related complaints mainly resulting from misleading advertising about the benefits of particular products and the waiting periods that apply for particular health insurance funds. This coincides with the Commission being asked to investigate and report on significant increases in general insurance premiums following the collapse of HIH.

The Commission has investigated web sites such as "Crowded Planet" for false claims about sponsorship and for selling Schedule 4 medicines to the public on the Internet.

The One Tel case was a good example of the need for the Commission to respond quickly to emerging consumer protection issues.

In the break up of One.Tel's assets, the Commission wished to ensure that the consumer protection provisions in the Trade Practices Act prohibiting misleading and deceptive conduct were enforced. The Federal Court granted an injunction against Telstra preventing it from engaging in unlawful misleading and deceptive conduct when dealing with former One.Tel mobile phone customers.

This was a case of a service provider taking advantage of the confusion surrounding the demise of a competitor. Clearly the Commission is concerned if a service provider has obtained customers via misinformation.

Since Governments have extended the coverage of the competition provisions (Part IV) of the Trade Practices Act to unincorporated businesses in Australia, all professionals, irrespective of the business structure of their practices, have had to comply with Part IV of the Act.

Since the changes to the Act, the Commission has concentrated its effort on providing education and informing professionals and their associations about their responsibilities under the Act and targeted enforcement action, in particular in the health sector. The Commission believes there is a need to thoroughly examine the practices of other

professions. The Commission has just set up a dedicated Professions Unit and expects to have an active enforcement role in the various professional sectors to ensure compliance with the competition and consumer protection provisions of the Act in the future.

The ACCC's powers in enforcing the TPA and fulfilling its consumer watchdog role

The Trade Practices Act combines both competition and consumer protection provisions. The Act sends a clear message that while competition is the most effective way of increasing consumer welfare there is need for action at the micro level. The consequence is that a single enforcement agency, the ACCC, can address national consumer issues to achieve more effective outcomes.

The Act provides an essentially satisfactory framework. It is pro-competition, contains strong enforcement powers, allows the authorisation of mergers and joint activities when the potential lessening of competition is offset by an increase in the public good. Consumer protection provisions apply equally to off and on line trading.

However, it should be noted that many Australian firms are increasingly competing in overseas markets where they face much tougher penalties for cartel behaviour. Australian firms and consumers are more exposed than ever before to the damage that cartels inevitably cause. In addition, globalisation has raised the stakes for cartels by escalating the potential gains from collusion, while technological innovation will make it easier for cartels to operate and harder for antitrust authorities to detect them.

The Commission believes there are troubling signs of an increase in hard core collusive activity internationally (and locally). This needs to be deterred by:

- Revision of the Trade Practices Act's civil penalty regime to ensure that it remains a relevant and effective deterrent; and
- True criminal sanctions, including imprisonment.

In relation to the misuse of market power (s46) the Commission is of the view that consideration should be given to incorporating an effects test along with the current purpose element in s46.

The reason for this is that in the Commission's view an effects test would more effectively focus the application of the provision on firms with substantial market power misusing that market power to the detriment of competition. It would cover those cases where firms with substantial market power harm competition but do not necessarily exhibit anti-competitive purpose. Relying on the proof of purpose alone, in the Commission's view limits the effectiveness of the provision.

A further power the Commission would like to see is a "cease and desist" power. In certain cases application of such a power would more effectively assist enforcement by placing a temporary stop on blatant damaging anti-competitive conduct. The ability to apply a cease and desist order would ensure that in severe cases damaging conduct does not allow offending corporations to benefit from the removal of competitors and competition while the Commission undertakes enquiries necessary to establishing the necessary evidence to bring such matters to court.

Q11 ***In the Australian Financial Review on 22 June 2001, Professor Fels wrote that "The ACCC has sought a strengthened Trade Practices Act because it embodies some concessions unnecessarily made to business lobbies in the 1970's and 1980's." What were these concession and why do they need to be removed?***

The Commission recognises that the introduction of the Trade Practices Act in the mid 1970s and the amendments in the 1980s reflected the political and economic circumstances of that time. In general, the comments made by the Chairman were directed at the debate that occurred in the past and the early introduction of key provisions of the Act relating to price fixing, the merger provision and the misuse of market power. The Trade Practices Act and its interpretation has evolved through numerous reviews and the development of extensive case law since that time.

The concessions referred to generally relate to the level of penalties and sanctions in the Act and the way in which the misuse of market power provision in section 46 of the Act was drafted. The sanctions for price fixing were introduced as civil remedies, not criminal remedies, as is the case, for example, in the United States and Canada. More generally, the pecuniary penalties for breaches of the competition provisions in Part IV of the Act were set in dollar terms rather than as a percentage of turnover as well as in dollar terms and the fines for breaches of the consumer protection provisions in Part V were set at relatively low levels.

In relation to the misuse of market power provision, it originally had a very high threshold of applying only to corporations which controlled a market. In effect, this precluded the provisions from applying to many corporations with a substantial degree of market power and limited the effectiveness of the provision. The provision is still drafted so as to require the Commission to establish anti competitive purpose rather than effect which makes breaches of the provision very difficult to prove.

"Why do they need to be removed?"

The Commission now thinks it appropriate that there be some consideration of change to the Act in relation to these areas. These changes reflect current international trends in relation to sanctions for cartel activity and the approach taken by Australia's major trading partners, for example, the United States, Canada, Korea and Japan where criminal sanctions apply. The United Kingdom is also considering such a change.

As raised in the previous question, in relation to the misuse of market power provisions (s46), the Commission is also of the view that consideration might be given to having the provision also incorporate an 'effects test'. This option has been raised in earlier enquiries, not only by the Commission, but by bodies representing, for example, small business interests. Such groups do not see the current provision as providing the necessary constraint on larger corporations with market power from damaging competition through the misuse of that market power.

Q12 ***Does the ACCC have a view on high-speed broadband access in Australia? Does it believe that Telstra is performing adequately in terms of broadband infrastructure provision? If not, how can the problems be overcome?***

The ACCC has been active over a number of years in promoting broadband competition by providing for access on reasonable terms and conditions to access services on infrastructure that is capable of delivering broadband but inefficient to duplicate. The prime example is direct access to Telstra's copper network. High bandwidth services competitively delivered over cable networks and by satellite and wireless technology are not subject to access regulation.

Data recently collected by the ACCC, which is still in the process of compilation, suggests increasing deployment of broadband services. There remains however a number of competition issues concerning the rollout of broadband services.

The ACCC is responsible for:

- Administering the telecommunications-specific competitive safeguards regime under Part XIB of the Trade Practices Act, which enables the Commission to deal with anti-competitive conduct by carriers and carriage service providers as well as allowing it to issue tariff filing directions and record-keeping rules to assist with its telecommunications powers and functions.

- Administering the telecommunications-specific regime under Part XIC of the Trade Practices Act for facilitating access to the networks of carriers. This includes declaring services for access, approving access codes, approving access undertakings, arbitrating disputes for declared services and registering access agreements.

The ACCC declared access to Telstra's unconditioned local loop service (ULLS) in July 1999. The ULLS allows competitors direct access to Telstra's copper lines that connect customers to local telephone exchanges. This enables other telecommunications companies to supply both advanced, high-speed, (including Internet services) as well as voice services in competition with Telstra.

A key issue in the effective provision of the ULLS as means of encouraging broadband services is in relation to the pricing of this line - essentially the on-going charge per line. The price of access to the ULLS plays a significant role in the deployment of broadband services (especially xDSL services) by Telstra's competitors. The ACCC is currently finalising its determinations on price in relation to a number of access disputes between Telstra and access seekers over access to the ULLS. Interim determinations have been in place in these disputes since December 2000.

Assertion and anecdote have bedevilled the debate surrounding the level of investment in telecommunications infrastructure. The ACCC believes that it is important for the community to have access to accurate information about the deployment of infrastructure to accurately assess the level of competition in such markets as broadband. The ACCC has been collecting data on an aggregated basis from all carriers

on the level of broadband deployment and hopes to be in a position to release this information in the near future.

In addition, the ACCC recently released a report, *Telecommunication Infrastructures in Australia 2001* prepared by BIS Shrapnel. This report contains information about the deployment of high-speed services such as fibre optic, xDSL, microwave and advanced broadband wireless (LMDS and MMDS) local access networks. It also reveals that carriers other than Telstra account for over 30 per cent of CBD buildings wired with fibre optic cable.

The report notes that telecommunications operators are investing billions of dollars in infrastructure. A total of 12 carriers, including Telstra, are investing in fixed broadband xDSL infrastructure, with planned investment totalling at least $1.9 billion between 2001 and 2003.

In the mobiles market, competing carriers have made investments in current networks of around $8 billion, with further investments being committed to 3G networks.

Finally, in August and September 2000, under Part XIB of the *Trade Practices Act 1974*, the ACCC issued two separate record keeping rules, the first of which related to Telstra's competitors gaining access to Telstra's copper network as well as the uptake of Telstra's retail Asynchronous Digital Subscriber Line (ADSL) services. The second rules required Telstra to provide the ACCC with extensive details concerning the scope and timeframes it delivers services on its copper network to itself and its competitors. The ACCC notes it is important that new technologies and services (such as high-speed broadband services) are not driven by Telstra's control of the local network since competition by a wide range of players provides a superior way of meeting the new telecommunications needs of consumers and businesses.

There are a number of current competition issues concerning the rollout of broadband services. The ACCC has not declared access to Telstra's wholesale ADSL products. The pricing and functionality of these products has been the subject of complaint by a number of Telstra's competitors and is the subject of ongoing investigation by the ACCC.

On a longer term basis, the deployment of broadband together with the explosion of data traffic is likely to require the revisiting of current arrangements in relation to interconnection. Current per minute charges, particularly for Telstra's PSTN, are very much premised on call holding patterns in a world dominated by voice traffic and are unlikely to be sustainable going forward. Telstra have already indicated their intention not to purchase PSTN termination services for data from some carriers, a matter the ACCC is also investigating.

The ACCC has raised the need for even more timely regulatory interventions before the current Productivity Commission Inquiry into Telecommunications Specific Competition Regulation. Timely intervention to counter anti-competitive conduct is seen as crucial in a rapidly evolving high bandwidth environment. The ACCC has proposed the development of an administrative model where the ACCC could prescribe standards of conduct having regard to competition and public interest criteria.

Q13 ***Is the ACCC concerned that local government authorities (such as Campbelltown Council) are using their planning powers to frustrate the establishment of new Aldi supermarkets, especially given the enormous benefit to consumers of Aldi-led market competition?***

The ACCC is not empowered to intervene in local government planning decisions. It would be concerned if planning powers were used to the detriment of the development of competitive markets and subsequent consumer benefits. In the ACCC's view the establishment of a new competitor in, say, retailing should only be stopped in a particular location if there are cogent planning or environmental reasons for doing so. The ACCC is not cognisant of the issues that local governments' may consider in assessing particular proposals. As such we are not in a position to comment on particular planning processes and their outcomes.

Q14 ***"With the current hysteria about competition policy (mainly driven by groups which have done well out of the market system but do not want their privileges eroded by competition), does the ACCC often feel like it is isolated in the public debate against the business lobby groups and their political representatives? If you had the resources would you like to run a counter campaign advertising the enormous benefits of competition to consumers and working families? For instance, the price savings from dairy deregulation and the entry of Aldi into the supermarket market?***

The Commission does not see it as appropriate that it directly injects itself into public debate against business lobby groups on the issue of the implementation of national competition policy as it is a regulatory and law enforcement agency. The National Competition Council undertakes this kind of activity and has limited specific funding for this general purpose which it uses for targetted information activities.

While the Commission does not see it as appropriate that it directly engage in public debate on such issues, the Commission, in its view, properly focuses its public comments to issues concerning the administration and application of the Trade Practices Act. This has involved compliance and education activities in those sectors recently subject to the application of the Trade Practices Act through competition policy changes. The Commission has always taken the position that it should promote its educative and general compliance role in those sectors subject to deregulation. This is to assist such groups understand their obligations under the Act and to understand how the Act assists them in relation to their commercial activities. The Commission has recently received increased funding to develop a targeted regional and rural programme whereby the Commission can be more active in its work in rural and regional areas.

It is the case that many emerging issues following deregulation and/or the implementation of national competition policy have required the Commission to respond to Government requests to monitor change and the implications of such change in some key sectors. An example here has been the recent milk industry/pricing reports. Such a process involves the provision of detailed information which can assist

the debate on the impact of reforms. However, the Commission in doing its monitoring work, is responding to specific Government requests.

The Commission would not consider running the identified advertising campaign as appropriate. As indicated above, the Commission does, through its compliance education work, attempt to assist all market participants, that is, producers and consumers to understand the operations of the Commission and the philosophy behind the Trade Practices Act and the benefits it provides. The Commission has also undertaken some advertising to help explain new provisions of the Trade Practices Act, for example the provisions relating to the introduction of the New Tax System. Where vested interests publicly argue for a weakening of the Act (for example through the weakening of merger law) or specific exemption outside the authorisation process contained within the Act, the Commission feels it is appropriate to enter and assist public debate on the benefits of competition and enhanced consumer welfare.

Q15 ***The new financial regulator in the UK, the Financial Services Authority, will operate on a risk-based approach which will identify, prioritise and address risks to its objectives. Two main questions will be applied: 1) What developments, events or issues pose significant risk to the objectives? and 2) How should resources be used to focus on the most important risks?***

How does this approach compare to the method used by the ACCC? Would it be adaptable to the objectives and risk factors in the Australian system? If not, would you please explain why it would not be suitable?

Section 2 of the UK *Financial Services and Markets Act 2000* requires the new Financial Services Authority (FSA) to use its resources in the most efficient and economic way. The FSA has adopted an explicitly risk based operating framework to decide on strategic priorities to ensure the most efficient use of resources. In this context "risk" refers to the risk that the objectives set out in the *Financial Services and Markets Act 2000* will not be met.

This approach is intended to enable the FSA to allocate resources based on future strategic priorities.

The main objectives of the FSA are to:

- Maintain confidence in the UK financial system;
- Secure the appropriate degree of protection for consumers;
- Promote public understanding of the financial system; and
- Reduce the scope for financial crime.

The objectives of the FSA, as a specialist financial regulator, are quite different from those of the ACCC. The primary objective of the ACCC is to seek compliance with competition, fair trading and consumer protection laws and to achieve appropriate

remedies when the law is not followed. The ACCC also aims to encourage competitive market structures and informed behaviour.

In deciding on its priorities the ACCC needs to have regard to the priorities indicated by Parliament in making certain breaches of the law so-called "per-se" offences. The ACCC also needs to have regard to the public interest aspect of its enforcement and compliance activities particularly in areas of the law that are relatively new or untested.

While the ACCC does not explicitly utilise a risk based operating framework of the sort developed by the FSA, the Commission does use a range of comparable management tools to ensure that the Commission uses its resources efficiently and effectively to achieve its statutory goals.

The Commission's recently released *Corporate Plan and Priorities for 2001-2002* sets out the Commission's strategies for achieving its corporate goals and the measures the Commission uses to evaluate its performance in achieving those goals. Many of the Commission's priorities focus on those developments, events and issues that pose particular challenges to the Commission's statutory objectives; including, for example, the challenges posed by globalisation, technological change, and hard core collusive behaviour.