BACKGROUND

CCAAC is the Commonwealth Consumer Affairs Advisory Council. Its role is to advise the Parliamentary Secretary responsible for Consumer Interest matters concerning issues facing consumers. It provides independent advice on developments that are likely to impact on consumers.

This submission does not go into detail with regards to the provisions of the Act and their legal interpretation but rather seeks to set out at a high level, the Council's view of the role of the Act and the ACCC in advancing the interests of all Australians through the promotion of competition and consumer protection. The particular areas of interest to the Council are as follows:

Penalties

The Council notes the remarks made by Professor Allan Fels, Chairman of the Australian Competition and Consumer Commission in his speech made on Saturday 9th June 2001 in Sydney (copy attached). In particular he stated:

- Australia's civil penalty regime for collusive activity is weaker than many other jurisdictions, including the US, Canada, Japan, New Zealand and the EU.

- The Commission believes there are signs of increasing hard core collusive activity internationally and locally (although no examples are given).

- Consideration ought to be given to widening the purpose of penalties under the Act from simple deterrents to add elements of punishment and retribution. In particular, jail terms (a significant deterrent and punishment to white collar criminals) and pecuniary penalties that are tied to the unlawful gains from collusive activity.

- There is also an apparent conflict between the current Trade Practices Act approach and that applying to offences such as insider trading which do attract prison sentences. There can be little doubt that collusive practices such as price fixing are just as harmful to society as insider trading. There ought to be a consistent approach.

- Prof. Fels points out (and the Council thinks this is an important issue), that these increased penalties should only apply to "hard core collusion" and are certainly not designed, as some commentators may well allege, to interfere with small business, the rural sector, the professions and the Unions.

Given that we exist in a market economy, the integrity of the market is critical to ensure the best outcomes for consumers and society in general. This requires education, enforcement and appropriate penalties for transgression. Cartel arrangements are highly destructive of competition and impose significant costs on consumers e.g. the recent freight service case and the global vitamins cartel. Domestic and international cartels also harm Australian businesses.

In view of the rewards available from price fixing, monetary penalties may be insufficient. Certainly that is the view of the legislatures in Japan and the U.S.A. The council also notes the safeguards referred to in the ACCC submission, namely, a trial by judge and jury and a requirement for a unanimous verdict with the criminal burden of proof beyond reasonable doubt. Additionally, the decision whether to prosecute rests with the DPP, not ACCC.

The Council believes consideration should be given to introducing jail terms for serious instances of collusion.

Governance

There has already been some public debate concerning oversight of ACCC. In the Council's view, no persuasive case has been put for a change to the current structure. In this respect the Council refers the review committee to the letter to the Editor of the Australian Financial Review by Sitesh Bhojani, Acting Chairman ACCC on Friday 14 June, 2002 (copy attached). The Council is not aware of any cogent evidence that the current structure is not effective (in fact in the Council's view, the evidence is to the contrary) nor of any reason why the appointment of a Board to oversight the Board of Commissioners would provide any advantages at all. This would particularly be the case if that Board were peopled by individuals whose interests may conflict with the activities of the Commission. The advantage of the current structure is that it and the methods of appointment and termination safeguard the independence of the Commissioners in a manner somewhat analogous to that of the judiciary.

The Council believes the ACCC governance structure should not be changed.

The use of the Media by and against the ACCC

The alleged use of the media by the ACCC has generated sporadic adverse comment by business over the years, however over the past few months, particularly in relation to a "raid" on an oil company, the criticisms from certain sectors of the business community have grown markedly in their stridence and consistency. In the Council's view, this criticism of ACCC for "using the press" is misconceived for a number of reasons:

- It pre-supposes that the media is some inert tool at the disposal of those who would abuse it rather than an independent and vital part of our democracy.

- As has been shown in recent months, the media is just as willing to publish criticism of the ACCC as it is of business. This promotes public debate and consumer information. There has been no criticism by ACCC of the right of business to criticise the Commission through the media.

- Parties, particularly those with the resources of big business, who believe their reputations have been unfairly or wrongly besmirched have access to legal remedies. If they do not pursue those remedies, it can only be assumed that they have no cause of action or that no damage has been caused. Those issues can hardly be blamed upon the ACCC. Nor do they create some basis for a special gag on the ACCC i.e. one that does not apply to the rest of the community, including business. This would be contrary to public policy and certainly not in the best interest of consumers.

- Publicising the issuing of court proceedings and court decisions educates the community and business and is a legitimate deterrent at the hands of regulators.

Mergers and Acquisitions

For some time now there has been considerable public debate about the ability of Australian corporations to compete with larger international corporations. This is sometimes put as a reason for allowing mergers and acquisitions which would otherwise breach the Act in its current form. One argument is that Australian businesses need a certain scale in order to be able to compete internationally.

In order to compete effectively, corporations need Competitive Advantage. As Prof Michael Porter [1] points out, competitive advantage can arise from both operational effectiveness and strategy. The former involves the state of best practice, e.g. purchased inputs and managerial practices. The latter involves obtaining a unique and valued position in the market place through a different set of activities from those of competitors. Scale is only one component and does not of itself provide competitive advantage. There are many examples of smaller companies with true competitive advantage competing successfully against larger companies, sometimes even leading to the larger companies' demise. Some examples include Porsche, in the Automotive sector, and Microsoft going from a backyard garage to being larger than IBM in a matter of 20 years.

The point here is that the best way to ensure Australian companies can compete effectively is to have a competitive and effective domestic market that drives the building of genuine competitive advantage.

[1] Porter, Michael E. *On Competition*, HBS Press

Australian consumers should not have to tolerate (and pay the price for) monopolies or oligopolies on the basis that such are necessary to enable Australian corporations to gain sufficient scale to compete effectively overseas. There is simply no evidence to support this indeed, the evidence is to the contrary.

Section 46

In relation to the debate concerning Section 46 of the Act (purpose or effect), the Council finds persuasive the ACCC argument that the "purpose" test is inconsistent with the economic purpose of the Act, namely to promote fair competition.

From a consumer perspective, it is difficult to see how purpose or intention are relevant to whether the conduct of a party with a substantial degree of market power is damaging competition. The conduct either has or has not deleteriously affected a competitive market. If it has, consumers are likely to suffer through increased prices and poorer service / quality.

The Council would be pleased to make members available for further comments.

Attach
- Speech made on Sunday 9th June 2001 in Sydney by Professor Allan Fels, Chairman of the Australian Competition and Consumer Commission.
- Letter to the Editor, Australian Financial Review by Sitesh Bhojani, Acting Chairman, ACCC (Friday 14 June 2002)

The Australian Financial Review
www.afr.com • Friday 14 June 2002

ACCC has enough overseers already

Woolworths chief executive Roger Corbett has demonstrated that while eager to criticise the Australian Competition and Consumer Commission's structure ("Corbett calls for ACCC overseer," *AFR*, June 7) he has not taken the trouble to understand it.

The chairman, Allan Fels, is not a one-man band nor do the commissioners "report" to the chairman. He chairs a board of commissioners appointed by the governor-general, and their appointment must have the support of a majority of the Commonwealth, state and territory governments.

All commissioners are appointed on fixed terms and appointments can only be terminated by the governor-general in very limited circumstances.

They are not beholden to the chairman. The Trade Practices Act requires that all decisions of the commission are taken by a majority vote. The act also requires commissioners to have experience relevant to the work of the ACCC.

All these requirements are intended to ensure the independence of the individual commissioners in their decision-making. I can assure Mr Corbett they are people "of integrity" equal to that of any independent board of review he proposes.

In calling for a review board Mr Corbett also fails to understand the number of ways in which the ACCC's activities are independently reviewed and monitored. Unlike a number of other agencies, the focus of the ACCC's work is not the making of numerous administrative decisions.

Its allegations must be proved in the Federal Court and can be appealed to higher courts.

The Australian Competition Tribunal was established to hear appeals on certain decisions of the ACCC. Other complaints can be lodged with the ombudsman. The ACCC is also at risk of suit for defamation if it improperly damages the reputations of companies or individuals.

Further, the ACCC annual report is tabled in Parliament. Its activities are also regularly reviewed by parliamentary committees.

Sitesh Bhojani,
Acting chairman, Australian Competition and Consumer Commission,
Dickson, ACT.

Australian Law Reform Commission

Presents

Penalties: Policy, Principles & Practice in Government Regulation – Conference

Regulating in a High-Tech Marketplace

Saturday 9 June 2001, Sydney

Professor Allan Fels, Chairman

Australian Competition & Consumer Commission

Since 1992, the prescribed pecuniary penalties for a contravention of Part IV of the Trade Practices Act have been among the highest in Australian law, and courts have been willing to impose increasingly severe penalties for the most serious acts of collusion and anti-competitive conduct. Yet we must ask ourselves whether these penalties will be an effective deterrent against such behaviour into the future.

Australia's civil penalty regime is beginning to look just a little weak in comparison with other countries. Several of our major trading partners, including Japan, the U.S., South Korea and Canada, impose criminal sanctions, including imprisonment, as a penalty for hard core cases of collusion. Other jurisdictions, including New Zealand and the E.U., provide for much higher financial penalties that are linked to the unlawful gain or turnover of the offender.

The relative leniency of Australia's penalty regime leaves us exposed to enormous risks in the global economy. Globalisation, technological innovation, deregulation and lower barriers to trade and investment have opened our markets to increased competition from multinational firms. While the entry of such firms into Australian markets can promote the benefits of increased competition, their entry can be equally damaging if it involves cartel activity, either on a global scale or targeted at Australian markets. Because Australian markets are comparatively small by international standards and tend to be characterised by high levels of concentration, they are particularly vulnerable to the detrimental effects of hard core cartels. It is vital to the future integrity of Australian markets that these multinational firms, which operate in major foreign markets with much tougher penalties, do not come to see Australia as being soft on serious hard core collusion and anti-competitive conduct.

In addition, many Australian firms are increasingly competing in overseas markets where they face much tougher penalties for cartel behaviour. One questions why similar sanctions should not apply to the conduct of Australian firms operating in Australian markets for the ultimate benefit of Australian consumers and small business?

Australia is 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) which will not be deterred by anything other than true criminal sanctions, including imprisonment.

We must respond to this challenge at two levels. First, we must continue to review and revise our civil penalty regime to ensure that it remains a relevant and effective deterrent. In the vast majority of cases under Part IV, civil penalties, which I will mention shortly, will remain the most appropriate deterrent.

In fact, for the most part, the Trade Practices Act works well, and it is not suggested that the present system be radically altered. It is just that it has a weakness for extreme collusive behaviour and the possibility of imprisonment would have a more powerful deterrent effect than fines, as other countries have found.

At the second level, the most serious, flagrant and profitable acts of collusion such as price fixing, market sharing and bid rigging are in a separate class of their own. In the worst cases, they are deliberate and secret acts of dishonesty which directly impact on prices and seriously impair the operation of free markets. If we are to effectively deter and properly punish this sort of behaviour in the future, we must follow the lead of several of our major trading partners and consider imprisonment as an additional sanction for executives who engage in these highly profitable, hard core breaches of Part IV, specifically, conduct that is caught by sections 45A and 4D.

Simply increasing our pecuniary penalties will not be enough to ensure that they remain an effective deterrent. In the high tech, global economy, the potential gains from hard core collusion are so great, and the chances of being caught seen as so remote, that the optimal fine needed to deter is almost infinite.

It is time to ask whether we should look at imposing penalties for the express purpose of punishing hard core collusion. While the Federal Court has held that penalties are imposed solely to deter, some judges have questioned whether elements of punishment and retribution should have a rôle to play in penalising serious contraventions of Part IV.

Looking at deterrence, nothing will focus the mind of an executive like the threat of imprisonment. It is not comparable to a fine or a pecuniary penalty. Do we seriously believe that given a choice between paying a civil penalty and serving a jail term, the majority of Australian executives would prefer to do the time? The deterrent effect of a financial penalty cannot be equated to the stigma, humiliation or disruption of imprisonment. The conventional risk-reward analysis breaks down when the risk is jail.

With an eye to punishment, a case can also be made for the imprisonment of serious offenders. Price fixing, market sharing and bid rigging are not 'victimless crimes'. They are comparable to white collar offences such as insider trading or fraud. There is no question that the punishment must fit the crime, but in the worst cases of collusion, imprisonment does precisely this. We do not, and should not, seek to 'tax' hard core collusion. It is a harmful, malevolent act. Society no longer treats white collar crime as a lesser evil. People are more inclined today to ask why white collar offenders are not pursued and punished with as much vigour as less sophisticated criminals?

It must be emphasised that this proposal is aimed only at the larger end of the economy where there is scope for highly profitable collusion on a massive scale. Small business, the rural sector and the professions have nothing to fear from this proposal and much to gain, since they too are potential victims of global cartels. Similarly, this proposal is not about targeting unions. The continuing dialogue on civil remedies will be of the utmost relevance to these sectors of the economy, but the debate on the need for imprisonment should not be side-tracked by baseless fears of heavy handed intervention in these areas.

The vast majority of Australian business people have nothing to fear from a stronger law, as the vast majority is not engaged in anti-competitive behaviour. Moreover, it is not proposed that the criminal sanctions would apply across the board to all breaches of the Trade Practices Act, but just to defined acts of collusion.

In our efforts to deter all forms of anti-competitive conduct, civil penalties will remain the central component of the penalty regime under the Act. Most contraventions of Part IV, while serious, do not rise to the level of criminal behaviour. Civil penalties enable the Commission to achieve compliance with the Act, while ensuring that victims are compensated and justice is done promptly and effectively. Administrative resolution allows

the Commission to resolve cases without recourse to the courts, saving time and reducing the burden on taxpayers.

That said, we must continue to review and revise our civil penalties to ensure they remain a relevant and effective deterrent in the global economy. A maximum pecuniary penalty of $10 million per contravention is no longer a heavy penalty by international standards. New Zealand, Japan, the U.S. and the E.U. all provide for fines or pecuniary penalties that are tied to unlawful gains, the volume of affected commerce or the offender's turnover. Australia too must consider the introduction of additional pecuniary penalties that are linked to the ever increasing gains from collusive activity and the damage that it causes.

It is not enough that civil remedies under the Act are severe. If they are to be effective they must also be flexible. The Commission believes there is a pressing need to implement a more sophisticated range of non-pecuniary remedies as recommended by the ALRC in 1994, including community service orders, corporate probation, cease and desist orders and orders to enforce internal discipline in companies that breach the Act.

We must also look again at the application of civil penalties to the consumer protection provisions in Part V. The consumer protection part of the Act has, curiously, almost the reverse position and problems of the competition part of the Act. Breaches of consumer protection provisions do not attract the kinds of civil penalties that currently apply in the restrictive trade practices part. It is possible to get criminal penalties in the form of fines (but not jail sentences) for Part V offences. However, the arguments that justified the application of civil penalties to the restrictive trade practices provisions in Part IV are equally compelling in relation to Part V. The Commission sees case after case where companies have breached Part V through a failure of compliance that is so serious and widespread that it cries out for a pecuniary penalty, but still does not amount to the type of conduct that would justify criminal action. As with Part IV, civil penalties for contraventions of Part V will ensure that would-be offenders are deterred, victims are compensated and justice is done promptly, effectively and at the lowest possible cost to the taxpayer.

Earlier this week I also called for the introduction of pecuniary penalties for unconscionable conduct under Part IVA. The prohibition on unconscionable conduct is no longer a novel concept in Australian law. Contraventions of Part IVA do not happen by accident. They

arise when corporations in a powerful position take advantage of a consumer or a small business in circumstances where they know, or should know, better. The resulting outcome is clearly unjust for the weaker party. In the most severe cases, or where corporations repeatedly offend, civil pecuniary penalties are an appropriate and necessary sanction to enforce compliance and, above all, provide a clear and visible deterrent. Behavioural change may not be achieved across the board without such sanctions.

With international cartels becoming more complex and more difficult to detect, the six year limitation period on actions under Part IV is looming as a potential barrier to the proper and effective enforcement of our competition laws. In New Zealand, which has only a three year limitation period, no action at all could be taken against the international vitamin cartel despite the damage it did in that country. In Australia we have the benefit of a six year limitation period which allowed the Commission to pursue this cartel. However, there were still significant periods in the life of the vitamin cartel for which the Commission could not take action, and this is an issue that may well be arising in other investigations. Looking forward, it is not too hard to imagine a situation where unlawful conduct could go unpunished altogether, or victims are denied compensation, because of the current limitation period.

The Commission also believes that its existing investigation powers will not be sufficient to successfully detect and prosecute modern, international cartels. There is a need to expand these powers to include the investigation tools usually available in criminal matters, such as the ability to seize records and the power to intercept electronic communications.

Finally, the Commission expects to make more innovative use of existing strategies, such as increasingly sophisticated leniency policies and further cooperation with other antitrust and law enforcement agencies, both here and abroad.

The measures I have outlined today, in particular the call for imprisonment, are significant and substantial reforms. However, the Commission is calling for such severe measures because it believes it is dealing with serious offenders, who are prepared to inflict massive damage on consumers and markets for their own gain. The future integrity of Australian markets in the global economy depends on Australia's competition laws keeping pace with those of our major trading partners. We simply cannot afford to be left behind. The stakes are too great.