Submission to the Dawson Review of the Trade Practices Act 1974

Preamble

As an Australian with extensive national and international business experience spanning many years, who has also held executive positions with chambers of commerce in Australia – local, state and international bilateral chambers – I welcome the Federal Government's decision to review some of the key provisions of the Trade Practices Act 1974 and its administration as per the Review Committee's Terms of Reference.

I am of the opinion that the Trade Practices Act 1974 in its present form (1) is adequately able to deal with any excessive concentration of market power that could damage competition and (2) contains more than adequate powers to promote competition for the benefit of consumers.

However, there appears to be serious deficiencies in the Act, and its administration by the ACCC, that inhibit the growth of commerce and industry in Australia generally, and small business enterprises in rural and regional areas in particular, in the present global economic environment. In the administration of the Act there is a lack of transparency and accountability, and an apparent bias against certain industry sectors.

I believe there is an urgent need to review the key provisions of the Act and its administration. Accordingly, I appreciate this opportunity to make this submission to the Dawson Committee for its kind consideration.

Executive summary

This submission contains the following recommendations:

1. That the provisions and administration of the Trade Practices Act be upgraded in order to meet the challenge of global international trade in the 21st century;
2. That the practice of subjecting business to trial by media, or 'name' and 'shame,' be prohibited and an oversight Board of Supervisors be established to set guidelines for media statements by the ACCC and procedures to be followed by the ACCC in initiating legal proceedings;
3. That on-the-ground activities by the ACCC to assist business communities in rural and regional areas to better understand the provisions of the Trade Practices Act, particularly authorisations and exemptions, be initiated and expanded as a matter of urgency and that explanatory memoranda that can be readily understood by a 'reasonable person,' be produced outlining the purposes and provisions of the Act;
4. That funds from consolidated revenue be allocated to support an extensive education program by the ACCC, as per recommendation 3, above, and to promote co-operation in lieu of confrontation;

5. That the special needs of rural and regional Australia be recognised to assist business and professional people and their local communities, to stem the outflow of expertise and job opportunities to Australia's capital cities and/or offshore;
6. That sections of the Act that may accelerate or contribute to the loss of medical services, including specialist services such as obstetrics, in rural and regional communities by restricting measures such as collective bargaining, be not applicable to doctors who are prepared to provide such services in these areas, and that the draft authorisation proposed by the ACCC to permit GPs to agree on fees charged to patients without risk of action under the Act be not confined to one integrated general centre;
7. That criminal sanctions sought by the ACCC be not granted as such provisions would further undermine competitive business conduct to the detriment of consumers, and that enforcement not be extended beyond financial penalties and banning orders as available through ASIC, and that there be no extension of penalties as at present prescribed by the Act;
8. That the ACCC be authorised to take representative action against unions on behalf of small businesses damaged by union secondary boycotts in the interests of equality;
9. That 'cease and desist' orders and the introduction of an 'effects' test as recommended by the ACCC be rejected, and,
10. That the ACCC be required to obtain a warrant from the Federal Court before entering premises to seize or search for documents of any kind.

Introduction:

Since the implementation of the Trade Practices Act 1974, Australian business has faced the ever-increasing challenge of global competition at all levels of activity. At the same time Australian business has been subject to regulations and restraints imposed by the Act, (and by the ACCC in its interpretation of the Act), which a reasonable person may justifiably consider to be excessive in the present global economic environment.

The consequences of these circumstances have significantly impacted the growth and development of Australian business and employment, and the growth and development of the Australian economy. During recent years, many Australian manufacturing companies have either closed or been sold to overseas interests with a corresponding loss of local production and of employment. Many plants purchased by overseas corporations have either reduced their Australian activities or relocated offshore. The adverse effects of such closures are most severely felt in rural and regional Australia where employment opportunities are less plentiful and the consequences of unemployment for families more widespread.

Both the fall-out from the terrorist attack on New York on September 11 and the collapse of Ansett Airlines seriously affected the potential growth of Australian tourism, which is now acknowledged as being in a state of crisis. Small business enterprises, particularly in rural and regional areas, have been severely affected by these and other events, such as Australia's present widespread drought. Commenting on the release August 19, 2002, of the Australian Chamber of Commerce & Industry's *August 2002 Survey of Small Business*, ACCI Chief Executive Peter Hendy said that as the "*ACCI Business Barometer* shows, there has been a softening in the level of activity amongst small business."

In recent times, Australia's GDP growth has been supported by spending on housing construction and on domestic consumption, rather than by investment or increased productivity. In addition to 'a softening in the level of activity amongst small business,' many major corporations have reported lower than expected results. Since the introduction of the GST many accountants and bookkeepers are experiencing increased work loads, this work, however, does not contribute to Australia's 'productivity.' In the same way, increased paperwork imposed on pharmacists and doctors by government agencies cannot be regarded as productive. (On July 5, 2002, the Federal Minister for Health and Ageing, Senator Kay Petterson, and the Parliamentary Secretary to the Treasurer, Senator Ian Campbell, announced that the Productivity Commission is to study the effects of paperwork on GPs in a bid to increase efficiency and reduce costs).

Chief Executive Martin R. Cox of the International Chamber of Commerce in Australia, writing in the *Australian Financial Review* (August 6, 2002) said: "there are serious questions that need to be asked about whether the ACCC keeps up with modern economic thought. In terms of its theoretical content, the ACCC submission [to the Dawson Review] is very useful as a fossil of post war neo-classical economics, but not much more." Mr Cox was commenting on an address by Professor Alan Fels to Canberra's National Press Club the previous week.

Martin Cox continued that a growing weight of expert opinion – including a long list of Nobel Prize recipients – would dismiss as spurious nonsense the list of business activities proscribed by the Trade Practices Act. "The great free market intellectual, Friedrich Hayek, would advocate that the competition regulations be torn up completely. Milton Friedman would probably agree. Economist George Stigler argued at the end of his life

that most anti-trust law was worthless and positively harmful to competition. While fellow Nobel laureate James Buchanan has devoted his career to analysing such phenomena as the manipulation of regulators by businesses seeking protection from open competition.

"In the footsteps of these and others, many economists have been steadily exposing the logical and methodological flaws behind the old neo-classical analysis." Authentic TPA reform, Cox concluded, should aim to put Australia "beyond the world-best practice, which is the lodestar for the backward-looking interventionists at the ACCC. Ancient fairy stories . . . . . about big Bad Businesses are delightful to hear, but out in the real world, Australia needs to build its economic foundation on something a little more substantial."

The 'Big-end-of-town'

A widespread misconception prevails among a great majority of Australians, including consumers, government and business leaders, that the Act as interpreted is aimed at 'big business' and can only effect corporations at the 'big end of town.' Over recent years, this misconception has been proved to be just that – a misconception. The media gives greater prominence to allegations against 'big' businesses whereas allegations against small businesses generally receive little media attention outside the area in which the particular business or businesses operated. Unfortunately, small and medium businesses are ill equipped legally to challenge the actions of the ACCC due to a lack of legal expertise and financial resources (it is better to 'confess' and pay the penalty rather than challenge the allegation and risk a multi-million dollar penalty).

An allegation against a small firm can be extremely damaging in view of the limited 'catchment area' in which the business operates, the businesses owners being generally well known in their local community. This is not to say that allegations against a major corporation cannot also be extremely damaging, however, major firms usually have top-quality legal expertise readily available to handle these matters. Big firms, also, are not 'bluffed' by unsubstantiated allegations by so-called 'whistleblowers,' or advice that they cannot comment once the matter is before a court as any such comment would be regarded as being in contempt.

These remarks should not be construed to infer that small business is always 'good,' or that big business is always 'bad.' Australian business generally is held in high regard in respect of business ethics and corporate responsibility. Small companies – traders, professionals and farmers – that engage in unethical practices or are financially irresponsible, or do not look after the interests of their customers, do not long survive in Australia's highly competitive business environment. Major corporations listed on the Australian Stock Exchange (ASX) are subject to supervision by the ASX, and corporations generally come under the watchful scrutiny of the Australian Securities and Investments Commission (ASIC). The Australian Prudential Regulation Authority (APRA) acts as a prudential regulator of banks, insurance companies and superannuation funds, credit unions, building societies, and friendly societies. Many business and professional organisations also have adopted codes of practice to oversight the activities of their members. The executive general manager of the ASX, Mr Stephen Mills, announced August 1 that a council is to be set up by the ASX to develop "consolidated and up-to-date standards" for listed companies "which reflects best practice." (*Melbourne Herald Sun*, August 2, 2002).

It is not unreasonable to suggest that the success of Australia's economy in today's world of globalisation has been due to the initiative and enterprise of business entrepreneurs in all

sectors of commerce and industry who apply their efforts for the common good of the community. In recent times small, medium and large firms have strengthened their ability to work and grow together, economically, in the same way that the trees of the forest – small and large – grow together, ecologically, and also share a certain degree of interdependence, at the same time respecting each other's independence for the common good.

It is also not unreasonable to suggest that in view of the rapidity of technological change, market liberalisation and globalisation, there is a need to update the Trade Practices Act and review its administration to enable the Australian economy to better meet the challenge of these developments as our nation enters the 21st century.

Small and Medium Enterprises (SMEs)

The small and medium business sector embracing all areas of activity including manufacturing, wholesaling, retailing, service and construction industries, farmers and professionals, is a major employer (if not the major employer) of Australia's workforce.

The Australian Bureau of Statistics (ABS) defined small businesses for statistical purposes as businesses employing less than 20 people. (*Characteristics of Small Business*, 8027.0, June, 2001). The ABS provides a broad overview of the structure of Australian business in 1998-1999 in its publication *Small Business in Australia 1999*, (1320.0), May, 2000. This paper says that just over 951,000 or 96% of total non-agricultural private sector businesses were classified as small businesses in the review period. These businesses employed just over 3.1 million people or 47% of the total non-agricultural private sector workforce. In the agricultural sector 90,000 businesses (86%) were small businesses. These small agricultural businesses represented 9% of all small businesses employing less than 20 people. Small businesses in agriculture employed an estimated 214,300 people (including seasonal casual workers) in 1998-1999.

A feature article published by the ABS, *Experimental Statistics on Australia's Exporters and Importers,* (June, 2002), covering the reference period July, 1 2001 to December 31, 2001, shows that although a small number of major traders accounted for almost half of the total export-import trade by value during the reference period, the largest number of traders in this sector were small and medium enterprises. A total of 109 businesses with goods exports of $100 million or more accounted for 60% of the total value of goods exports during the reference period. A total of 70 largest goods importers accounted for 36% of Australian goods imports during the same period. A total of 2,746 businesses that exported goods valued at $1 million or more together accounted for 94% of the value of goods exports. A total of 5,328 businesses that imported goods worth $1 million of more together accounted for 91% of goods imports.

Based on these figures, small and medium businesses (SMEs) contributed significantly to Australia's export-import trade. Based on my own international experience, I frequently found that SMEs were able to develop small markets for goods that were more profitable on a percentage basis, than many of the larger markets developed by their major counterparts. SMEs are frequently able to service these small markets more economically than larger companies.

Trial by press release

For some considerable time business leaders and other have expressed concern about the present ACCC Chairman's policy of issuing press releases subjecting businesses to trial by press release. I share this concern.

It is my opinion that ACCC personnel should be prohibited from issuing media statements naming a business or individual it is investigating until such business or individual is formally charged with a breach of the Trade Practices Act by the Federal Court. A policy of trial by press release or 'name and shame' should be prohibited. Backgrounding a press release with the ACCC chairman's views, which the ACCC proposes to put before the court as evidence, should be prohibited, as such comments could prejudice a fair trial for the accused company and/or accused individuals. ACCC press releases issued almost daily frequently claim that proceedings have been instituted by the ACCC against a claimed guilty party preceding the findings of the Federal Court. This places the company or individuals concerned against whom the allegations are made in the invidious position of being named as 'guilty' long before the court has considered the matter. (During March 2002, the ACCC issued 32 press releases, during April 2002, 35 press releases, and during May 2002, 40 press releases. These releases were in addition to media interviews and briefings given by the ACCC). Preliminary media statements of this kind by either the ACCC or those against whom allegations are being made by the ACCC, should be prohibited until the matter is before the court.

A press release was issued by the ACCC (MR176/02) on **July 19, 2002**, under a bold-type headline: **"ACCC Alleges Misleading Conduct About Tours to Aboriginal Land Near Uluru."** The press release stated that the ACCC had instituted Federal Court proceedings against Voyager Hotels and Resorts Pty Ltd alleging misleading and deceptive advertising regarding tours, and detailed 10 lines of text, setting out the ACCC's allegations. The statement also stated that the ACCC was seeking interim injunctions, permanent injunctions, and the publication of public notices, declarations and a trade practices compliance program. It went on to state that "the matter will be before the Federal Court, Darwin, on Wednesday **31 July 2002** at 9 a.m," – 12 days after the date of the press release.

On **July 12, 2002**, a press release was issued in similar vein by the ACCC (MR174/02), under a bold-type headline**: "ACCC Institutes Against Westfil Australia Pty Ltd Alleging Country of Origin Deception."** The press release stated that the ACCC had instituted proceedings in the Federal Court, Perth, against the company alleging misleading and deceptive conduct in relation to the country of origin labelling of automotive air filters by the company. The alleged offence was detailed over 14 lines of text setting out the ACCC's allegations. No date was stated as to when proceedings would come before the Federal Court. As of the date of this submission, I am not aware of any further statement by the ACCC as to when these proceedings will commence.

A further example of the unfortunate situation created by ACCC press releases, is the instance of a release (MR127/99) dated **July 16, 1999**, stating in bold face type: **"ACCC Alleges Market Sharing Agreement Between Regional Newspapers Result in Misuse of Market Power."** The release stated that the ACCC had filed proceedings in the Federal Court, Adelaide, against Rural Press Ltd, its subsidiary Bridge Printing Office Ltd and its directors, which were individually named. The ACCC alleged that the newspaper misused its market power in breach of Section 46 of the Trade Practices Act, as per the bold face headline, and that the ACCC was seeking "injunctions, declarations and penalties." The hearing was set down for July 30, 1999. Following the hearing of the ACCC's case and a subsequent appeal and counter appeal, the Federal Court ruled July

2002, that "while the arrangement did not contain an exclusionary provision, it did have the effect of substantially lessening competition in breach of section 45 of the Act. The court also declared that Rural Press and Bridge Printing did not misuse their market power in breach of section 46 of the Act. A press release on the Federal Court's decision dated **July 18, 2002**, (MR175/02) was issued by the ACCC under the **heading "ACCC and Rural Press."** In the interests of fairness and equality, it is my opinion that the headline should have referred to the dismissal of the ACCC's allegation of ***Misuse of Market Power*** in the same ***bold typeface*** as used in the original ACCC press release.

The ACCC issued a press release dated **April 17, 2002**, under the bold typeface headline: **ACCC Alleges Anti-Competitive Boycott Arrangement by Regional Obstetricians to Stop 'No-Gap' Billing.** The press release outlined in detail that the ACCC had instituted proceedings against three specialist obstetricians "who provide in-hospital obstetric services in Rockhampton" alleging they had agreed to boycott 'no-gap' billing arrangements. The press release further alleged that their actions amounted to an exclusionary provision (primary boycott) in breach of the Act. The three Rockhampton obstetricians were individually named by the ACCC. Particulars of court orders sought by the ACCC were detailed in the release including reimbursement of expenses incurred by the patients ('no-gap' payments), publication of information notices in the local media, injunctions, costs, etc. The *Brisbane Courier Mail* published the ACCC release in detail in its issue of April 18, 2002, in which it included a comment by the AMA's Queensland president Mr Bill Glasson, criticising the ACCC's actions.

It is important to note, however, that the ACCC press release did not state whether or not the matter had been before the Federal Court. Since the date of the press release (April 17) no further statement has been issued. Whether proceedings had actually commenced in the Federal Court or whether the press release was issued with the intention of using fear as a weapon is unclear. The ACCC's press release, however, does not provide an answer to this question. I am of the opinion that it would be inappropriate to repeat the remarks of the president of the AMA Queensland, quoted by the *Courier Mail*, in view of the fact that the matter may be before the Federal Court at the time of the preparation of this submission.

In a submission to the Trade Practices Act Review (Dawson Inquiry), dated July 2002, the Australian Doctors Fund, Arncliffe NSW, says "the ACCC has made allegations against three obstetricians who have been threatened with Federal Court action unless they comply with the ACCC's demands." The ADF further states that "the conduct of the ACCC [in this case] cannot be commented on publicly at this stage, although the ACCC is able to publish allegations in newspapers on its part."

This statement by the ADF clearly illustrates the unsatisfactory situation surrounding the media policy of the ACCC as applied by Chairman Prof Alan Fels, AO. The ACCC's media statement has effectively muzzled both the ADF and the writer from commenting on this case, as it would be inappropriate to do so if the matter should be before the court or an appeal be pending. Meantime, however, the ACCC's press release has received wide coverage. ***Is this kind of activity a denial of natural justice?***

I respectfully submit that such practices as those briefly outlined above are contrary to the basic tenet of British/Australian justice that a person is presumed innocent until proven guilty by a court of law. If the Act permits the ACCC's 'name and shame' press release policy, then I respectfully submit that this anomaly be corrected at the earliest opportunity in the interests of natural justice. A policy should be established setting out in detail

guidelines for media statements by the ACCC and, at the same time, a Board of Supervisors should be set up by Parliament to oversight and monitor procedures to be followed by the ACCC in initiating legal proceedings. Such a board should comprise a majority of members with grass-roots business and legal experience rather than academics or bureaucrats with little or no hands-on business knowledge.

Special needs of rural and regional Australia: authorisation and education

Section 90 of the Trade Practices Act 1974, is an excellent example of the problems facing SMEs, particularly SMEs in rural and regional areas, which lack in-house legal expertise enjoyed by corporations located in Australia's capital cities. On-the-ground activities to assist business communities in these areas to better understand the provisions of the Act should be expedited as a matter of urgency. There is a need for education programs to be implemented and expanded so that business and professional people at all levels in country centres understand what the Act can do to assist them by way of authorising agreements that provide a public benefit. The present emphasis of the ACCC is to stress the penalties that the ACCC is empowered to impose rather than what it can do by way of education and assistance to help business to better understand the basics of the Act, and how it can help them where a "proposed conduct, arrangement or understanding . . . . would result, or be likely to result, in a benefit to the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if (a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to; (b) the proposed covenant were given, and were complied with; or (c) the proposed conduct were engaged in."

Unfortunately, the ACCC appears to have mainly relied on a program of fear (instilled by press releases that seem to cater for the natural propensity of most members of the media looking for a 'good story'), rather than a program of education to explain the Act's provisions in laymen's terms (or simple English) to SMEs in rural and regional towns, so that they better understand the Act and could utilise its provisions such as authorisations and exemptions, which would benefit them and their business communities. Authorisation and exemption order procedures need to be simplified and streamlined to better accommodate the needs of business and professional people in rural and regional towns rather than boosting the scoresheet of the ACCC's 'achievements' in bringing so-called offenders to book for offences about which they have little if any knowledge. The Federal Government should not regard the ACCC as a 'cash cow' to feed into consolidated revenue, instead, the situation should be reversed and funds from consolidated revenue should be diverted to fund an extensive education program by the ACCC to assist business and professional people in rural and regional areas in a co-operative rather than a confrontational manner.

Considering the high level of activity by the ACCC and its Chairman through the media, attacking ' the big end of town,' it is not unreasonable for the majority of SMEs in rural and regional areas of Australia to presume that the Act does not apply to their relatively small business activities located in remote parts of Australia. After all, tradesmen, motor mechanics, plumbers, doctors and dentists operate many of these business enterprises – they are not run by lawyers. They are run by people who, in the main, are technicians not bureaucrats, they are members of their local communities, they participate in sporting events, school and church fetes, and support Rotary, Apex, local charities and their local chamber of commerce. They are the Tom, Dick and Harry that rally to their neighbour's

aid in times of flood, fire or drought – and are among the first to volunteer when our country is threatened.

But the Act does apply to these people. The full weight of the Act - complete with its penalties, including massive fines for so-called 'offenders' – applies in principle to the greater majority of SMEs almost equally as much as it does to major corporations. This statement is not made to justify in any way the attitude of the ACCC to Australia's major corporations, but to illustrate the lack of resources of small firms to cope with the ever increasing burden of rules and regulations imposed on commerce and industry by all three levels of government. For major corporations, too, the cost and inconvenience of complying with the demands of ACCC searches and investigations can be enormous.

Many political and government leaders and sections of the media seem to be willingly misled by the attitude promoted by the ACCC that it is some kind of 'white knight' attacking the 'giants' (big businesses) in order to protect the 'weak' (small businesses and consumers). Fortunately some of our leaders and media representatives are aware of this situation and recognise that the ACCC's chairman is not St George incarnate and that businesses in rural and regional areas are very vulnerable to attack by the heavy hand of bureaucracy, legitimised by the provisions of the Trade Practices Act which, I submit, are in urgent need of updating and modernising.

In his submission to the Review, Queensland Senator Ron Boswell, states that the mainstays of rural and regional towns are small businesses and that the loss of small independent businesses in country towns has a snowballing effect, "removing other businesses and employment from the area."

The closure of local post offices and banks in rural towns compels those requiring these services to travel long distances to larger towns, taking their other business and personal shopping requirements with them to the further detriment of traders and service providers in their home towns. As jobs are lost such rural and regional centres are inclined to decline still further. The establishment of community banks has assisted to reverse this decline in some areas but more needs to be done.

In an address at Tweed Heads, NSW, October 22, 2001, *Leadership and Certainty for Regional Australia,* the Hon. John Anderson, MP, Deputy Prime Minister and Minister for Transport, said: "The National Party and our coalition partners have delivered on our commitment to regional Australia. Our country needs prosperous regions as much as it needs prosperous cities. The sunlit plains that Banjo Paterson wrote about are part of us all and have shaped our national character."

It is recommended that the special needs of rural and regional Australia be recognised by updating and modernising the Trade Practices Act in respect of authorisation and education in order to assist rural and regional business and professional people in these areas, and their local communities, by stemming the outflow of expertise and job opportunities to Australia's capital cities and/or offshore,

Does the ACCC understand the special needs of the bush?

I believe that the situation faced by rural and regional medical practitioners deserves special consideration, not only in regard to the application of the Trade Practices Act to medical practitioners in rural and regional areas of Australia, but because their situation illustrates how the ACCC has used the position of power accorded to it by the Federal

Government to abuse those who might dare suggest the ACCC does not understand the problems faced by small-business medical practitioners in the bush, or understand the special needs of rural and remote communities as distinct from the needs of communities located in the major metropolitan areas of Australia's capital cities.

A clear indication of this attitude is shown by a study of certain press release issued by the ACCC this year in response to complaints by the medical profession that the Trade Practices Act imposes unnecessary burdens on medical practitioners in rural and regional Australia, which should be addressed by the ACCC. These press releases are as follow:

January 29, 2002. (MR15/02) **"Rural Doctors Association of Queensland Unfortunately Joins AMA in Misleading Medical Practitioners and the Public About Genuine Medical Rosters and the T.P.A."**

February 5, 2002 (MR17/02) **"No Evidence that Trade Practices Act Hinders Rural Doctors: ACCC"**

June 20, 2002 (MR156/02) **"ACCC Draft Decision Gives Certainty to General Practitioners on Fee Arrangements."**

All headings to the above press releases were set in the ACCC's usual large bold face type format.

It would seem from a study of the material contained in these press releases issued by the ACCC in January and February 2002, which are extremely critical of statements made by the Australian Medical Association and the Rural Doctors Association, that the Chairman of the ACCC has endeavoured to remedy the situation by issuing a more co-operative press release in June in an attempt to defuse any criticism or antagonism and restore his 'white-knight' image.

In his press release criticising the Rural Doctors Association of Queensland, January 29, 2002, the ACCC's Chairman said "The Rural Doctors Association of Queensland is mistaken and misleading in its comments in the *Australian* today with its reported claims that roster arrangements could breach the Trade Practices Act 1974, ACCC Chairman Allan Fels said today.

"It is a shame that RDAQ President, Roger Faint, has chosen to further perpetuate misleading comments by the AMA regarding genuine rosters."

The ACCC press release continued: "Dr Faint was quoted in today's article as saying that: 'Under the Trade Practices Act, rural doctors can be prosecuted for simply getting together to arrange a roster so that a colleague can take a well-earned weekend off,' and 'But under the Trade Practices Act we're not even allowed to get together to set up a roster. That's unfair. Each doctor can't be expected to work seven days a week, 365 days a year.'"

Prof. Fels commented: "These alarmist views about the application of the Act are wrong and the ACCC has never held them or put them to doctors." The ACCC Chairman continued: "By calling for rural GPs to be given 'exclusion from the Trade Practices Act,' it would seem the RDAQ wants to put rural doctors above the law and in a position to collectively agree to boycott bulk-billing or to be in a position for all the different medical practices in town to agree collectively on the fee to be charged by rural GPs in that town. Or for there to be a collective boycott that would prevent the introduction of 'no gap'

arrangements by private health insurers. Any conduct of this type has the potential to harm regional and rural patients who already have restricted access to other medical practitioners."

The ACCC's press statement concludes: "The ACCC is concerned that the AMA and other groups such as the RDAQ continue to perpetuate these alarmist and misleading comments. . . . . .The ACCCC hopes this inquiry will clear up these types of misconceptions about the Act and the ACCC so that doctors can get on with their jobs without further scare-mongering by groups such as the AMA and RDAQ."

Permit me to comment with respect that the above remarks by the Chairman of the ACCC, Prof Fels, appear to be unnecessarily aggressive and far from conciliatory. Could it not be construed that should two medical practitioners (or two chemists, or two dentists for example) meeting together to consider devising a roster for week end work so that they could alternatively have a weekend away from their practice, that such a meeting could amount to collusion? After all, such an agreement could amount to 'a lessening of competition,' in a market, ie. collusion? According to the *Macquarie Dictionary, third edition,* collusion is defined in *Economics* as*: 'a formal or informal agreement between companies about the way they compete with each other that has the effect of lessening the level of competition in their industry.* (From the L *collusio* a playing together).'

If Prof Fels disputes this analogy, then he must agree it is time for the Trade Practices Act to be rewritten in simple English so that the Act can be readily understood by a 'reasonable person,' rather than in complex legalese which is only understood by expert legal practitioners and a select number of bureaucrats. Prof Fels comment that the RDAQ wants to "put rural doctors above the law" seems most unhelpful; unfortunately such statements can only serve to perpetuate the chasm that appears to exist between the ACCC and the professional community.

The Rural Doctors Association of Australia, in its *Submission to the Review of the Impact of the Trade Practices Act on the recruitment and retention of the rural medical workforce,'* December 2001, said in its first recommendation: " The RDAA contends, on the basis of evidence provided by its members and others, that a practical, albeit unintended, effect of the application of the TPA to the rural medical workforce runs counter to other legislation and policies designed to increase the recruitment and retention of rural doctors. Thus it undermines progress toward its own stated objective of public welfare by denying Australians who live in rural and remote areas the medical care they need."

Further in its submission, the RDAA stated: "The ACCC's focus on theories of competition and markets appropriate to other markets and environments overlooks the reality of medicine in the bush. Apart from the fact that a level of supply sufficient to generate competition has not yet been reached, it ignores the reality that it is not competition but collaboration and co-operation supported by prohibited mechanisms like collective bargaining or certain rostering arrangements, that is needed to achieve the welfare of people in rural and remote areas in this matter. The ACCC approach to rural medical services also apparently fails to take into account the considerable differences between rural and urban practice in the level of supply, the type of service provided and the possibilities for substitution.

"This fundamental misunderstanding in conjunction with the dominating image of the ACCC as a belligerent body targeting a small and beleaguered segment of a vital industry,

has created an unfortunate and unhelpful atmosphere of scepticism and mistrust. Effective attempts to disseminate knowledge of the Act and the ACCC in ways conducive to dialogue do not seem to have been a high priority . . . . "

In his press release criticising the AMA, February 5, 2002, Chairman Fels claimed that the ACCC "still has not seen any evidence that the Trade Practices Act 1974 hinders the recruitment or retention of doctors in the bush. . . . . Prof Fels said that the shortages in rural health could be attributed to a multitude of reasons. There is no evidence that the Act, or the way the ACCC applied the Act, hinders the recruitment and retention of doctors in the bush. The AMA has provided incorrect information about the Act and the ACCC and the medical community."

The ACCC Chairman continued: "The AMA and other interest groups have called for an exemption for rural doctors from the Act because they assert the medical profession is different to any other sector of the community. However, groups such as the AMA and the Rural Doctors Association have failed to provide a credible case for giving rural doctors special treatment."

In a statement by Federal AMA President, Dr Kerryn Phelps, on the effects of *the Trade Practices Act on the rural medical workforce,* December 2001, Dr Phelps said the TPA was having a negative impact on the recruitment and retention of rural doctors. "Country doctors are under constant fear that time-honoured practices in regard to work rosters, work sharing and local hospitals may in some way breach the Act," Dr Phelps said. "Doctors are already overworked and in short supply in rural and regional Australia. The combined effect of escalating medical indemnity premiums and the threat of action by the ACCC is placing enormous pressure on country doctors and their ability to provide around-the-clock high quality medical services to their local communities. This is affecting the viability of doctors to continue practising in country towns.

"For local communities, the loss of the family doctor would be a tremendous blow. Having already lost their banks and post offices and Telstra jobs, many communities would consider the threat to their medical services the last straw," Dr Phelps said. (Extract from *Monday Memo* published by the Rural Workforce Agency Inc. South Australia (December 3, 2001).

In it submission dated December, 2001, to *The Review of the impact of the Trade Practices Act on the recruitment and retention of the rural medical workforce,* the Rural Doctors Association of Australia said "Obstetrics comes under the general heading of procedural practice, but given its high profile in the community, the impact of its loss to small towns and the political sensitivity of this issue, it deserves a separate heading. . . . . The area of procedural medicine which is often given highest priority in rural towns is obstetrics. Women and families prefer their families to be born in their local community . . . . .Local access to obstetric services is very highly valued by communities. Having to travel to a distant centre for delivery can impose high emotional and costs upon mothers and families. . . . . Those sections of the TPA which may accelerate the loss of obstetric care to these communities by restricting the collective bargaining which can support it should not apply to the rural doctors who are prepared to provide it."

Similar to the views expressed by Federal AMA President Dr Phelps, the RDAA stated in its submission that a number of studies have investigated why doctors leave rural practice . . . . . "Research now in progress at James Cook University in Townsville is analysing the retention of rural doctors. Preliminary results suggest that supportive collaborative

professional relationships and arrangements are a major factor in keeping a doctor working in the bush. RDA members report the TPA exacerbates the problems and inhibits the major solution – negotiated collaborative arrangements."

In an ACCC press release dated June 20, 2002, (MR156/02), the ACCC Chairman has proposed to "provide certainty to general practitioners working in specified business arrangements to agree on fees charged to patients without risk of action under the Trade Practices Act. This draft authorisation follows an application by the Royal Australian College of General Practitioners." The ACCC conceded in its statement that it "acknowledges in its draft decision the possibility that GPs within some business structures may risk price-fixing allegations by agreeing on fees." The ACCC proposes to grant authorisation to GPs in 'associateships', which it describes as groups of GPs who wish to remain independent businesses while co-locating to obtain certain advantages. Some may simply share rent and administrative costs, while others may be more closely integrated. "The ACCC concluded that authorising these GPs to agree on fees would help a team approach on patient care, thereby improving its quality."

The proposed agreement would not allow fee arrangements between doctors in different general practices. "The draft decision highlights that the general practices proposed to be authorised present themselves to the community as one integrated general centre." The proposed authorisation would apply to rural and remote as well as metropolitan areas.

While the draft decision is welcomed as a forward step, questions arise as to why the ACCC has taken so long to acknowledge that 'GPs within some business structures may risk price-fixing allegations by agreeing on fees'? Why is the proposed plan limited to 'associateships' co-locating 'in one integrated general centre'? The ACCC acknowledges "some concerns have been aired in recent months, which the proposed authorisation would address." It is recommended that such 'associateships' be extended, in the interests of equality, to groups of doctors working together in rural and regional Australia thus better acknowledging the needs of these areas.

Criminal sanctions

The ACCC has proposed in its submission to the Committee of Review (No 056, part 1), that criminal sanctions should be implemented. The Commission considers that "both corporations and individuals should be subject to criminal liability and that the maximum penalty for individuals should be seven years imprisonment [at the discretion of the court] (which may choose to impose a pecuniary penalty, or other appropriate remedy, in lieu of a goal sentence) and would only apply to persons directly involved in collusion." The Commission proposes that the introduction of criminal sanctions would not affect the continued availability of existing civil remedies. "This would allow the Director of Public Prosecutions (DPP), the agency established to prosecute breaches of the Commonwealth criminal law, and the Commission the option to tailor the remedy sought from a court to the gravity of the offending conduct. The Commission would publish guidelines as to what matters it would consider in determining whether it should commence civil proceedings or refer the matter to the DPP."

The adoption of this submission by the ACCC would grant further extraordinary powers to the ACCC which, I believe, would further undermine competitive business conduct at a time when the full resources of Australian companies should be devoted to strengthening the economy and supporting the efforts of businesses to better compete in the global marketplace, instead of looking continually over their shoulders in fear of an attack by a

bureaucrat of the kind envisioned by English author and satirist *par excellence* George Orwell. I am a firm believer in education as well as enforcement, but I firmly believe that enforcement should not extend beyond financial penalties and banning orders as available through the ASIC.

I find it strange that the ACCC's submission also proposes that "unions not be liable for criminal sanctions" under the Act. I other words, representatives of employees should not be liable for criminal sanctions but employers should be so liable. Surely this is inequitable? It may be a coincidence that the Australian Senate recently refused to allow the ACCC to take representative action on behalf of small businesses damaged by union secondary boycotts, yet the ACCC is allowed to take action on behalf of consumers damaged by alleged business secondary boycotts. The question needs to be asked: is there one set of laws for unions and another set for everyone else?

The Chief Executive of the Australian Chamber of Commerce and Industry, Peter Hendy, said in a statement, August 21, 2002, that the Senate's refusal [to allow the ACCC to take representative action on behalf of small businesses damaged by union secondary boycotts] "is a blow to the job-creating small business sector." The ACCI said "the Senate's decision means that the competition regulator is empowered to assist small business in representative legal action against big business, but not against big unions – that is ridiculous." The ACCI's statement concluded: "An exclusion for union officials from the full enforcement regime of the Trade Practices Act when they cause damage to the commercial interests of small business is completely unwarranted."

It is recommended: (1) that the ACCC's recommendations in respect of criminal sanctions be rejected; (2) that there be no extension of penalties provided by the Trade Practices Act, and (3) that unions be brought within the ambit of the Trade Practices Act in the interests of equality.

General, incl. matters raised by the ACCC's submission

Other matters, which it is recommended the Review Committee take into account, may be summarised briefly as follows:

'Cease & desist' orders – The ACCC's request that it be granted supra-legal powers to issue administrative 'cease and desist' orders against companies for alleged anti-competitive conduct, should be rejected.

Introduction of an 'effects' test - The introduction of an 'effects' test as recommended by the ACCC would create uncertainty and should also be rejected.

Seizure of documents – Before entering premises to seize or search for documents of any kind the ACCC should be required to obtain a warrant from the Federal Court.

Conclusion

The *Australian* newspaper published the following comment, September 4, about the future administration of ACCC following the announcement by Prof Fels that he did not intend to seek another term as the ACCC's chairman, which I believe would find ready acceptance by many sections of the community. Under the heading *'After Fels, time for a new approach'*, the editorial stated, (inter alia):

"Professor Fels's greatest failure has been not to recognise that in a largely deregulated economy, Australian businesses should not be hobbled by arbitrary restrictions on their ability to grow in their home market and achieve economies of scale required to compete offshore and to attract foreign capital . . . . . The next ACCC chair will have the opportunity to break free of his backward looking regulatory approach. Professor Fels has always emphasised the need for corporate accountability, now it's the ACCC's turn to aspire to international best practice."

In making this submission for the consideration of the Review Committee, I respectfully conclude with a quotation from *The Chief*, a work by Lord Hewart (PC and a former Chief Justice of England) published in *A Dictionary of Modern Quotations*, Penguin 1973:

"A long line of cases shows that it is not merely of some importance, but it is of fundamental importance, that justice should not only be done, but should be seen to be done."

John L. Harrower AM.

September 5, 2002