
Guidance and information

Small business update

Retail tenancy reform: latest developments

In its statement *New Deal — Fair Deal*, a response to the Parliamentary Report entitled *Finding a Balance*, the Government announced its intention to implement many fair trading reforms for the benefit of small business.

The majority of the fair trading reforms are to be implemented through amendment of the Trade Practices Act. The Commission has various roles in connection with the fair trading package including consultation, monitoring and public education.

Included in the proposed fair trading reforms is a remodelling of retail tenancy law to protect small business tenants from unfair treatment by retail landlords. The legal background to this area was outlined in *ACCC Journal 11*, November 1997.

Following consultations with landlord and tenant representatives, on 5 December 1997 the Government agreed on the following set of principles to be adopted as minimum standards in retail tenancy law across Australia:

- comprehensive ongoing disclosure of information and costs;
- fair determination of market rent;
- abolition of rules prohibiting rent reduction;
- adequate notice and compensation for compulsory relocation;

- adequate notice about lease renewal decisions;
- fairness and reasonableness regarding outgoings;
- reasonable notice for assignment of leases; and
- confidential treatment of tenant turnover information.

State and Territory governments are currently working toward redrafting tenancy legislation to adopt these standards in their tenancy legislation.

Regulation of the retail tenancy relationship is not likely to be confined to the States and Territories, however. The Trade Practices Act might also provide a remedy for small business tenants in cases where landlords have engaged in unconscionable conduct in relation to retail lease arrangements. As part of the fair trading package, the Government proposed that a new s. 51AC (proscribing unconscionable conduct) be inserted into Part IVA of the Trade Practices Act (see *ACCC Journal 11*). Section 51AC is designed to protect small business against unfair commercial conduct exerted by larger corporations in the commercial supply of goods or services.

Accordingly, depending upon the conduct, the circumstances of the case and the ultimate terms of the proposed legislation, in future small business tenants faced by coercive landlords may be able to pursue their rights through State and Territory legislation or the Trade Practices Act.

The reforms proposed in the Government's *New Deal — Fair Deal* statement, and the

expansion of the Commission's role in assisting small business, are discussed further in a new Commission report for small business, *New deal — fair deal: giving business a go*. It is available from Commission offices and the Commission's website.

Australian Standard on Compliance Programs

On 5 February 1997 Commission Chairman Professor Fels launched a new Australian Standard on Compliance Programs, known as AS 3806. The standard was drafted by a committee made up of representatives of corporate compliance professionals, government, and the consumer movement.

The standard will provide companies with objective benchmarks against which they can judge their compliance program.

Professor Fels endorsed the standard as an essential reference for any Australian company that is serious about its compliance obligations. It includes:

- the essential elements of effective compliance;
- guidance on implementing these elements;
- sound guidelines on training and education requirements for compliance;
- suggestions on how to put in place practical procedures to ensure that all aspects of compliance are met;
- suggestions on resources for compliance;
- suggestions on how to apply continuous improvement to a compliance program; and
- guidance specifically for small business on compliance.

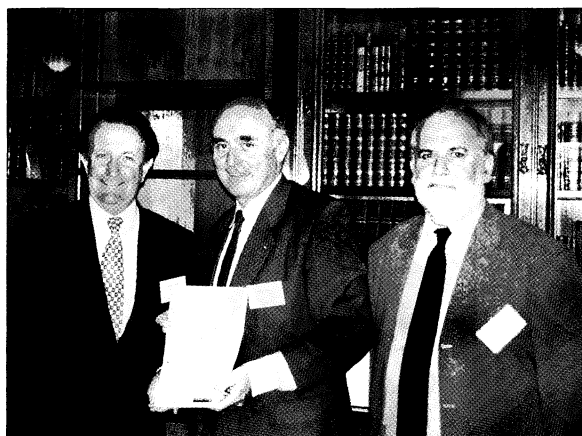
Professor Fels said that the standard incorporates guidance on how to promote 'behavioural' compliance as well as 'procedural' compliance in an organisation (see *Journal 12*).

The standard also recognises that:

- an effective complaints handling system is one of the principal means of identifying an organisation's compliance failures so that appropriate rectification action can be taken; and

- maintenance of the compliance program is necessary so that it remains relevant and effective for the regulatory regime of the day.

Copies of the standard are available from Standards Australia offices.



Left to right: Peter Walsh (Standards Australia), Professor Fels and Bill Dee (ACCC)

International Internet Sweep Day

On 16 October 1997 the Commission coordinated a world-wide sweep of the Internet for scams. The 'International Internet Sweep Day' involved about 70 consumer affairs enforcement agencies from 30 countries sweeping the Internet for get-rich-quick scams.

Once suspicious sites were identified, the operators of those sites were sent an education email message outlining the fact that the activities they appeared to offer may be regulated in some countries. The message referred them to the Commission's website for more information on how to comply with the Trade Practices Act and how to find out more about the legislation applicable in countries other than Australia.

The Commission also set up an 'Internet Scams' page on its website where consumers and businesses could get information about what type of schemes to look out for, and a 'Slam-a-Scam' email address so that they could report suspicious sites.

The next step in the sweep exercise was the 'Follow-up Sweep Day'. In November 1997 each of the sweep participants revisited the sites they had identified and sent messages to on the sweep day. Participants noted whether the site had been amended or removed as a result, and forwarded those details to the Commission for collation.

The results indicated that over 1100 suspicious websites were identified in the course of the sweep. The follow-up sweep gave a good indication of the success of the educational messages sent to website operators — 28 per cent of the revisited sites had been removed or altered. The Commission has also received over 100 emails to date through 'Slam-a-Scam'.

Since the Internet sweep, the Commission has progressed enforcement action against a number of websites originating in Australia. It continues to monitor the Internet for potentially illegal websites and plans to coordinate another international cooperative event similar to the sweep day later this year.

New publications

Mergers statistics

The majority of mergers scrutinised by the Commission over the past four years were not opposed, a Commission report issued in February 1998 concludes. The report provides statistics on mergers examined by the Commission since the adoption of the substantial lessening of competition test in 1993.

Commission Chairman, Professor Allan Fels, said that a perception existed in some quarters that the Commission was somewhat intrusive in merger matters. The report shows that very few mergers attracted Commission concern and that, of those that did, many proceeded after slight changes to their structure.

For example, in 1996-97, of the 147 mergers considered by the Commission, 140 were not opposed. The Commission concluded that only seven were likely to be anti-competitive and so advised the parties. Of those seven,

two proceeded after s. 87B undertakings were received and the other five were withdrawn. In addition to the 147 mergers considered, a further 55 mergers were initially referred to the Commission for consideration but were withdrawn by the parties for commercial reasons.

The report found that only about 15 per cent of merger reviews were initiated by the Commission. The vast majority were initiated at the request of the parties to the proposed transaction, from government agencies and private complainants.

Most mergers in Australia are not considered by the Commission — they are either too small or they raise no competition concerns.

Many of the matters referred to the Commission relate to mergers or acquisitions without significant competition issues. These are examined as expeditiously as possible.

The merger matters which require the greatest attention are those which are closest to the margin in terms of whether or not they are likely to substantially lessen competition.

The Commission values informal approaches from proposed merger parties and also input from buyers, consumers, suppliers and competitors. This allows issues arising from the proposal to be examined quickly and any problems to be easily resolved.

The Commission is most interested in mergers in the non-traded sector. The report shows it has never opposed a merger/acquisition where imports have had a significant share of the domestic market.

The ACCC's approach to mergers: a statistical summary is available for \$15 from Commission offices.

Third line forcing guide

In February 1998 the Commission issued a plain English guide to the circumstances under which third line forcing may be allowed.

Third line forcing is a specific form of exclusive dealing prohibited under s. 47 of the Trade Practices Act. It involves suppliers:

- supplying goods or services, or supplying at a particular price or subject to a discount or rebate, **on condition** that the purchaser acquire other goods or services from another person; or
- **refusing** to supply goods or services, or refusing to supply at a particular price or subject to a discount or rebate, if the purchaser has not acquired, or not agreed to acquire, other goods or services from another person; or
- granting or renewing a lease **on condition** that another party to the lease acquire goods or services from another person; or
- **refusing** to grant or renew a lease for the reason that another party to the lease has not acquired, or not agreed to acquire, goods or services from another person.

Although third line forcing is prohibited, suppliers wishing to engage in such conduct may seek immunity from court action under the Act's notification and authorisation processes, which are administered by the Commission. The guide outlines the processes involved and the circumstances in which the Commission is likely to grant immunity. It provides case studies of various types of third line forcing conduct and the Commission's decisions in relation to authorisation or notification of that conduct.

The guide is available for \$10 from Commission offices and from the Commission's website.

Glass bottles monitoring report

A monitoring report issued by the Commission in December 1997 concluded that the prices of wine bottles in Australia were high by international standards.

The majority of bottled wine exports are in bottles manufactured by ACI. Government and the wine industry had raised concerns that bottle prices were too high and could constrain an important export industry.

ACI had been declared for prices surveillance in relation to glass containers in 1991. A report by the Prices Surveillance Authority in 1995 recommended that ACI continue to be declared in relation to glass containers. In 1996, following recommendations from the Industry Commission (IC), most glass containers were removed from prices surveillance under the Prices Surveillance Act. The IC report recommended that declaration continue for wine bottles and medium to large glass food containers because of a lack of price competition from imports and close substitutes. The ACCC was directed by the Treasurer, Mr Costello, to monitor ACI's price, cost and profit data for three years, and to report publicly on an annual basis. This is the first annual monitoring report.

In addition to wine bottles, the monitoring report discusses trends in ACI's prices, costs and profitability in jars and bottles used in the food, soft drink, beer, spirits and fruit juice industries. The report focuses on the questions of ACI's ability to cross-subsidise and to raise prices, the effect of ACI's pricing policies on the competitiveness of export industries, and the responsiveness of ACI to the requirements of its customers.

The report concluded the following.

- ACI does not appear to have taken advantage of de-declaration by increasing prices where it has market power. However, price levels compared with overseas continue to remain high and this may be constraining export potential, particularly for wine bottles (wine bottle prices are often 30 to 100 per cent higher in Australia, and ACI appears to have an import parity pricing policy).



- ACI's market power appears to be unchanged and its profitability continues at high levels. The data suggest that profit margins on wine bottles and some other containers (most notably spirits) are disproportionately high. The wine segment appears to be one of the most profitable parts of the ACI Glass business.
- Communication between ACI and its customers appears to have markedly improved overall, and there have been some real improvements made in some customer services. However, there are some market segments, such as soft drinks, where ACI's customers consider its responsiveness and value for money are poor.

The report is available for \$10 from Commission offices.