

THE ACCC AND THE MEDIA: IMPROVING THE RATINGS

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The way in which the ACCC administers the Act claimed the attention of many of those who made submissions to the Committee to a greater degree than the provisions of the Act itself.¹

Significant concerns were raised by business and others about the use of the media by the Australian Competition and Consumer Commission ('ACCC') and its impact on business both prior to and in the context of the Dawson Review ('the Review').

The Review's terms of reference specifically required the Dawson Committee ('the Committee') to address whether the competition provisions of the *Trade Practices Act (1974)* (Cth) (the 'Act') provide adequate protection for the commercial affairs and reputation of individuals and corporations, and allow businesses to readily exercise their rights and obligations consistent with certainty, transparency and accountability.²

Criticisms of ACCC media policy over the years have related to issues including both the timing and content of media releases. Submissions to the Committee called for limitations including a protocol or code dealing with the use of media by the ACCC.

Whilst the ACCC has traditionally deflected criticism of its media strategy by arguing that it is a function of its robust approach to enforcement,³ and whilst the submissions of small business and consumer groups championed the need for the

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1 Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003) 171 (the 'Dawson Review'). The Review recognised that this reflected both the ACCC's vigorous efforts to publicise and enforce the Act, and the way it had gone about the task.

2 'Terms of Reference', Dawson Review, above n 1, para 1(d), (e).

3 To my mind criticisms about 'trial by media' have been deliberately crafted and voiced with the intent of making the ACCC quiet on matters of public interest and concern. The ACCC will not be quiet on anything just because of this criticism. It has tradition, reason and its own legislative responsibilities to uphold.

Allan Fels, 'Australia's Competition Regulator and the Media' (Speech delivered at the Conseil de la Concurrence, 15th Anniversary Conference, Paris, 13 February 2002) 15. See also Allan Fels, 'Competition Policy: A Report Card for the Last 12 Years and an Agenda for the Future' (Speech delivered at the National Press Club, Canberra, 30 June 2003) 12.

ACCC to use the media for information and deterrence,⁴ other submissions to the Committee showed a different level of concern by most businesses about the nature of ACCC conduct. They suggested a need to examine the actual content of media releases used to deliver legitimate publicity outcomes.

The Dawson Committee ultimately recommended development of a media code to be followed by the ACCC. This article sets out to examine the real issues in terms of the ACCC's use of the media and to ascertain whether the proposed media code is capable of addressing them.

I THE PROBLEM

The issue of ACCC media use has been raised by a number of sources, not just by so called 'big business', for quite some time. Chairman of the ACCC at the time of the Review, Professor Allan Fels, has emphasised the importance of ACCC-media links in fulfilling ACCC functions.⁵ Whilst complaints by businesses on the receiving end of unwanted negative publicity for breaches of the Act should be expected (but will generally receive little sympathy from most within the community), not all complaints about ACCC conduct are of that nature. The likelihood of criticism, justified or not, is increased because the ACCC sees itself as a regulator whose duty it is to apply the Act 'without fear or favour'. Professor Fels has also been prepared to engage in lively debate with business on the application of the provisions of the Act.⁶

II SPECIFIC CRITICISMS

Submissions to the Committee contained a variety of complaints about the ACCC's use of the media, including that the ACCC:

- is cavalier in its use of the media at the beginning of investigations before any charges have been laid, but quite 'camera shy' when investigations lead nowhere or its charges are not sustained;⁷
- has undermined public confidence in 'big business' by provocative press statements and by other conduct despite the fact that big business is also its constituent;⁸
- presents itself as a regulator which never loses a case, and, as a result, some press releases are by content or omission arguably quite misleading;⁹

4 See, eg, submissions made by the National Federation of Independent Business (Gold Coast) Inc, Queensland Retail Traders and Shopkeepers Association and the Australian Consumers' Association: <<http://www.tpareview.treasury.gov.au/submissions.asp>> at 14 July 2003.

5 Fels, 'Australia's Competition Regulator and the Media', above n 3, 2.

6 Ibid 10.

7 Submission by Shell Australia Ltd: at 9; submission by the Australian Institute of Company Directors: at 7 <<http://www.tpareview.treasury.gov.au/submissions.asp>> at 14 July 2003.

8 Shell Australia Ltd, above n 7.

- has, on occasion, issued up to six press releases in connection with a matter prior to actually instituting proceedings;¹⁰
- has claimed power to impose penalties where this is the power of a court, and has often suggested or asserted, through its press releases, that a breach of the Act has occurred even before proceedings have been commenced;¹¹
- does not take sufficient note of the harm which adverse publicity prior to a hearing can cause to a company and its directors, for reasons including that the institution of proceedings results in a public perception of guilt;¹² and
- has allowed its officers to engage in inappropriate ‘photo opportunities’.¹³

There was little complaint in submissions about post trial media releases.

In response to similar complaints, from a variety of different business sources, to the House of Representatives Standing Committee on Economics, Finance and Public Administration during its review of the 2001–02 ACCC Annual Report, the Committee concluded that it had ‘concerns with some of the ACCC’s tactics, approach and attitudes to business, as well as the way in which the ACCC uses the media on occasion’.¹⁴

More worrisome were the comments of Finn J in 2001 in *Electricity Supply Association of Australia Ltd v Australian Competition and Consumer Commission* (‘ESAA’).¹⁵ The ESAA had challenged the ACCC’s use of media releases and other publicity in the context of heated debate between ESAA and the ACCC concerning the proper interpretation of the Act. The debate was widely reported in the press and each party publicised its opposing view. In the course of debate, Professor Fels characterised QC opinion obtained by ESAA as ‘absurd’ on national television. The ACCC threatened to commence civil and criminal proceedings against ESAA or suppliers who published opposing views.

9 Submission by the Franchise Council of Australia <<http://www.tpareview.treasury.gov.au/submissions.asp>> at 14 July 2003, 3.

10 Submission by the Business Council of Australia <<http://www.tpareview.treasury.gov.au/submissions.asp>> at 14 July 2003, 27.

11 Ibid, 40.

12 See, eg, Submission by the Institute of Company Directors, above n 7, 7.

13 Submission of Caltex Australia Limited <<http://www.tpareview.treasury.gov.au/submissions.asp>> at 14 July 2003, 9. This related to conduct during the course of raids for information on oil companies when it was alleged that ACCC officers allowed themselves to be photographed emerging from premises carrying boxes which did not contain documents taken from the premises.

14 House of Representatives Standing Committee on Economics, Finance and Public Administration, Parliament of Australia, *Competing Interests: Is There a Balance: Review of the Australian Competition and Consumer Commission Annual Report 1991–2000* (2001). In relation to complaints about the role and conduct of the ACCC, the Committee stated that

the volume of complaints is growing and many are coming from the small business sector ... What appears to be changing is the volume of criticism, its documentation, its evaluative nature and the sources are becoming more authoritative: at 4.

The Committee also commented on the apparent intolerance for well founded criticism exhibited by the ACCC: at 47.

15 (2001) ATPR ¶41-838.

In a section of the judgment headed 'Matters of Public Administration', his Honour detailed aspects of ACCC conduct and stated:

The stances so taken may constitute good public theatre. Whether they represent good public administration is another matter. There is a very real prospect that the view the ACCC has taken of Division 2 of Part V will be found to be incorrect. At the moment, as the ACCC's own counsel in this proceeding properly acknowledges, whether and if so how the implied conditions apply to electricity supply contracts is a matter for debate about which there can be respectable opinions on both sides of the argument. To describe the opinions supporting one side of the debate as 'absurd' borders on the mischievous ... The stance taken by the ACCC, in at least some of the instances in which threats were made against the ESAA and the suppliers, could quite reasonably be interpreted as simply an attempt to stifle debate. It would be censurable for so powerful and influential a public agency to take such a course.¹⁶

His Honour also stated in the body of the judgment:

I do not wish to question the use of the media made by the ACCC in publicising its views. I would merely suggest that, as the agency responsible for policing s 52 of the *Trade Practices Act*, it properly can be expected to set the example of care in its own representations to the public.¹⁷

Clearly, in this case his Honour was of the view that aspects of the ACCC's use of the media were quite inappropriate. His Honour dismissed ESAA's claims for relief and in the circumstances was unable to determine the threshold issue of which of the views of the parties on the interpretation of the Act was correct. The ACCC media release following the case noted this but made no mention of his Honour's criticisms of ACCC conduct.

III WHY DOES THE ACCC USE THE MEDIA?

Dissemination of information by the ACCC is part of its mandated functions. Under s 28 of the Act the ACCC must make available information about the exercise of its powers and functions to businesspeople, and inform the public about issues affecting consumer interests and consumer protection laws.¹⁸

The ACCC sees the media as a way of informing the public, promoting compliance, and building a general culture of compliance and support for competition law and its enforcement within the community.¹⁹

16 Ibid 43,373.

17 Ibid. Yeung suggests that his Honour '... cast doubt, not on the legality of the ACCC's conduct in the case, which was ultimately upheld, but on its ethical propriety': Karen Yeung, 'Is the Use of Informal Adverse Publicity a Legitimate Regulatory Compliance Technique?' (Paper presented at the Australian Institute of Criminology Conference, Current Issues in Regulation: Enforcement and Compliance, Melbourne, 3 September 2002) 27.

18 The price exploitation provision of the Act relating to the introduction of the Goods and Services Tax also specifically provided for the release of public notices to deter price exploitation: s 75AX.

19 Fels, 'Australia's Competition Regulator and the Media', above n 3, 9.

IV ANALYSIS OF ACCC PRACTICES

Whether the use of the media by the ACCC fulfils its legislated and aspirational roles in practice has been considered in great detail in a recent paper referred to by the Dawson Review.²⁰ The author, Dr Karen Yeung, examined the area of informal adverse publicity in a general context, concluding that whilst publicity will generally satisfy the requirements of formal legality, it may be ethically questionable.²¹ Research on the effect of informal adverse publicity on regulatory compliance was considered and found to suggest that, whilst having a punitive impact, it is less clear whether it can be shown to improve compliance.²² Whether informal adverse publicity satisfies basic constitutional values of procedural fairness (something which was the subject of submissions to the Committee in respect of the ACCC) was found to depend upon factors such as the timing and content of the publicity.²³ Media issues were examined by the author in the context of the fundamental aims of the adversarial process of justice, namely, the quest for truth or fidelity in the application of legal standards, rather than the mere resolution of disputes. The effect of the use of media ‘spin control’ was found to challenge the assumption that the increased dissemination of information heightens transparency.²⁴

The author noted that publicity prior to or during proceedings runs the risk of contempt in criminal proceedings. In respect of its impact on constitutional values, the greatest risks also arise where publicity occurs during investigations prior to final court judgment, in that it may at that stage promote a public perception of guilt where this has not yet been determined. Accurate post trial publicity poses none of these problems.

In the specific context of a review of 2001 ACCC media releases,²⁵ the author found, on the positive side, that:

- only a very small proportion of media releases concerned investigations (1.5 per cent of total releases);
- only a small proportion of media releases dealt with proceedings on foot (10 per cent of total releases);
- a very small proportion of the litigation media releases concerned criminal proceedings;
- media releases announcing the initiation of proceedings were quite cautious in what they said, generally refraining from comment and thereby avoiding the risk of prejudice to the defendant; and

20 Yeung, above n 17. The author states that the paper aims to ‘present a dispassionate analysis of the use of adverse publicity as a regulatory compliance technique’: at 3. It focuses on the use of the media by the ACCC in this context.

21 Ibid 43.

22 Ibid 19.

23 Ibid 43.

24 Ibid 35.

25 Ibid 44. This was described as a ‘partial evaluation’ as it did not analyse other forms of media publicity, nor attempt to measure the extent to which ACCC publicity contributed to a reduction in regulatory violations.

- of releases announcing final judgments, most provided an analysis of the broader implications of the decision and were intended to serve as a warning, not only to enhance compliance but also to promote the constitutional values of clarity and stability in the law.

On the negative side, the author found that:

- very few pre-trial litigation releases contained an express statement emphasising that allegations were unproven nor a warning not to assume guilt;
- of the litigation releases, in a 'large majority' of cases only the ACCC viewpoint was expressed – the views of the defendants were referred to in only 25 per cent of litigation releases, and this often amounted to little more than an acknowledgement by the defendants that the conduct engaged in had been unlawful;²⁶
- releases announcing the issue of proceedings may be regarded as one sided because they merely state the allegations against the defendant making no mention of the defendant's response; and
- the ACCC characterised itself as 'the winner' in 95 per cent of cases (including ESAA noted earlier).

The author concluded that the findings provide

strong evidence that the ACCC's media releases provide a rather one-sided view of individual cases, rather than providing an objective, factual account ... [T]he ACCC's media strategy appears to be somewhat of a double-edged sword. While its use of publicity may have enhanced its credibility as a strong and vigorous regulator with a deeply held commitment to the underlying aims of the Act ... it may have tended to undermine its credibility as an even-handed enforcer of the law which is willing to afford those at risk of being found in violation of the Act with a fair opportunity to respond to any allegations. The above findings suggest that, while the claims of 'trial by media' may have been overstated, there is clearly room for improvement.²⁷

This is in contrast to the view taken by the ACCC about its approach to media, which is that it protects individual reputation where appropriate, limits media releases to factual and accurate accounts of cases and their outcomes, and does not comment on ongoing investigations except in exceptional circumstances.²⁸ Whilst the ACCC notes in its submission to the Committee existing methods of oversight of its processes, there is no specific oversight of its media strategy.²⁹

26 Ibid 49. This was characterised as clear evidence of 'spin control' by the ACCC, rather than evenly balanced reporting.

27 Ibid 53.

28 ACCC, *Submission to the Review of the Trade Practices Act 1974* (2002) 177 <<http://www.tpareview.treasury.gov.au/submissions.asp>> at 14 July 2003.

29 Ibid 166.

V MEDIA SPIN

‘Media spin’ refers to the way in which facts and situations are presented. In *ESAA*,³⁰ Professor Fels gave evidence that a media release has to be ‘really simple’. He is also aware that

the mainstream media is not particularly interested in weighty debate about the finer points of competition policy. They relate best to stories about how ordinary citizens are affected by abuses of competition law and what the ACCC is doing to protect their interests. The media is interested in news that affects everyone.³¹

This suggests that in dealing with the media the ACCC is conscious that there is a need to try to make issues newsworthy. Professor Fel’s comments are illuminating in the context of Yeung’s comments on media spin and the ultimate opinion of the Dawson Committee and other critics on issues of content and balance.

VI WHAT OF OTHER REGULATORS?

The Australian Securities and Investments Commission (‘ASIC’) has had a written public policy statement since 1993. ASIC Policy Statement 47 entitled ‘Public Comment’ sets out when ASIC will comment publicly on investigations and enforcement actions. The underlying principles of publication are to inform the public of how ASIC is dealing with people who break the law, and to inform industry about the expected standards and the consequences of failing to meet them.

ASIC generally does not publicise investigations unless it is in the public interest to make a statement, and will normally only comment once charges have been laid or civil or administrative proceedings have begun. In a case of significant public interest, comment may be made at the conclusion of the investigation and prior to commencement of proceedings, but only to state the fact that the investigation has concluded and that appropriate enforcement action is being considered. Where ASIC has publicised the laying of charges, it will publicise the outcome including the withdrawal of charges, acquittal or successful prosecution. If a matter is appealed, ASIC will publicise the outcome of the appeal. Where ASIC is party to civil litigation or administrative proceedings, it will issue a media release on the outcome. Terms of settlement will not be confidential and their nature and that of any enforceable undertakings will be publicly announced.

The emphasis of the ASIC statement is on the timing of media releases, and the ACCC would no doubt argue that it has adhered to a similar media regime. Investigation of 2001 media releases would suggest that, in the main, it has.

The ASIC statement does not, however, address issues of content and balance. It appears to be assumed that the content will be accurate and balanced. Issues of

30 *ESAA* (2001) ATPR ¶¶41-838, 43,372.

31 Fels, ‘Australia’s Competition Regulator and the Media’, above n 3, 6.

content and balance appear to be the crux of complaints about the ACCC, confirmed by the findings set out above.

VII THE DAWSON RECOMMENDATIONS: WHAT SHOULD A CODE CONTAIN?

The Dawson Committee summarised complaints made as relating to the manner in which the ACCC:

- publicised investigations before they were concluded and before proceedings were instituted, and when no decision had been reached by a court;
- made statements that lacked balance and objectivity, sometimes by reporting a court outcome in a manner that misrepresented the court's decision; and
- linked new and unrelated investigations or prosecutions to other actions in which an adverse finding had been made against another corporation.³²

The Committee recommended the development, by a proposed restructured consultative committee, of a media code of conduct covering all formal and informal comment by ACCC representatives. The Committee accepted that the public interest is served by the ACCC disseminating information about the aims of the Act and the ACCC's activities in encouraging and enforcing compliance, including providing information about proceedings instituted.

The Committee also placed emphasis on an objective and balanced approach, which it stated was necessary to ensure fairness to individual parties, stating:

The focus of the ACCC in publicising a court judgment should not be to score points but to inform the public of the issues resolved in order to improve their understanding of the requirements of the Act. Unbalanced reporting of results will only serve to colour the message at the risk of clouding its educative and informative value.³³

Comments such as this indicate that the Committee has reached similar conclusions to ACCC critics on this issue.

As to the timing of media releases, the Committee made the following recommendations:

- *Investigations*: whilst it may be necessary for the ACCC to confirm or deny the existence of an investigation in exceptional circumstances, the ACCC should decline to comment on investigations.
- *Commencement of proceedings*: with the object of preserving procedural fairness, commentary on the commencement of court proceedings by the ACCC should only be by way of a formal media release confined to stating the facts.
- *The outcome*: reporting of the outcome of court proceedings should be accurate, balanced, and consistent with the sole objective of ensuring public understanding of the court's decision.

³² Dawson Review, above n 1, 182.

³³ Ibid 188.

The ACCC response to the recommended media code was positive, although it failed to expressly acknowledge the criticisms of balance contained in the Review. The ACCC stated:

The ACCC welcomes the committee's acknowledgment of the important and legitimate use of the media by the ACCC. For example the committee said it was appropriate and cost-effective for the ACCC to use the media to educate both business and consumers about their rights and obligations.

The Media Code based on certain principles as recommended by the committee is essentially consistent with the ACCC's normal and preferred media policy and with the principles suggested by the ACCC.³⁴

In his last speech as Chairman, Professor Fels described the impetus for and outcome of the Dawson Review in the following way:

The business community has been casting around for years to find some reasons why the public should not be informed. They have tried to throw the 'trial by media' slogan at the ACCC. When in somewhat exceptional circumstances of the case, we somewhat ill advisedly allowed the photo of staff returning from the Caltex raid to appear ... this provided them with a golden opportunity which on the whole was resisted by Dawson, with its proposed fairly mild media code of conduct to be sorted out by the ACCC ... [H]ad the ACCC engaged in trial by media over the years there would have been court reprimands. There have not been.³⁵

These comments could be said to encompass the Chairman's views on the whole media controversy.

VIII THE WAY FORWARD IN THEORY AND IN PRACTICE

The government accepted the Dawson Review's recommendations, noting the Committee's observations that the ACCC should exercise care to ensure that there is no unfairness to parties involved, and affirming that a code will assist the ACCC's relationship with business and consumers.³⁶ Even before the Committee reported, however, the Treasurer had stated that the ACCC has '... got to be sure the press is always secondary to the enforcement activity ...'³⁷

On the announcement in late May of Mr Graeme Samuel's appointment as acting Chair of the ACCC, the new incumbent made it clear that the ACCC would continue to use the media to ensure consumers knew their rights and business people their responsibilities, but added that he would be cautious in disseminating information. He stated that the ACCC would '... operate in much the same way that Allan Fels had it operating', although he admitted 'the style

34 ACCC, 'Dawson Report – Preliminary Response: Criminal Sanctions Major Step Forward for Competition Policy' (Press Release, 16 April 2003).

35 Fels, 'Competition Policy', above n 3, 12.

36 Commonwealth, 'Commonwealth Government Response to the Review of the Competition Provisions of the *Trade Practices Act*' 16 April 2003 <http://www.treasurer.gov.au/tsr/content/publications/TPA_Response.asp> at 14 July 2003.

37 Laura Tingle and Katharine Murphy, 'Treasurer Warns Fels on Publicity', *Australian Financial Review*, (Sydney) 3 July 2002, 1, 4.

will change. It has to change ... We're different personalities'.³⁸ Mr Samuel said he thought it was important the media was cautious not to trample on the civil and legal rights of businesses.³⁹ Statements made since that time have reinforced this approach.

The proposed media code should provide the new incumbent with assistance in formulating a different focus for use of the media by the ACCC.

38 AAP, 'Watchdog style "to change"' [www.news.com.au <http://finance.news.com.au/common/story_page/0,4057,6516977%255E462,00.html>](http://finance.news.com.au/common/story_page/0,4057,6516977%255E462,00.html) at 30 May 2003.

39 Ibid.