

Health sector liability under the Trade Practices Act

PATTY KAMVOUNIAS

Patty Kamvounias is a Lecturer in Commercial Law in the Department of Accounting at the University of Sydney.

Abstract

Following the implementation of the national competition policy and the consequent exposure of unincorporated businesses to trade practices regulation, the health sector has faced increasing exposure to fair trading and competition issues. This article examines the rights and the obligations of health sector participants under the consumer protection and the restrictive trade practices provisions of the Trade Practices Act 1974 (Cwlth). The article outlines the relevant provisions and identifies examples of conduct that has breached the Act or that has the potential to breach the Act. The author notes that the Act has been applied to the health sector in the same way as it has been applied to all other sectors of the economy.

Introduction

Health sector participants are already familiar with their responsibilities under the common law of tort, in particular, the tort of negligence (Cahill 1992). However, legal risks and responsibilities also exist under legislation and must also always be considered. This article examines the rights and obligations of health sector participants under the *Trade Practices Act 1974* (Cwlth) (the Act).

The Act was passed by the Commonwealth Parliament so its application is subject to the limitations of the Commonwealth Constitution. It is because of these constitutional limitations that the substantive provisions in the Act are directed at the conduct of 'corporations' (see section 4(1) of the Act for the definition of 'corporation'). Individuals and unincorporated businesses are generally not within the reach of the Act unless they can be brought within a head of legislative power other than the corporations power. Persons, not being corporations, may be subject to the Act if they are engaged in interstate or overseas trade and commerce, in conduct between territories or within a territory,

in the supply of goods or services to the Commonwealth, or in the use of postal telegraphic or telephonic services or a radio or television broadcast (see section 6 of the Act).

Part V of the Act is headed 'Consumer Protection' and contains a range of provisions mainly dealing with unfair practices and conditions and warranties in consumer transactions. Each State has enacted its own fair trading legislation that 'mirrors' the consumer protection provisions in Part V of the Act but applies them to 'persons' rather than to 'corporations'. Constitutional limitations in the application of Part V of the Act have therefore not been significant. Several cases over the last few years have highlighted the potential liability of health sector participants under this Part of the Act.

However, the Act also aims to protect consumers by promoting competition. Part IV of the Act is headed 'Restrictive Trade Practices' and prohibits certain anti-competitive conduct. Until recently, the restrictive trade practices provisions generally applied only to the conduct of corporations and there was no equivalent State legislation imposing liability on persons. If private hospitals and health funds engaged in anti-competitive conduct, they were potentially liable to the penalties and remedies provided by the Act. However, other health sector participants, in particular, individual health professionals, partnerships and unincorporated professional associations, were not subject to the competition provisions in the Act because they were not corporations. At least that was the case until major legislative reforms brought all businesses within the reach of the law. All health sector participants must now also be aware of their obligations and their potential liability under Part IV of the Act as they now face increased exposure to competition issues.

National competition policy

In 1992 the Federal Government established an independent committee of inquiry to report on Australia's competition policy. The committee, chaired by Professor Fred Hilmer, tabled its final report in August 1993. It recommended that a national competition policy be implemented in which the Commonwealth, the States and the Territories cooperated to ensure that the competitive conduct rules in the Act applied uniformly to all businesses regardless of their form of ownership. The recommendations included extending the application of the competitive conduct rules to businesses that were previously excluded from the application of the Act due to constitutional limitations, in particular, to government-owned businesses and to unincorporated businesses engaged solely in intra-state trade and commerce.

Following the release of the Hilmer report, negotiations for the implementation of the recommendations resulted in the Competition Policy Reform package, consisting of the amending legislation and three intergovernmental agreements which set out the way in which the reforms were to be implemented. The three agreements, the Conduct Code, the Competition Principles Agreement and the Agreement to Implement the National Competition Policy and Related Reforms, were signed on 11 April 1995. The amending legislation, the *Competition Policy Reform Act 1995* (Cwlth) (the Reform Act), introduced the national competition policy in three stages between 17 August 1995 and 21 July 1996. The Reform Act made extensive amendments to the restrictive trade practices provisions in Part IV of the Act. It also provided the mechanism for the application of Part IV to unincorporated businesses by creating a form of text known as the 'Competition Code' as a schedule to the Act. This Code contains the rules set out in Part IV of the Act modified to refer to 'persons' rather than to 'corporations'. The text of the Code was made operative by State and Territory laws that applied the Code within each jurisdiction as from 21 July 1996. The Reform Act, together with the complementary State and Territory application legislation, thereby extended the restrictive trade practices provisions of Part IV of the Act to all businesses in Australia, including corporations as well as individuals, partnerships and unincorporated associations. As a result, sectors of the economy such as the health sector, previously outside the scope of the provisions in Part IV of the Act, became subject to those provisions as from 21 July 1996. It should be remembered that each State and Territory already had fair trading legislation that substantially reproduced the consumer protection provisions of the Act.

Australian Competition and Consumer Commission Guide for the Health Sector

The Australian Competition and Consumer Commission (the Commission) is the federal government body responsible for administering the Act. In November 1995 the Commission published *A Guide to the Trade Practices Act for the Health Sector* (the Guide) (ACCC 1995). The Guide was released in January 1996 and is available from all Commission offices in Australia and on the Commission's website (<http://www.accc.gov.au>). It aims to assist health sector participants covered by Part IV of the Act for the first time to identify and better understand their obligations and rights under the Act.

The Guide canvasses many issues, including those that are likely to raise fair trading and competition issues for individual health professionals, private

hospitals, health funds and professional associations. These issues are discussed below with reference to examples given in the Guide and to decided cases.

After the release of the Guide, the Commission embarked on an educational campaign specifically designed for the health sector. The campaign included contacting health associations to inform them of the need for their articles of conduct by-laws and so on to be reviewed to ensure compliance with the Act, and presenting a series of workshops across Australia to address health sector issues under the Act (ACCC 1996, p 1).

Liability under Part V of the Act: Consumer protection

As noted above, the substantive provisions in the Act are directed at the conduct of 'corporations'. One of the issues the Federal Court of Australia (the Court) had to consider in *E v Australian Red Cross Society & Ors* (1992) ATPR 41-156 was whether the Royal Prince Alfred Hospital was a 'trading corporation' within the meaning of section 4 of the Act. The Court found that, although a hospital's predominant activities were the provision of medical and surgical care to patients, there was nothing in the intrinsic nature of those activities to disqualify a hospital as a trading corporation.

Unfair practices

Division 1 of Part V of the Act deals with 'Unfair Practices'. The most important section in Division 1 is section 52, which is a general prohibition of misleading and deceptive conduct. Other sections deal with specific prohibitions such as the prohibition in section 53 of making false or misleading representations concerning, for example, the standard quality or price of goods and services or the need for goods and services. The provisions in Part V of the Act may be enforced by way of injunction (section 80), corrective advertising (section 80A), damages (section 82), and other orders (section 87). Furthermore, fines of up to \$200 000 per breach for corporations and up to \$40 000 per breach for individuals may also be imposed (section 79), with the exception that fines cannot be imposed for a breach of section 52.

All health sector participants need to take care when making any statements or claims or representations to ensure that such statements or representations are neither false nor misleading or deceptive. For example, individual practitioners need to take care when making representations about matters such as professional qualifications or experience or about fees charged for services. Private hospitals also need to take care when making statements to consumers, for example, about comparisons with other hospitals or about arrangements with

particular health funds, and when making representations to health funds about matters such as the standard or timeliness of services that can be supplied or the availability of specialist medical equipment.

Health funds need to give particular attention to their advertising and marketing campaigns to ensure that the representations they make are accurate. There should be no misleading statements about, for example, '100 per cent cover' when the health insurance covers only accommodation costs, or about 'immediate cover' when there is a waiting period for many conditions. In response to complaints about misleading promotional claims made by some health funds, the Commission and the Private Health Insurance Complaints Commission jointly published a guide to advertising for the health insurance industry. This guide was launched in April 1998 and is also available from all Commission offices and on the Commission's website. It is designed to help the health insurance industry develop strategies to improve compliance with the Act and includes sections on matters such as obligations in relation to the correctness and currency of promotional claims, the use of qualifications and limitations, the use of industry-specific terms, comparative advertising and other issues such as changes to benefits, excesses, tax benefits and unexpected exclusions.

Comparative advertising is a specific area of concern that has arisen in some recent cases. In *Australian Unity Friendly Society & Anor v Health Insurance Commission* (1995) ATPR 41-392, action was taken under the Act in respect of an extensive comparative advertising campaign by Medibank Private in newspapers, notices on trams, taxis, billboards and brochures. The advertisements compared benefits available under the policies of the three main competitors in the health insurance market in Victoria and stated that the Medibank Private rate was 'the best 100 per cent hospital cover price' but failed to state that the advertised rate was subject to certain conditions. The Court noted that there was a certain degree of latitude allowed in such cases and that there was always room for 'puffing' or expressions of belief and claims that the person making the advertisement believed that its products were better. However, the Court also noted the risks inherent in this type of advertisement and the importance of accurate comparisons. The Court found that the advertisement here was misleading or deceptive because the rate stated was wrong in the sense that it applied only if conditions were complied with which were not specified. The Court accepted the undertaking given by Medibank Private to modify its advertisements by inserting appropriate words in a clear visible text to warn that the rates mentioned were subject to specific conditions.

In *St Luke's Health Insurance v Medical Benefits Fund of Australia Ltd* (1995) ATPR 41-428, the Court had to consider another application with respect to

alleged misleading and deceptive conduct in a health fund's advertising campaign. The applicant alleged that certain advertisements promoting the respondent's 'Extra Essential' insurance policy were in breach of the Act because they suggested that the policyholders would pay no excess and that they would be totally indemnified for costs incurred relating to certain services when this was not the case. The Court found that there were in fact marked limitations on the cover given to the policyholder and money had to be paid by the policyholder that could not be recovered under the insurance policy. The Court therefore found that the advertisements were misleading and deceptive as a person seeing or hearing them would have thought that no excess was payable under the policy and there was nothing to be paid by the policyholder on costs incurred for the specific services. Any explanation of the terms of the policy that the respondent subsequently provided to potential policyholders did not overcome the misleading or deceptive conduct that occurred when a person saw or heard the advertisement. The Court therefore granted an injunction restraining use of the advertisements. The claim for corrective advertising was refused on the ground that the time had passed where corrective advertising would be useful.

Conditions and warranties in consumer transactions

Division 2 of Part V of the Act implies certain non-excludable terms into consumer contracts for the supply of goods or services. The terms implied by these provisions include, for example, a condition that the goods are of merchantable quality (section 71(1)), a condition that goods are reasonably fit for the purpose for which they are being acquired (section 71(2)) and a warranty that services will be rendered with due care and skill (section 74). Loss or damage suffered from a breach of an implied condition or warranty may be recovered by taking legal action for breach of contract.

Health funds therefore need to take care when selling policies to ensure that they sell policies that are appropriate. Where, for example, a consumer expresses a particular need for coverage for physiotherapy services, the policy sold must meet that need otherwise there is a risk of a breach of the implied condition as to fitness for purpose.

In *E v Australian Red Cross Society & Ors* (1992) ATPR 41-156, the appellant was given a blood transfusion in the course of an operation and later sued the respondents (the Australian Red Cross Society (New South Wales Division), the Australian Red Cross Society and the Royal Prince Alfred Hospital) when it was discovered that the blood was HIV-infected and he contracted AIDS. The appellant alleged, *inter alia*, breach of the terms relating to merchantable quality

and fitness for purpose implied by the Act. One of the questions to be decided on this aspect of the case was whether the supply of blood plasma to the appellant by the hospital amounted to a supply of goods within section 71 of the Act. The Court held that section 71 did not apply because there was no relevant contract for the supply of goods. The essence of the contract between the appellant and the hospital was one for services, namely, the provision of hospital, medical and nursing services for the purpose of treating the appellant for his medical problems and restoring him to health. To the extent that goods were provided to him they were provided as an incident to the contract for the provision of services. As there was a contract between the appellant and the hospital for the supply of services, the application of section 74 of the Act also became an issue. However, the Court again found against the appellant on this issue because the services provided pursuant to the contract did not fall within the statutory definition of services as it was at the relevant time.

Liability under Part IV of the Act: Restrictive Trade Practices

The provisions in Part IV of the Act prohibit a number of anti-competitive practices that are generally based either on arrangements between the market participants or on the exercise of market power. The practices prohibited are anti-competitive agreements and exclusionary provisions (sections 45-45D); misuse of market power (section 46); exclusive dealing (section 47); resale price maintenance (section 48); and acquisitions of shares or assets which would have the effect or likely effect of substantially lessening competition in a market (section 50). The provisions in Part IV of the Act may be enforced by way of an order for an injunction (section 80), divestiture (section 81), damages (section 82) and other court orders (section 87). Pecuniary penalties of up to \$10 million per breach for corporations and up to \$500 000 per breach for other persons may also be imposed (section 76). Only the Commission can seek pecuniary penalties but other persons through private action may seek any of the other remedies.

All unincorporated businesses faced liability for the various remedies from 21 July 1996 but were not exposed to liability for pecuniary penalties until 21 July 1997. This delay was to allow businesses whose conduct had become subject to Part IV of the Act for the first time an additional 12 months to inform themselves of their obligations and to change potentially anti-competitive practices.

Although the Act prohibits certain anti-competitive conduct and provides a wide range of relief in the event of a contravention, another fundamental feature of the Act is authorisation. Section 88 empowers the Commission to authorise conduct that would otherwise be prohibited under the Act. Authorisation may

be granted for all practices prohibited in Part IV of the Act, except for misuse of market power. For authorisation to be granted, the Commission is required to apply a public benefit test to the conduct and must be satisfied that the conduct in question will result in a benefit to the public that outweighs any anti-competitive detriment. There is no definition in the Act of what amounts to a public benefit. Public benefits recognised in previous decisions include fostering business efficacy, industry rationalisation, expansion of employment, prevention of unemployment, industrial harmony, improvement in the quality and safety of goods and services, expansion of consumer choice, and supply of better information to consumers and businesses to allow informed choices in their dealings (Hurley 1995, p 60).

Anti-competitive agreements

Section 45 of the Act prohibits a range of contracts arrangements or understandings between competitors. Any contracts arrangements or understandings with colleagues or competitors that have the purpose or effect or likely effect of substantially lessening competition in a market are at risk under section 45(2) of the Act. The Guide gives the following examples of market sharing arrangements involving all market participants as an indication of how individual practitioners, private hospitals and health funds risk contravention of section 45(2).

All general practitioners in an area collectively agree to refer patients requiring paediatric care to a particular specialist. The purpose or effect of this agreement may be to prevent other specialists from competing in the market for paediatric care (ACCC 1995, p 14).

All hospitals decide to divide the market to ensure that each hospital adheres to a separate geographic area and does not enter into supply arrangements with health funds for services outside its agreed part of the market (ACCC 1995, p 16).

All health funds in a market collectively agree which health funds will acquire services from hospitals in that market (ACCC 1995, p 19).

Professional associations also need to be concerned about potentially anti-competitive conduct in the rules they apply to their members. The articles of association and by-laws of a professional association are contracts between the members and thus contracts between persons as provided in the Code. The Act already applied to a number of associations before the Code became applicable under State legislation because those associations were incorporated. In 1990, for example, The Private Hospitals Association of New South Wales sought and was

granted authorisation for certain clauses in its articles of association that were considered to be incompatible with the Act (The Private Hospitals Association of NSW Inc (1990) ATPR (Com.) 50-097).

The Commission indicated in the Guide that competition issues under the Act are likely to be raised by some of the restrictions that professional associations place on their members. Examples of such restrictions include restrictions on advertising (in particular, restrictions on advertising fees and discounts); restrictions on associations with other professionals; restrictions on the right of a professional to undertake business activities in addition to their core professional service; restrictions on the right of members to participate in public forums where the purpose of the restriction is to prevent a professional from gaining a public profile or imparting knowledge to others; restrictions on membership of an association where the purpose of those restrictions is to substantially lessen competition; and disciplinary action by an association if its purpose is to prevent the member engaging in competitive conduct such as discounting fees (ACCC 1995, pp 23–4).

Price fixing

Contracts arrangement or understandings between competitors that have the purpose or effect or likely effect of fixing, controlling or maintaining prices are deemed by section 45A to substantially lessen competition. Such arrangements are therefore *per se* breaches of section 45(2) and so it is not necessary to assess whether there has been a substantial lessening of competition in the relevant market.

Price competition is one of the most important features of a competitive market. Any arrangements therefore between colleagues or competitors relating to price are at risk under the Act. The least risk option for competing health funds, private hospitals and practitioners is to act individually and avoid any collusion about price.

Health funds that, for example, determine premiums for health insurance after discussions with other health funds risk breaching the price fixing provisions of the Act. Similarly, private hospitals that enter into arrangements with other private hospitals about the price for their services are also likely to breach the Act. Furthermore, negotiations between health funds and private hospitals should also be conducted on an individual basis. If a group of competing private hospitals, for example, reaches an agreement about the fees that they will charge health funds for particular medical procedures, it would be considered a price fixing agreement in breach of the Act (ACCC 1995, p 15).

Individual practitioners should also individually determine the fees they charge for their services and individually negotiate with hospitals and health funds over fees because if they enter arrangements about fees with colleagues they may breach the Act.

Professional associations also risk contravening the Act if they get involved in setting fees for the services of their members. They should also ensure that any schedules of fees issued to members are recommended only and that there is no pressure on members to adhere to the recommendation. The Commission is of the view that a recommended fee scale that is adhered to by members of an association is a price fixing agreement in breach of the Act. Conversely, a genuine recommended fee scale that is generally not adhered to by members, such as the Australian Medical Association (the AMA) list of medical services and fees, may not breach the Act (ACCC 1995, p 22).

Since the exposure of the health sector to Part IV of the Act, the price fixing provisions have been in issue on a number of occasions. In October 1997 the Commission commenced legal proceedings against five Sydney anaesthetists and the Australian Society of Anaesthetists alleging price fixing in relation to after-hours anaesthetic services at three Sydney metropolitan area hospitals. The Commission has alleged that the conduct arose out of a series of meetings at the three private hospitals between November 1995 and April 1996 (ACCC 1997, p 24). At the time of writing, the matter was still before the Court.

Price fixing in the health sector also came before the Commission in a recent application for authorisation. On 31 July 1998 the Commission granted authorisation to the South Australian and the Federal AMA and their members to negotiate and to give effect to a common service agreement for the remuneration of visiting medical officers practising in South Australian rural public hospitals (Australian Medical Association Limited & Anor (1998) ATPR (Com.) 50-264). The Commission considered that the service agreement had anti-competitive effects because it acted as a price floor for all hospitals in South Australia and so all hospitals had to pay the same rate for medical services whether or not they were in regions having difficulty attracting doctors. Furthermore, although negotiations with doctors over fees may have resulted in fee packages over and above that provided by the agreement, negotiations never resulted in a discount to the hospitals. However, the Commission agreed that these anti-competitive effects were outweighed by the public benefits associated with the provision of medical services to residents of rural South Australia. The Commission therefore granted authorisation until 30 June 1999, at which time the current fee agreements expire. The Commission did not grant authorisation for the making of new agreements because it was not convinced that this was the only way to produce these public benefits.

It is important to note that the Commission recognised that the AMA and the South Australian Health Commission had long-established collective negotiation techniques and that doctors carrying on business without incorporating were not subject to the Act until July 1996. The Commission therefore also acknowledged some public benefit in allowing the parties some time to phase in a less regulated system for the remuneration of medical officers.

Price fixing – Exceptions to the deeming provision

There are a number of exceptions to the deeming provision in section 45A of the Act. Conduct that comes within one of these exceptions is not deemed to substantially lessen competition in the market so it is not prohibited unless it fails the substantial lessening of competition test in section 45. The exceptions include some joint venture pricing (section 45(A)(2)) and pricing of goods and services to be collectively acquired by parties to the agreement and the joint advertising of price for the re-supply of the goods or services so acquired (section 45A(4)).

A group of private hospitals that enters an agreement to collectively acquire the services of health professionals may not be deemed to be price fixing because of the exemption in section 45A(4) of the Act. However, the Act still requires an assessment as to whether such an agreement has the purpose or effect of substantially lessening competition in the market. A group of private hospitals that has a combined significant share of the market therefore risks breach of the Act in these circumstances (ACCC 1995, p 16). Similarly, a group of health funds with a combined significant share of the market also risks breach of the Act if it attempts to collectively acquire services from hospitals and/or health professionals (ACCC 1995, p 18).

Exclusionary provisions

Also prohibited by section 45(2) of the Act are contracts arrangements or understandings that contain an exclusionary provision as defined in section 4D. These generally are arrangements between competitors that exclude or limit dealings with a particular supplier or customer. Such arrangements are not subject to the usual competition test but are prohibited outright. An example of conduct in the health sector that may breach this provision is an agreement between all specialists in an area not to sign contracts with hospitals in that area (ACCC 1995, p 14).

Misuse of market power

Section 46 of the Act prohibits misuse of market power in certain circumstances. A corporation with a substantial degree of power in a market is prohibited from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into that or any market, or deterring or preventing a person from engaging in competitive conduct in that or any market. The section prohibits the misuse of a substantial degree of market power but it does not prohibit the mere possession of that power or the mere use of that power as long as it is not for a proscribed anti-competitive purpose.

Health sector participants with a substantial degree of market power may contravene the Act if they use that market power for anti-competitive purposes. The Guide gives the following example of circumstances in which a private hospital with market power risks breach of section 46.

A hospital has the only facilities in a region necessary to enable a particular medical procedure to be carried out. It is uneconomic for anybody to reproduce those facilities. The hospital provides the medical procedures using its own in-house medical practitioners and refuses to make its facilities available to other medical practitioners who want to use them to provide medical services in competition with the hospital (ACCC 1995, p 17).

This conduct does not automatically breach section 46 of the Act. Contravention of the section depends on the purpose of the hospital's refusal to make its facilities available. If the hospital refuses to make its facilities available because it has no spare capacity then the refusal would be a legitimate commercial decision. However if the refusal is to hinder or prevent other medical practitioners from competing with the hospital's preferred medical practitioners, then such a refusal may breach the Act.

Exclusive dealing

Section 47 of the Act prohibits the practice of exclusive dealing which basically involves suppliers imposing restrictions on their customers' freedom to choose with whom, or in what, to deal. It is a breach of section 47 to supply goods or services on condition that the purchaser will not acquire or will limit the acquisition of goods or services from a competitor of the supplier if the effect of the arrangement is to substantially lessen competition in the market. A health fund that enters a contract for medical services with a private hospital on the condition that the hospital use the services of a laboratory owned by the fund risks breaching section 47 if this arrangement substantially lessens competition in the market (ACCC 1995, p 19).

Third line forcing is another type of exclusive dealing conduct that is prohibited under section 47. It is third line forcing for suppliers to supply or to withhold the supply of goods or services on the condition that the purchaser will acquire goods or services from a third party. A supplier of medical equipment, for example, is third line forcing if it demands as a condition of supply that a hospital purchases other products from a third party. Third line forcing, like price fixing, is a *per se* breach of the Act and so it is not necessary to also establish a substantial lessening of competition in the market for the Act to be contravened.

It is important to recall that authorisation on public benefits grounds is available for all exclusive dealing conduct, including third line forcing. Furthermore, the Act also makes for provision for the notification of such conduct. Section 93 sets out the notification procedure which extends statutory protection from the time the application for notification is lodged to exclusive dealing conduct that might otherwise breach the Act.

At the time of writing there were a number of notifications under consideration by the Commission involving health sector participants and third line forcing. The AMA has lodged one such notification in relation to the requirement that medical practitioners joining the AMA (federal) also join the AMA (State/Territory) branch (ACCC 1998, p 44).

In *Australian Competition and Consumer Commission v Health Partners Incorporated* (1998) ATPR 41-604, the Court found that a private health insurer in South Australia had engaged in third line forcing in breach of section 47 when it refused to supply services to a pharmacy because the pharmacy was no longer a member of a particular franchise. Pharmacies affiliated with Health Partners Incorporated could offer its members retail discounts and prescription benefits. However, the Court found that Health Partners cancelled an agreement it had with an Adelaide pharmacy when the pharmacy left the Chem-mart pharmacy chain for its own commercial reasons, namely, that it did not think that the benefits of being a Chem-mart pharmacy warranted the licensing cost. Although the Court did not grant the injunction sought by the Commission, the Court found that the conduct of Health Partners was serious. The Court also held that it was in the public interest that the conduct be marked with the Court's disapproval because a large insurer had placed a small business at a disadvantage merely because of a commercial decision to stop doing business with a particular buying group.

Resale price maintenance

Section 48 of the Act prohibits the practice of resale price maintenance, which essentially is the practice of suppliers specifying minimum prices to resellers. If a pharmaceutical supplier, for example, specifies as a condition of supply, a minimum price below which goods cannot be sold or advertised, the supplier will contravene the section. Resale price maintenance is another *per se* breach of the Act and so there is no need to establish a substantial lessening of competition in the market to establish a contravention.

Mergers and acquisitions

Section 50 of the Act prohibits mergers and acquisitions that have the effect or likely effect of substantially lessening competition in a market.

In May 1997 the Commission was notified of an acquisition by SGS Pathology Qld Pty Ltd of a number of providers of pathology services to private patients in Queensland and northern New South Wales. The Commission found that the Queensland pathology market was highly concentrated, with a combined market share of the four largest participants of more than 90%. However, the applicant did not own any pathology businesses in Queensland or northern New South Wales before the acquisition and so the acquisition did not change the level of market concentration. The Commission therefore decided that the acquisition was unlikely to substantially lessen competition in the market and did not oppose it (ACCC 1997, p 63).

Conclusion

The main aim of the Act is to protect both consumers and businesses from unfair market practices and unlawful anti-competitive conduct. Part IV of the Act was not designed to harm business but to promote competition. Certain restrictive trade practices are prohibited by the Act only if they have the purpose or effect of lessening competition in the relevant market. Other restrictive trade practices are prohibited outright and, in both cases, as discussed above, the potential remedies and penalties for breaches of the Act are substantial. However, these remedies and penalties will not apply if conduct that would otherwise breach the Act has been authorised by the Commission on the ground that the conduct results in public benefits that outweigh any anti-competitive effects.

Until the national competition policy reforms, the health sector had little or no exposure to the restrictive trade practices provisions in the Act. The Commission therefore began an education campaign to assist health sector participants identify their rights and responsibilities under the Act. That campaign continues.

The health sector has become one of the major enforcement priorities of the Commission because of its size and importance. In the relatively short period of time since the national competition policy reforms were introduced, the Commission has had to deal with a number of matters involving health sector participants and allegations of contraventions of Part IV of the Act.

In a recent speech to the Australian College of Health Services Executives, Professor Fels, Chairman of the Commission, stressed that the health sector really had to learn to live with the Act. Clearly, the view of the Commission is that the Act applies to the health sector in the same way as it applies to businesses in every other sector of the Australian economy. This view is evidenced by the recent involvement of the Commission, both in applications for authorisation and in legal proceedings seeking remedies for breaches of the Act.

However, this view ignores the question of whether the health sector is in fact like every other sector in the economy. Many of the activities of health sector participants involve important questions of national public interest, and only some of the activities in the health sector can be regarded as commercial activities. Health issues and activities are very complex and so there may be a need for a different application of the law to health. For example, it may be appropriate for the Act to apply to private health insurers in exactly the same way as it applies to other insurers because their activities are essentially commercial activities. However, it may not be appropriate for the Act to apply in the same way to the provision of medical services by private individuals because, in many cases, this is not a commercial activity but a public service. Currently, these concerns may be raised in authorisation applications but perhaps it may be better to exclude certain sections of the sector from the application of the Act to avoid the time and costs involved in an authorisation application. A discussion of these policy issues is beyond the scope of this paper.

It is still early days in the application of the Act to the health sector. Even so, it is clear that knowledge of the Act is essential for all individual health professionals, private hospitals, health funds and professional associations so that the risks of contravening the Act are kept to a minimum and the benefits of the competition reforms are maximised.

References

Australian Competition and Consumer Commission (ACCC) 1995, *A Guide to the Trade Practices Act for the Health Sector*, Australian Government Publishing Service, Canberra.

Australian Competition and Consumer Commission (ACCC) 1996, 'Health Sector Workshops', *ACCC Journal*, no 4.

Australian Competition and Consumer Commission (ACCC) 1997, *ACCC Journal*, no 11.

Australian Competition and Consumer Commission (ACCC) 1998, *ACCC Journal*, no 15.

Cahill W 1992, 'Hospital professional liability', *Australian Health Review*, vol 15, no 4, pp 449–59.

Hurley A. 1995, *Restrictive Trade Practices Commentary and Materials*, 2nd edn, The Law Book Company Limited, Sydney.