



The Australian Competition and Consumer Commission and Video Ezy (A)

By January 2000, recent price rises at national retailer Video Ezy had prompted public complaints that they were illegally pre-empting the July 2000 introduction of the 10 percent Goods and Services Tax (GST). Charged with enforcing GST price exploitation legislation by the Federal Government, the Australian Competition and Consumer Commission (ACCC) launched an investigation. The Commission first sought to negotiate with Video Ezy regarding an appropriate remedy, but talks broke down at the end of April, just over two months before the new tax was due to be introduced. As this was the first case of its kind to confront the ACCC, chairman Allan Fels had to decide the Commission's next move. Complicating matters was ambiguous legislation and an ongoing internal debate about which law-enforcement approach to take.

The ACCC

Established in 1995, the ACCC was an independent statutory authority which administered the Trade Practices Act 1974 (TPA) and the Prices Surveillance Act 1983 (PSA). Formed by a merger of the Prices Surveillance Authority and the Trade Practices Commission, its primary objective was to promote competition and free trade for the benefit of consumers, business and the community in general. It was also designed to provide both formal and informal advice to members of Government and educate the public about their rights as consumers.

The ACCC was the sole national agency dealing with competition and the only body responsible for enforcing the Trade Practices Act. With regard to fair trading and

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consumer protection, the ACCC's role complemented that of the state and territory consumer affairs agencies, which enforced mirror legislation in their own jurisdictions.¹

The TPA regulated commercial conduct between wholesalers, suppliers, retailers and competitors (including public utilities) covering matters such as product labelling, product safety, misleading advertising and price monitoring. Meanwhile, the PSA enabled the ACCC (at the Government's behest) to: vet proposed price rises within businesses; hold inquiries into pricing practices; and monitor prices, costs and profits within a given industry. However, in practice, the PSA was rarely used.

In terms of enforcement, the ACCC was empowered to investigate public and business complaints relating to contraventions of the law, primarily the TPA. Where companies appeared to be in breach, the Commission had a variety of options. Normally actions began with an *informal notice* advising the business that they may have infringed provisions of the TPA. The notice would point out their obligations under the law and seek rectification of the situation.

In situations where an inadequate response or no response was forthcoming, the ACCC could then issue a *formal notice*. This would again outline the appropriate remedy and advise traders of the consequences of non-compliance. Failing that, the Commission could enter into *negotiations* with the trader, possibly resulting in a court-enforceable undertaking. If such an outcome was not achieved, the ACCC could initiate *legal action*. Legal action was particularly favoured when matters were of national import or had the potential to deter similar infringements in the future (see *Exhibit 1*). When matters reached this stage, they were heard before the Federal Court. Depending on the nature of the breach, the ACCC had the power to seek penalties or demand remedies including: individual and company fines, injunctions, refunds and corrective advertising.

The ACCC's main offices were based in Canberra and Melbourne, with smaller regional offices located in the remaining states and territories. In addition to the Chairman, Allan Fels, there were seven full-time commissioners who provided support in their fields of expertise. Due to the variety of different areas the ACCC presided over, the Commission had a number of separate divisions and branches including: mergers and asset sales, enforcement and coordination, compliance, and corporate management. There were also several industry-specific groups such as gas, electricity and telecommunications.

Chairman since the Commission's inception, Fels led highly successful campaigns against anti-competitive and unfair business practices, taking on many large corporations in the process. He was no stranger to standoffs with business, coming to the new regulatory role from the Trade Practices Commission (TPC) which had now been subsumed into the ACCC. Formerly chairman of the TPC and the Prices Surveillance Authority before that, Fels displayed his commitment to enforcement early on. When he became chairman of the TPC, the Commission would typically launch four

¹ The Australian Competition and Consumer Commission, *The Australian Competition and Consumer Commission: Role and Functions* (Canberra, ACCC Publishing Unit, 2002) at URL: <http://www.accc.gov.au/content/item.phtml?itemId=303168&nodeId=file3f25c1cc41bab&fn=ACCC%20Role%20and%20Functions.pdf>, 1.

or five cases per year.² Over the years, as the TPC morphed into the ACCC, the number soon rose to approximately 40–50 cases per annum.

Some of the prominent targets that came under fire included banks, unions, record companies and airlines. One case involved cracking a freight cartel operated by three major Australian companies, another concerned import restrictions surrounding CDs. The Commission's track record in the courts was formidable; they won over 90 percent of the cases launched.

As the number of successful court actions against companies kept climbing, so did public confidence in the agency. And the media-friendly Fels was characterised by consumer groups as almost a "Robin Hood" figure, unafraid of standing up to big business and exposing their practices to public scrutiny. However, despite its achievements, the Commission had been consistently under-funded from the very beginning. This impinged on the ACCC's capacity to execute its duties and the ability of employees to communicate effectively. Most pressing was the need for a technological upgrade.

The GST

After its November 1998 re-election, the Howard Government was determined to introduce the new tax on 1 July 2000 with a minimum of fuss. On that date, a 10 percent surcharge would be added to the cost of most goods and services in Australia, replacing pre-existing taxes in some cases. Even before the victory, as they campaigned on a GST platform, the Government took pains to ensure that the tax would be successfully introduced. When the Liberal Party under John Howard won office in 1996, there was a history of failed attempts to institute a GST behind them. The inability of former Liberal leader John Hewson to predict the new price of a birthday cake under a GST during an interview was widely regarded as having cost him the 1993 election. More worrying was the electoral fallout on the Canadian Government after their seven percent GST was introduced.³ The Government wanted to avoid a similar scenario, as Fels recalled:

"The Government were deeply concerned about [the GST's] possible effect on their survival, the politics of introducing a new tax. In Canada, the government had lost an election over the introduction of just a small GST. One of the biggest concerns of all was that it would put up prices and that the Government would be very vulnerable to (a) negative feelings about prices going up and (b) that there would be accusations of pricing rip-offs. That was why they wanted stringent safeguards there."

And they wanted their main safeguard to be the ACCC. Treasurer Peter Costello approached Fels prior to the 1998 election with the Government's plan: the Commission would oversee the introduction of the GST. The Government felt that the Australian Taxation Office (the Tax Office) would be overburdened to handle the task and that leaving price changes up to market forces was too risky politically. There was also the feeling that consumers would not see the Tax Office as being as approachable as the ACCC. Costello explained that the Commission's strong "enforcement reputation" and

² Brenchley, F., (2003) *Allan Fels: A Portrait of Power*. Milton, Queensland, John Wiley & Sons Australia Ltd, 117.

³ Canadian Prime Minister Brian Mulroney resigned after suffering a sharp decline in popularity post-GST. His successor Kim Campbell suffered a crushing defeat in the October 1993 election after which the Progressive-Conservative Party retained only two seats in parliament.

public credibility made the ACCC the ideal body for the job. It obviated the need for the creation of a new agency with no track record and ensured the Government was seen to be taking compliance seriously.

Fels recognised the challenge: “In some ways it’s a mind-boggling task to check up on approximately one billion price changes in detail and to have the job thrust upon you at short notice.” These billion prices would change under the new system and change differentially. Although the GST was set at ten percent, prices could rise or fall depending on the pre-existing wholesale and state taxes to be replaced by the new tax. Complicating matters were numerous exceptions; certain products and services such as fresh produce were to be GST exempt, whereas takeaway food was not. There were many examples of how subtle the distinction between GST-attracting and GST-free items could be. Fels saw that the potential for public confusion and profiteering was enormous.

There was also considerable risk to the ACCC itself, of which Fels was acutely aware:

“Unlike a lot of our other ACCC work, [the GST] was the subject of major difference between the political parties. It was bound to spill over into our role being strongly attacked by the Opposition and critics of the GST, so it was quite a different role politically. Up until then we’d been operating in a consensus area over our main activities.

“The complexity of the task and all the difficulties of enforcing the law in every business, big and small, all over Australia were really worrying. The political divisiveness, plus the extraordinarily high profile which the Commission would have, meant it would be put in front of the public like never before...

“On the other hand, I could also see that if we did the job well it would be quite a boost for the Commission’s reputation with the public...and it would improve its standing with the Coalition Government. Some of them had mixed feelings about the Commission.”

He knew that monitoring prices at such a micro level represented quite a shift from the core business of the ACCC. And determining whether price rises were justified was quite a fine art – much more complex than approving mergers or breaking up cartels. But once the 1998 election was won, the ACCC’s fate was sealed; they would be policing the GST.

Price exploitation legislation

Although the ACCC had essentially already been assigned the job of overseeing the GST’s introduction, by mid-1999 it was official. With prevention in mind, the Government drew up amendments to the TPA containing GST-specific price exploitation legislation to cover the two years following the introduction of the tax. This enabled the Commission to issue price exploitation notices and seek penalties of up to \$10 million for companies and \$500,000 for individuals found to be charging “unreasonably high” prices as outlined in section 75 of the TPA. These provisions also included retailers who sought to anticipate the GST by raising prices prior to 1 July 2000. However, the legislation (which was passed in July 1999 and came into effect on 22 December 1999) also contained a stumbling block for the ACCC. Costello

added a provision stating that “the supplier’s costs, supply and demand conditions and any other relevant matter” could be used to justify increases (see *Exhibit 2*).

The Commission was deeply concerned about the lack of clarity and pressed for a revision to the TPA, but the Treasurer would not budge. He was keen on publicly exposing offenders, but not on court action. Costello explained to Fels that he wanted a “big stick” approach to scare companies into compliance, with few actual prosecutions. The law was also drafted under considerable time-pressure, as Fels reflected:

“The Government was concerned to get the whole of the GST through a good 18 months before an election. There was a degree of consultation but... [the legislation] went through really before the Commission had much say in it. We did make a late effort to try to get the scope of those other factors cut back but we were unsuccessful. The Government didn’t want to reintroduce any more controversial legislation or correct what had already been put out. So we were stuck with that and we were very aware that [the law] would make court cases extremely difficult.”

The next election was slated for 2001, by which time Costello wanted the GST phase-in to be well and truly over. While the Treasurer was quite clear about what he wanted, Fels noted that, privately, the Government wasn’t totally united:

“Amongst the ministers there was a range of views about whether this was a law that should be vigorously enforced in court or not. Some of them were very keen about the idea of the ACCC zapping people publicly and taking them to court and getting them fined. Others said: ‘Keep away from the courts, the main thing is to shame’.”

Inside the Commission

Though there had not been a great deal of choice in the matter of accepting the job, Fels was somewhat ambivalent about taking on the GST. He knew that a successful transition would bring more kudos, power and resources for the Commission. Yet the opposite would spell years and many millions spent in the courts, a sizeable dent to public confidence, and a damaged relationship with business. The Labor opposition had also long been running a fear campaign, promising catastrophe. Said Fels:

“I was worried that we’d be tied up in thousands of difficult cases. There was such a busy industry out there on the part of the Labor Party and critics exposing excessive prices, I thought we’d be hearing about excessive prices for months and months... I was particularly worried about that short period around the introduction of the tax because early impressions would be all important. We did have a concern that there’d be a large amount of work to do for a year or two ahead which would mean we had failed.”

In the hope of avoiding a difficult transition, the ACCC took education very seriously, spending close to \$20 million on advertisements and promotional material explaining the GST to business and consumers. Shopping guides with estimated price rises were distributed to over eight million households whilst a prices hotline was established in late 1999. “A lot of industry associations were talking up prices and were saying: ‘Our industry is likely to have to put prices up by eight percent’ and we’d publish material saying a six percent increase was about right,” Fels recalled. Allan Fels also became a semi-permanent fixture in the press, posing for photo-ops in supermarkets whilst encouraging consumer awareness and warning of dire consequences for non-

compliance. But when it came to enforcing the law, Fels saw divisions within the ACCC become apparent:

“Within the Commission there was some range of feeling about how hard we should play the game. And also there were debates about how the law should be enforced. Should we be prosecuting people in court frequently or did we have more of an educational role? They were serious issues.”

Allan Asher, chief of the ACCC’s enforcement committee, favoured legal action. Based in the Canberra office, he, like Fels, had been an important player in changing the ACCC culture from one of chasing minor offenders to that of taking on the big end of town.⁴ A former consumer activist, he was a commissioner at the former TPC, staying on when it became the ACCC. He liked to pursue actions quickly for maximum impact and had been instrumental in the Commission’s legal successes.⁵ In response to the GST, Asher created legal teams around the country who were empowered to get offenders before the courts within 24 hours. Keen on the “naming and shaming” approach, he believed scapegoating to be the best deterrent. He was not, however, keen on using the price exploitation laws, considering them far too ambiguous.

Instead, Asher preferred section 52 of the Act relating to “misleading or deceptive conduct” (see *Exhibit 3*). Staying tight-lipped on the loose wording of section 75, he instead played up the threat of unleashing a “blitzkrieg” of legal proceedings and consequent negative publicity.⁶ Indeed, the ACCC didn’t exactly publicise the law’s shortcomings and, according to Fels, corporations weren’t overly cognisant of them: “[The business community] had a dim awareness [of the law]. They were more struck by the ferocity of the Commission’s approach, that’s what really worried them.”

However, David Cousins, the GST Commissioner brought in specifically to help with the tax, had other ideas about enforcement. He had extensive experience as a commissioner at the former Prices Surveillance Authority, but had worked most recently at major accounting firm KPMG. Based in Melbourne, Cousins favoured working with business and taking a big-picture view on compliance, rather than chasing every minor infringement. From late 1999 onwards, the ACCC was engaged in drawing up voluntary agreements with approximately 100 major corporations across a variety of sectors. In these agreements, organisations would specify their new prices in advance in return for ACCC approval.

Fels was wary of such accords, reluctant to sign away the Commission’s rights to post-GST prosecutions, while Asher was even less convinced about them. However, there was concern within the Commission that Asher’s enthusiastic attitude to enforcement was alienating the business community, potentially creating future headaches once the GST introduction was over. Fels was worried about the response from small business, which usually saw the ACCC as being protective of their interests. He also knew that businesses were already leaning quite hard on the Government to get the ACCC to tone down their approach.

⁴ Brenchley, 109.

⁵ Brenchley, 119–121.

⁶ Brenchley, 107.

Video Ezy

Video Ezy was a national operation in the business of video/DVD rentals and sales, comprising 480 stores with 3.5 million customers or 30 percent of the rental market. During early 2000, the ACCC began investigating a series of complaints, mainly from the Townsville area in North Queensland. In December 1999, Video Ezy had raised their overnight new-release hire in 21 of their 33 corporately owned stores from \$6 to \$7.⁷ This increase affected stores in Victoria, New South Wales and Tasmania, as well as Queensland. Staff allegedly told customers that the increase was about introducing the GST early to get them accustomed to paying more.

The ACCC obtained the records of company meetings held during 1999⁸ and found references to the new tax including: “GST suggestion raised again to look at our prices,” and “GST. Now a good time to review our prices”. They also conducted statutory examinations of several senior executives. The ACCC believed that general manager Peter Sciciuna, director Daryl McCormack and senior manager Jaims Hill were all party to exploiting public confusion over the GST to raise prices. The ACCC made initial approaches to Video Ezy in late January, seeking that the company admit to price exploitation and compensate customers. Despite negotiations, by April they had still not made any reparations.

On 11 April, the ACCC issued a press release stating:

“The ACCC has concluded that Video Ezy unlawfully sought to anticipate the GST in its prices, even though the tax is not due until 1 July 2000... This is the first price exploitation notice issued by the ACCC. It was issued under section 75AW of the Trade Practices Act 1974 which gives the ACCC the power to notify companies that it believes they have engaged in price exploitation in relation to the New Tax System changes. Such notices are prima facie evidence that price exploitation has occurred and can be used later in Court action... The ACCC notes that, at this stage, no franchise outlets have been served with a notice although a number are under investigation... The ACCC will be seeking suitable remedies for the situation. This may include a rollback of prices, compensatory free video rentals, apologies and/or penalties.”

In return, the company denied the allegations that they had sought to jump the gun over GST. According to Video Ezy, a handful of junior staff had mistakenly informed customers that the price rise was GST-related, but that it was not at the direction of management. Said marketing director Mark Patterson: “The ACCC have the hearsay evidence of five people that the GST was linked to the price rise by some of our employees... There’s a paper trail a mile long showing that we went to \$7 for commercial reasons.”⁹

The company pointed to other video rental firms who were charging \$7 and accused the ACCC of using “bullying” tactics. Managing director Bob Maidment claimed that there were several commercial factors behind the price rises including significant investment in new-release stock and store refurbishments: “We were not the first to introduce this

⁷ All dollar amounts given are Australian dollars.

⁸ Where the ACCC believed a company or individual had information pertinent to an investigation they had the power to issue statutory demands for information. Where necessary, ACCC staff could also enter premises to obtain copies of relevant documents that were not forthcoming.

⁹ Beh, M. “Video Ezy Faces Tax Price Link,” *Courier Mail*, 27 May 2000.

rental price. In fact, our corporate stores maintained a lower price for years after other stores went to seven dollars,” he said in a press release.¹⁰

The next day Video Ezy requested a meeting with the ACCC, and was reportedly prepared to pursue legal action to clear the company’s name. Maidment claimed that hundreds of Video Ezy’s franchisees had suffered as a result of the Commission’s action. He also expressed his misgivings about the ACCC:

“Consumers and businesses are all still confused about the possible impacts of GST. While this confusion exists, it is very easy for consumers to wrongly link price increases with the new tax... This claim against us shows that a misunderstanding between a few staff and customers is all that is needed for the ACCC to make very serious allegations... We think all businesses should be very concerned. It is difficult in this environment to make legitimate commercial pricing decisions.”¹¹

Talks were held in an attempt to reach agreement. But, according to Asher, Fels’ comments in the press about the notice angered Video Ezy to the point that negotiations broke down by 20 April. This was the first case of its kind to confront the ACCC: most prior accusations regarding price exploitation involved the insurance sector, which the ACCC was investigating. Previous matters involving retailers mainly concerned marketing practices such as dual ticketing, where pre- and anticipated post-GST prices were displayed in a bid to get consumers to spend up before 1 July.

Conclusion

With less than two months before the introduction of the GST, Fels knew that the ACCC’s workload was only going to increase, especially as the 1 July deadline drew steadily closer. And now that every single Australian had been enlisted as a “price watchdog” the scrutiny on the Commission would be intense. The ACCC needed to send the business community a strong message about the consequences of non-compliance. However, launching a legal battle during the Commission’s busiest period had its risks. Fels had to think carefully: an ill-conceived response could have far-reaching consequences for the ACCC and his own position. But within the Commission, consensus about the best course of action was unlikely to be reached any time soon.

¹⁰ “PR Wire: Video Ezy Defends Store Pricing,” AAP Newsfeed, 13 April 2000.

¹¹ “Video Ezy Says GST Fears Prevent Legitimate Price Hikes,” AAP Newsfeed, 13 April 2000.

Exhibit 1: The Commission's priorities

The questions asked by the Commission in determining which matters it will act on were:

- Was there an apparent blatant disregard of the law?
- Does the party of concern have a history of previous contraventions of the law, including contraventions that occur overseas?
- What's the significance of public detriment and/or number of complaints?
- What's the potential for action to have a worthwhile educative or deterrent effect?
- Does the matter involve a significant new market issue?
- Will the likely outcome justify the use of resources?

Exhibit 2: Section 75AU of the Trade Practice Act

Section 75AU: Price exploitation in relation to New Tax System changes

- (1) A corporation contravenes this section if it engages in price exploitation in relation to the New Tax System changes.
- (2) For the purposes of this section, a corporation engages in price exploitation in relation to the New Tax System changes if:
 - (a) it makes a regulated supply; and
 - (b) the price for the supply is unreasonably high, having regard alone to the New Tax System changes (whether the supply took place before or after those changes); and
 - (c) the price for the supply is unreasonably high even if the following other matters are also taken into account:
 - (i) the supplier's costs;
 - (ii) supply and demand conditions;
 - (iii) any other relevant matter.

Exhibit 3: Section 52 of the Trade Practices Act

Section 52: Misleading or deceptive conduct

- (1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).