

28 August 2015

Martin ★
FOLEY MP

Victorian Labor Member
for Albert Park District

46 Rouse St, Port Melbourne
Victoria 3207

P: (03) 9646 7173

E: martinfoley@parliament.vic.gov.au

Facebook.com/MartinFoleyMP

Twitter: @MartinFoleyMP

Instagram: martinfoleymp

www.martinfoley.com.au

Mr Rod Sims
Chair
Australian Competition and Consumer Commission
Level 35, 360 Elizabeth Street
MELBOURNE VIC 3000

Dear Mr Sims

RE: DALLY MESSENGER III

I write on behalf of Mr Dally Messenger, a retired civil celebrant living in my electorate, who has contacted my office regarding historical legal action taken against him by the ACCC.

For a full history of the matter I refer you to the enclosed extract from the Commonwealth Parliamentary Debates in which former Senator Judith Troeth outlined the history succinctly. In her speech, Senator Troeth asked the commission to have a second look at Mr Messenger's case, which as far as I am aware it has not done so.

Mr Messenger, an old age pensioner with limited means, was in no position to mount an effective legal defence. Mr Messenger informs me that his mostly pro-bono legal support made it very clear to him that the ACCC could prolong a series of legal cases at great personal and financial cost.

He was persuaded to negotiate a settlement with the ACCC and agree that he attempted to fix prices in the funeral industry—a claim that he maintains is absurd given that he was only representing some twenty celebrants out of the 2,500 or so appointed at the time.

Moreover, Mr Messenger presented abundant evidence that others in the industry then, as now, largely control the fees for the funeral industry. The suggestion that one nominal spokesperson for a small number of celebrants would be in a position to fix prices then and now is absurd.

In any case, the fine of \$47,000 imposed on Mr Messenger was, given the circumstances, manifestly excessive.

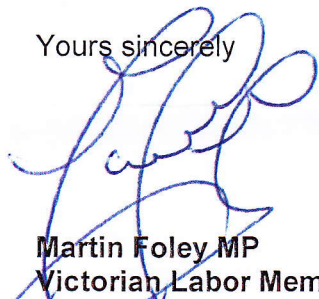
Mr Messenger continues to have no idea why the ACCC issued proceedings against him without some sort of preliminary due process and examination of his evidence.

I understand that his FOI requests, aimed at investigating which party brought this matter to the attention of the commission, have been repeatedly refused.

The actions of the ACCC in this matter have had a very bad effect for the general public. Celebrants, I am told, now live in fear of charging more than the Funeral Directors set fee. The accusation against Mr Messenger has seen celebrants conclude that the ACCC supports big business, namely the Funeral Directors.

I would ask, as has been done so already by former Senator Troeth, the ACCC to reconsider this matter and reflect on whether taking action against Mr Messenger was justified and fair, and whether the penalty imposed on Mr Messenger was manifestly excessive.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Martin Foley', with a large, stylized flourish extending from the bottom left.

Martin Foley MP
Victorian Labor Member for Albert Park

CC: Mr Dally Messenger, 504/80 Lorimer Street, Docklands VIC 3008

SPEECH

Date Tuesday, 24 June 2008
Page 3278
Questioner
Speaker Troeth, Sen Judith

Source Senate
Proof No
Responder
Question No.

Senator TROETH (Victoria) (11.00 pm)—I rise tonight to speak of the case of a constituent in my home state of Victoria, Mr Dally Messenger, who has had a most unfortunate experience with the ACCC. Mr Messenger is a funeral celebrant. As the Senate would know, funeral celebrants emerged in around the 1970s from the institution of marriage celebrants. Celebrants of both marriages and funerals try to negotiate a reasonable fee. While marriages are usually a very happy affair, funerals of course are in a different category, with most of the relatives being in a very bereaved state, and funeral directors need to deal very carefully with them.

Historically, funeral directors, who have charge of the mechanics of a funeral, and mainstream churches agreed on a fixed fee for officiating a funeral ceremony. In the past, this fee was traditionally low because of the high church-going population of the era. In many cases, funeral celebrants do a great deal of work leading up to a funeral by discussing the deceased with the family, preparing a eulogy and so on. Sometimes their work can take up to between 20 and 30 hours per funeral. Celebrants nowadays get a small fee for their service from the funeral directors, usually in the vicinity of \$150 to \$400. When a person dies, people usually go to a funeral director, not a funeral celebrant. The director will charge between \$6,000 and \$10,000 for the funeral and the celebrant's fee comes from that figure.

In Victoria, the funeral directors agreed to pay a little more to celebrants on the strict condition that, like the clergy, it was a fixed fee. Over the years, the celebrants have always tried to have their fee increased in line with inflation and CPI. There was usually resistance, but the fixed fee did rise. In 1997, Mr Messenger was the President of the Australian Federation of Civil Celebrants, and he wrote the usual letter to funeral directors asking for a rise in fees. Mr Messenger at that stage received a letter from the ACCC saying his letter could be in violation of the Trade Practices Act. He responded to that by saying the funeral directors fix the fees and usually work it out quite openly with the churches, the celebrants and each other. Mr Messenger asked the ACCC to properly investigate the matter. He was then ordered by the ACCC to write the following sentences into the constitution of the Australian Federation of Civil Celebrants: 'The celebrant should individually determine the fees to be charged for his or her services. In doing so, he or she may wish to consult the fee scale recommended by the college association.' Mr Messenger did so in 1997 and the matter was dropped.

Because the fee was still very low, in 1997 Mr Messenger demanded and took the personal stance that the only way to fairly pay a celebrant was by an hourly rate. Unfortunately for him, this resulted in him not being given any funerals at which to officiate by any funeral company. At a Best Practice Funerals conference in 2005, he opposed the directors fixed fee in his keynote speech. The majority of the people at that meeting thought the directors were far too powerful to oppose. But on behalf of the conference Mr Messenger wrote a two-part letter. The first part asked for a raise in the fixed fee and the second part asked the directors to consider an hourly rate. Unbeknown to him, somebody sent this letter to the ACCC. The ACCC at that stage did not take into account any of the evidence they would have needed to see. They focused on the first part of the letter and, without interviewing Mr Messenger, issued legal proceedings in the Federal Court.

Senator Boswell interjecting—

Senator TROETH—I beg your pardon! Mr Messenger's senior counsel demanded mediation. At mediation they fined Mr Messenger \$46,000; legal fees cost \$18,600—a total fee of \$64,600. Mr Messenger is a 70-year-old pensioner. He lives with his wife in Melbourne. Obviously he is in no position whatever to pay this money, and I find it extremely ironic that the ACCC, which is supposed to encourage competition, discourage monopoly and look after the small trader, the small businessman, and protect them from big monopolies, is forcing this gentleman to pay this money, which he can certainly not afford. I understand there are collections being taken up and so on. But I felt it only fair to raise this matter in the Senate because his efforts to raise it in other places have not met with much success. I sincerely hope that the ACCC finds reason to take up this case again, look at it again and consider what its true responsibilities are.