Australian Competition & Consumer Commission	**2012 Competition Law Conference** ***ACCC Priorities in Enforcing Competition Law*** **Rod Sims, Chairman** **5 May 2012, Sydney**

Introduction

I am very pleased to be here as I believe conferences such as this play an important role. They bring together people interested in competition issues and we each gain new insights.

My refrain is that the Australian Competition and Consumer Commission (ACCC) plays the crucial role of providing many of the boundaries within which a market economy works.

We all benefit from the tremendous incentive and focus provided by the profit motive, but it can only be a force for good while companies know they cannot fix prices, misuse their market power or mislead consumers.

And if they are monopolies, they need more specific regulation.

I have just returned from the International Competition Networks' (ICN) annual conference in Brazil.

At least with Brazil Australians are not the longest travellers.

Our Asian neighbours, to our north, had a 30 hour journey to get to Rio and, with a wry smile, they told me they did not have to reset their watches as there was an exact 12-hour time difference.

The ICN conference was fascinating as I saw other competition regulators grappling with the same issues as we are.

It also provided another example of the benefits of the ACCC's broader role in competition, consumer and regulatory issues.

There was, for example, wide interest in our Google litigation, which is a consumer issue.

And I heard my counterparts struggling with some telecommunications and energy issues in ways we do not have to, given that we and the Australian Energy Regulator (AER) are also the regulators for both those sectors.

It was, in addition, a further opportunity to interact closely again with my Asian counterparts. As I have said publicly before, Asian engagement is a key priority for the ACCC.

Our economy is ever more closely tied to Asia, and therefore we – as a regulator - should be too as merger and cartel activity, for example, is increasingly regional.

Today, I want to discuss three topics.

1. Our priorities in competition matters
2. Some imminent cartel initiatives
3. A few thoughts on the ACCC's approach under the new price signalling laws

1. ACCC's priorities in competition matters

The ACCC's areas of focus in competition matters will not come as a surprise to you. They are:

- The digital and online economy
- Concentrated sectors
- Mergers and acquisition and
- Cartels

At any one time the ACCC has between 40 and 50 cases in the Federal Court. Currently, around one quarter relate to competition issues.

As a sign of our increasing competition focus, however, we also have more than 35 separate investigations into misuse of market power, cartels, or cases involving lessening of competition.

While these cases are complex, and take considerable time and resources to investigate and then prosecute, the deterrent effect of our work is substantial.

A snapshot of our current cases before the courts include:

- A case against Cement Australia Pty Ltd, Pozzolanic Enterprises Pty and two other firms - where the ACCC has alleged that the firms contracted to buy flyash for which they actually had no commercial need, and they did that for the purpose of preventing entry and competition in the market.
- The power cables case – in which the ACCC is seeking leave to serve out of the jurisdiction in proceedings alleging an unlawful understanding entered into prior to October 2001 by Nexans, Prysmian, Viscas and Sumitomo Electric Industries (SEI) in relation to the allocation of projects involving the supply of high-voltage or extra high-voltage land or submarine cable, including supply to Australia.
- The air cargo cartel proceedings – which the ACCC commenced against 15 international airlines between 2008 and 2010. Eight carriers have now settled for a total of more than $52 million in penalties to date. Hearings are scheduled in the Federal Court for later this year against Singapore Airlines, Malaysian Airline Systems, Garuda International, Emirates, Cathay Pacific, and Air New Zealand.
- TF Woollam & Others - penalties totalling $1.38 million were imposed against three Queensland-based construction companies for engaging in illegal price controlling conduct known in the construction industry as

cover pricing. One of the Respondents has appealed this ruling to the Full Court. .

- And ANZ and Flight Centre – a little more on those two cases shortly.

I believe our enforcement record is strong.

To remind you, in the last couple of years it includes the following competition outcomes.

- Cabcharge – this case saw orders requiring Cabcharge to pay $15 million in penalties and costs for three contraventions of misuse of market power provisions. This was the highest penalty imposed in misuse of market power (section 46) proceedings brought by the ACCC. Two contraventions related to a refusal by Cabcharge to allow competing suppliers of electronic payment processing services for taxis to process Cabcharge branded non-cash payment products. The third contravention related to the below-cost supply of Cabcharge taxi meters and associated fare schedule updates for an anti-competitive purpose.
- Baxter Healthcare – an abuse of market power and exclusive dealing case in which a supplier of essential health products to government health procurement agencies was ordered to pay total penalties of $4.9 million.
- Telstra exchange capping – an $18 million penalty was imposed on Telstra by the Federal Court, for denying competitors access to infrastructure in contravention of its carrier licence. The Court noted that Telstra was in an overwhelming position of bargaining strength and "has control over its exchanges and the power to allow or refuse access". This case again illustrates the benefit of a combined competition and telecommunications regulator.
- April Fine Paper Trading - penalties totalling $8.2 million were imposed for breaching price-fixing provisions in the supply of copy paper.
- Marine Hose - penalties exceeding $8.24 million were imposed for cartel conduct through rigged bids to supply marine hose to customers in Australia. The ACCC's proceedings would not have been possible without extensive cooperation with counterparts in the United Kingdom and the United States.
- Admiral - penalties of approximately $9.27 million were imposed for involvement in price fixing and bid-rigging affecting contracts for air conditioning in schools, hospitals and shopping centres in Western Australia.
- DRS - penalties of $1 million were imposed for cartel conduct whereby DRS agreed with Cubic Defence Applications Inc. that DRS would withdraw from a procurement process.

These cases, which are diverse in geography and the sectors of the economy, demonstrate the vigour with which the Commission will prosecute conduct that lessens competition or where businesses misuse their market power.

They also show the willingness of the courts to impose substantial penalties in respect of on contraventions of Part IV.

Digital and online markets

The online economy poses the biggest regulatory challenge in a generation.

The two main challenges – for the ACCC - are:

1. Ensuring consumers enjoy the same protections in the digital and online economy as they do elsewhere.
2. And, crucially for competition, ensuring the digital and online economy produces the benefits of new and innovative competitors to challenge incumbents that it promises, and that this promise is not eroded by anti-competitive conduct.

There are two high-profile cases that I will mention because, while both of them arise under consumer law, they have major competition implications.

First, in April the Full Federal Court upheld the ACCC's appeal over search engine practices operated by Google.

The question before the Court boiled down to this:

> Was Google engaging in misleading and deceptive conduct when its search results directed a user to one business when the user was running a search using the name of a competing business?

The Full Court found, on appeal, that in the case of four advertisements this practice was misleading and deceptive conduct by Google.

Google generates substantial revenue by selling advertisements through the 'AdWords' program. It sells these advertisements to businesses that are engaged in marketing products and services online.

The Google case has considerable implications for the way people market themselves online, specifically the use of sponsored links and the way in which search results direct consumers to specific sites.

Some of you will have seen the recent '*7.30 Report'* program on this case, where a competition law expert declared at the end that: 'Google has to appeal this decision'.

And, indeed, Google is seeking special leave to appeal to the High Court.

From the very start of this matter the Commission has held the view that this case is important in clarifying the law about advertising practices of search engine providers in the internet age.

The other case is continuing – that's the Apple one.

The ACCC alleges that in marketing its new "iPad Wi-Fi (plus) 4G" in Australia, Apple was representing that the device would - with a SIM card - connect to a 4G network in Australia.

But the ACCC alleges that's not the case as that model of iPad won't do that.

As part of interim orders agreed to by Apple in the Federal Court, pending final hearing on the matter, Apple has put up signs advising consumers that the device cannot connect to the 4g network in Australia .

Although as I have said Apple is also a consumer law case it, like the Google case, has competition implications. Other firms Samsung for example, sell tablets which compete with the iPad.

Those firms are entitled to compete in a market that is fair in terms of the claims that are made about what the devices can do.

I should note that the Apple case remains before the Federal Court, and no decision has been made to date.

Two other cases currently before the court – both involving online competition - are proceedings brought by the ACCC against ANZ Bank and Flight Centre. In relation to ANZ, the ACCC alleged price-fixing conduct in relation to over mortgage rebates. We are awaiting judgment in this matter. In the proceedings recently commenced against Flight Centre, the ACCC has alleged attempted price fixing by Flight Centre in relation to the booking and distribution of international flights.

The Ticketek case also involves a potential online competitor.

In that case, the court imposed a penalty of $2.5 million against Ticketek, for taking advantage of its market power following action by the ACCC.

The court found that on four separate occasions Ticketek engaged in conduct with the anti-competitive purpose of deterring or preventing a small firm - Lasttix - from supplying its services.

Lasttix offers promotional services to event organisers to target consumers wanting to buy 'last minute' discounted tickets.

Ticketek's market strength allowed it to do things it may not have done in a more competitive environment.

The behaviour towards Lasttix was anti-competitive, and the outcome of the case will benefit consumers who will have access to discount ticket deals that are increasingly accessible online - and in other places - not just through ticketing agents.

Overall, my message is this: online technology is revolutionising competitive dynamics. We will do all we can to prevent incumbents misusing their market power against the many new competitors that will emerge.

Concentrated markets, mergers and acquisitions

Australia has many markets which are highly concentrated.

In those markets, there may be no more than a few major buyers or suppliers to choose from. We have now increased our focus on these sectors.

Supermarkets and liquor are two such concentrated sectors that are often named.

But there are others. Banking and energy are among them.

Our role in these concentrated markets is twofold. One stems from our section 45 and 46 powers that I've just discussed.

Our second, and crucial role, is in ensuring that mergers and acquisitions don't result in structural changes that will substantially lessen competition.

Some of these mergers and acquisitions attract a lot of publicity and in some cases criticism of the ACCC's approach to merger reviews.

The FOXTEL-AUSTAR acquisition, and the Metcash case that went before the court, illustrate that.

But some basic data puts those examples – which occupy a lot of newsprint – into context.

In the nine months to 31 March, of the 246 mergers that the ACCC considered, 65 of them – that's 26 per cent – were determined by the ACCC to require a substantive review.

Of those 65, in three the ACCC identified competition concerns based on a confidential review, and another two were resolved by undertakings accepted by the ACCC. None were opposed outright.

Fifty were not opposed by the ACCC, while in 10 cases the review ceased usually because the transaction was withdrawn or abandoned by the parties.

With the ACCC now pre-assessing an increasing number of transactions where the competition effects are determined to be low, only 7 per cent of the cases we looked at took more than eight weeks for a decision.

That's a pretty good track record, particularly compared with a number of overseas agencies where review timelines are significantly longer and merger parties are compelled to comply with strict upfront information requirements before the review commences.

As some of you will know, we apply a scaled approach to information requirements that does not demand any more information than we judge is necessary at the initial stage, so as to minimise the workload for merger parties.

But if we need to, we ask for more information.

And, in the complex cases, those are often substantial requests including where necessary, using our compulsory information gathering powers under section 155 of the Act. And, of course, that adds time to the process, which can draw criticism.

There will be transactions that require close attention and will inevitably take longer for the ACCC to complete the review.

Taking FOXTEL-AUSTAR as a case in point, we had a large integrated ACCC team working on this including staff from mergers, the economic unit, legal, communications group, and the undertakings compliance unit.

We reviewed a large volume of information and documents from the merger parties and other industry participants prior to making the decision.

In the course of trying to find an acceptable outcome in a complex case, members of the Commission will often take a direct role.

We are not afraid to roll-up our sleeves and get involved. Indeed, I did exactly that in the FOXTEL-AUSTAR case.

As many of you are aware, the ACCC ultimately accepted a complex undertaking which required extensive negotiation and internal consideration, as well as public consultation, to ensure it adequately addressed the ACCC's competition concerns.

There are three points I would I like to highlight in relation to mergers.

First, much of our merger activity illustrates the benefit of the ACCC having roles beyond purely competition issues. As I have said, the FOXTEL-AUSTAR assessment saw our communications regulatory team heavily involved as we tackled complex IPTV issues. And our current AGL/Loy Yang and APA/Hastings assessments are drawing heavily on our in-house energy expertise.

Second, I often hear complaints about our merger assessment processes from competition lawyers trying to get deals approved for their clients.

While I understand their perspective, some people may not be aware of the many complaints we receive from those who think we move too quickly, and approve too many mergers.

Such opposing criticism was evident in the reaction to our FOXTEL assessment and decision.

Some competition lawyers, I sense, would like some of the formal processes that they see overseas adopted here.

I doubt this would speed things up. Indeed I think it would see longer reviews.

In any event, I am always open to new ideas on how we can improve what we do in any area.

We now have regular meetings with the Law Council and, of course, events like these provide an opportunity to exchange views.

Third, I have said that in assessing mergers the ACCC will continue to make commercial assessments based on real-world activity and evidence rather than theory.

I have to say that I have been surprised when arguments have then been presented to us by parties, in support of a merger, that were clever in their theoretical construction, but much lacking in their commercial sense.

2. Cartels – enforcement and advocacy

Cracking cartels is perhaps the most commonly-recognised role for a competition agency.

Businesses that collude rather than compete are silently stealing from consumers and/or other businesses.

This behaviour also undermines the efficient functioning of the affected markets.

Unfortunately, and indeed surprisingly, the available evidence suggests that many businesspeople are still not aware that price fixing, market-sharing, bid-rigging, or agreeing restrictions on supply or output, constitutes cartel activity.

Among the cases that we have concluded, in the last two years, are an international cartel between four multinationals for the supply of marine hose-piping used in oil and gas operations. Penalties in Australia in that case totalled over $8 million.

In a series of cases regarding air cargo, the courts have imposed penalties in excess of $50 million, and there are a number of cases continuing.

And in what is known as the 'Fine Paper' case, the Federal Court awarded penalties over price-fixing.

We currently have a number of important cartel investigations underway, including cartels that potentially involve criminal conduct.

Enforcement is one dimension of our cartel work.

Education is another and it is extremely important.

In this regard, we aim to raise awareness of the potential penalties for those participants who are detected, and also of our immunity policy for those who are willing to come forward with information about a cartel.

As you will know, from 2009 cartel conduct became a criminal offence under Australian law. The penalties can include 10 years imprisonment, per offence, for individuals who engage in criminal cartel conduct.

The task for us, now, is to ensure that people understand that criminal sanctions are available in the law, what that could mean for them, and exactly what conduct is covered by the criminal provisions.

We've written to 2,500 executives in the last few weeks – in the heavy construction and construction supply industries - providing a reminder about the potential sanctions for cartel conduct, and alerting them to our dedicated web pages.

We also provided the name of someone they can contact if they want to report their involvement in a cartel and apply for immunity.

And there is more material on the subject coming shortly, including innovative video content.

This effort is, at least partly, informed by research by the University of Melbourne.

The results, as reported by Associate Professor Caron Beaton-Wells, were published in the *Sydney Law Review* in December.[1]

The survey – which was based on the general population, not just business executives – produced what the researchers called a 'mixed score card' on the ACCC's efforts to raise understanding and support for criminal sanctions.

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[1] '*Anti-Cartel Advocacy: How Has the ACCC Fared?'*, Sydney Law Review, vol 33, no. 4, pgs 735-769.

Overall the survey found Australians agreed price-fixing, market allocation, and output restriction should be against the law. Respondents also had high general awareness of the ACCC.

But some of the other findings caused us to rethink our efforts.

For example, according to the survey 58% of respondents do not know that cartel conduct is a criminal offence; 37% either believe that cartel conduct is legal or are unsure; while 20.6% know it is against the law but are unaware that cartel conduct carries criminal sanctions including jail time.

And, amazingly although 42% of businesses were aware that cartel conduct is now a criminal offence, almost one in 10 of the survey respondents admitted they'd still be likely to join a cartel if the opportunity arose.

There was also low support for immunity policies - like the ACCC's immunity policy - that protects the first firm to report a cartel and which is a potent tool for detecting and stopping cartel conduct.

The survey – along with our own direct understanding of the climate among businesses - has underlined the need for us to continue to dedicate energy and resources to explaining the prohibitions on cartel conduct and what they mean for everyone in business.

You will see further high-profile initiatives from the ACCC in this area.

3. Price signalling

Many of you will be aware that the Competition and Consumer Act will outlaw anti-competitive price-signalling and disclosure of information.

These new provisions take effect from June 6th.

The genesis of these changes date back to a case involving allegations of price-fixing in the Geelong petrol market in the late 1990s.

In that case there was no dispute - by many of the respondents - that they had communicated with each other about petrol prices.

But what was disputed in the Federal Court was whether those communications amounted to an arrangement or understanding between the parties as to how they would price their petrol.

The Court effectively ruled that the respondents had not engaged in price fixing as there was no commitment by the parties to increase prices after receiving the information.

That decision by the Court seemed to leave a lot of unanswered questions.

Price signalling conduct which doesn't involve such a commitment - and therefore falls outside the scope of subsection 45(2) – may, nonetheless, have the same anticompetitive outcomes as cartel-type conduct.

The new provisions close the gap between Australia's competition law and that in Europe and the United States, where anti-competitive price-signalling and information disclosures can be unilateral and so more readily addressed.

What the new laws say

The new provisions will initially apply only to the banking sector, and only in relation to the taking of deposits and making advances or loans. This sector-specific focus is, of course, unfortunate.

Competition laws should apply economy-wide and not be sector-specific. I note, however, that the law can be extended, by regulation, to other sectors of the economy.

Under the law taking effect in June, it will be unlawful for a banking firm to disclose prices to competitors - in private - where doing so is not in the ordinary course of business.

That is a per se prohibition and as such there is no need for the regulator – or any private litigant for that matter – to prove an anti-competitive effect.

Further, it will be illegal for a banking firm to disclose the price of the goods or services it buys or supplies, its capacity to buy or supply, or its commercial strategy, where the disclosure is made for the purpose of substantially lessening competition.

Based on the experience of regulators in other jurisdictions with similar provisions, we expect the per se prohibition to be the mainstay of the new regime.

A number of exceptions have been created to prevent legitimate business activities from falling within the prohibitions.

They include exceptions for disclosures between parties in a joint venture, between merger parties, as part of a corporate work-out, those authorised by law, and those in compliance with the continuous disclosure requirements in the Corporations Act.

In addition to the exceptions, it will be possible to lodge an application for authorisation, and in some cases a notification, with the ACCC to obtain protection against legal action for proposed disclosures where those are likely to be in the public interest.

The ACCC's approach

Not surprisingly, the business community and its advisers are very interested to understand our approach to this new law.

I will comment today on two aspects of our approach, specifically the 'ordinary course of business' test, and the general prohibition on disclosure for the purpose of lessening competition.

The ordinary course of business test is central to determining whether a private disclosure of pricing information between competitors is per se illegal.

At the ACCC, we've seen parties to cartels who regard big-rigging and the like as unremarkable.

They have said, effectively: 'that's the way things are done in our industry'.

However, we think that an objective observer would regard the covert sharing of prospective pricing information – between competitors – as *not* in the ordinary course of business.

So, that would be captured under the new per se prohibition.

But what sort of communication would raise concerns under the prohibition on disclosures for the purpose of substantially lessening competition?

A great deal would depend on the purpose of the disclosure, or the reason for making it.

If it's in order to facilitate coordinated conduct, that's exactly what the law is intended to stop.

Here's an example: a bank might make a public statement that its funding costs have risen.

And indeed, that statement might be in order to lay the groundwork – with its customers and shareholders - for an eventual rate rise.

But we think that statements that genuinely describe market reality are unlikely to raise concerns of anti-competitive conduct.

But our attention would be attracted where, say, a bank offers its support for a change in pricing strategy, effectively tipping that strategy to competitors and testing how they might respond, without committing itself to action.

Further, of course, we would be concerned if, say, an Australian banking executive announced that he or she would be reluctant to lift rates beyond that of the Reserve Bank cash rate or introduce new fees, but they would follow if other banks did so.

I expect the banks will do everything they can to comply with these new laws. They have strong systems and cultures that support strict compliance with the law.

The ACCC will of course take action if we see unlawful conduct.

We will also be providing more guidance on this subject in coming months, mostly in fact sheets.

Conclusion

Thank you for your time and attention today I am happy now to take questions