Competition Law Conference

The Enforcement Priorities of the ACCC

12 November 2005
Graeme Samuel, Chairman

The enforcement priorities of the ACCC have, in a general sense, remained unchanged for many years now.

We target areas of widespread consumer detriment and act where we believe our action will improve overall compliance with the *Trade Practices Act 1974* (the Act).

Against that general backdrop, however, the ACCC is constantly reviewing its caseload, identifying new trends and assessing whether we are making best use of our resources.

In addition, the Trade Practices Act itself is constantly evolving, and it's fair to say is currently undergoing its most significant changes since the Hilmer Competition reforms of a decade ago.

A very good example of how these two come together is in the area of cartels. Over the past two years the ACCC has significantly sought to raise the profile of its work in this area, backed up with significant internal changes such as the introduction of our Immunity Policy and the creation of a dedicated cartels unit, and supported by some very powerful new legislative sanctions.

I will go into some detail about cartels, the Immunity Policy and criminal sanctions later, but first I want to talk more broadly about the changes at the ACCC and our enforcement priorities.

New Internal Processes

Over the past year or so the ACCC has implemented quite significant changes to our internal processes and the way we manage our legal budget.

These changes are aimed at making best use of our resources by imposing greater discipline on our enforcement and litigation activities in seeking meaningful and cost effective outcomes.

In short, our aim is to ensure our enforcement activity is better targeted, more sophisticated, efficient and relevant.

These internal processes have concentrated on two key areas:

- Better data management and information systems to identify trends, prioritise investigations and promote efficient use of our resources
- Systems and processes to ensure greater control over our management of legal services and our relationship with law firms.

The most significant change at management level has been the introduction of a relatively sophisticated matters management system.

The matters management system relates not just to those matters that have developed into a serious investigation, but also the several hundred matters under initial investigation at any one time.

Given we are a national organisation with regional offices operating in every state and territory, this system enables our senior management throughout the country to have a very clear view as to the progress of every investigation, to control the progress of that investigation, to see where there might be bottlenecks or blocks occurring in the process so as to ensure that the enforcement process is operating as efficiently, smoothly and quickly as we can make it.

One advantage of this system is that it has enabled us to do what you might call a "continuous stocktake" of our existing investigations and cases, and clean out a number of matters which had either dragged on too long or which we see as marginal in terms of outcomes given the resources applied.

Another important development has been the creation of a Litigation Committee to work in tandem with the ACCC Enforcement Committee.

All of us are well aware of the capacity for litigation to stretch out, sometimes for many years. The time frames that are taken to deal with litigation can then diminish significantly the impact of the ultimate litigation result—that is, the court orders finally handed down.

The Litigation Committee assists the ACCC in ensuring that its litigation and tribunal work is conducted to the highest standards. This includes making sure that its claims are clearly articulated and able to be readily understood by the court. It also requires that the orders we seek are the most appropriate given the particular circumstances of a matter.

So our litigation is also under very stringent controls, as to budgetary expenditure, monitoring expenditure on litigation and controlling the actions themselves.

We don't have unlimited resources for litigation – that is stating the bleeding obvious. But that doesn't mean that we don't have sufficient resources for litigation.

In the 2004 Budget the Federal Treasurer provided the ACCC with substantially increased resources that were carefully calculated to satisfy our

foreseeable requirements - although additional funding is expected to be necessary to pursue criminal investigations and prosecutions.

Critically, this injection of funds covers both our ongoing litigation, and a litigation contingency fund which covers us for our potential losses. This not only strengthens our ability to commence new litigation, but to litigate in cases where there is not necessarily a high prospect of success. In short, the additional funds give us greater flexibility and greater courage to litigate even in the more marginal cases.

I should also mention that it has come to our attention that some legal advisers are interpreting our desire for speedy litigation as an invitation for them to delay litigation in the hope this will persuade us to back off.

Nothing could be further from the truth. Where the ACCC identifies delaying tactics we are putting in place appropriate counter measures to ensure these do not succeed.

We are aware of the legal firms employing these tactics and I want to send a warning to them that we are becoming increasingly intolerant of their attitude. We anticipate that the Federal Court will be sympathetic to approaches by the ACCC to counter these tactics.

Those who employ these techniques in the hope of gaining some legal advantage will instead find a very aggressive response from the ACCC and its lawyers to anyone attempting to delay the work of the Commission.

Part V Consumer Protection

When it comes to consumer protection the ACCC's priority remains to target misleading and deceptive conduct, where such conduct is blatant and there is widespread detriment to consumers.

We target conduct with a national or international focus and cases where enforcement action will have a broad national educative or deterrent effect.

A very good example of this is the real estate sector where in 2003 we flagged that allegations of misleading and deceptive behaviour in the property industry – such as property investment seminars and "dummy bidding" - would be a priority for us.

As a result of extensive media interest in this announcement, and some well-honed court cases, we have seen a marked change in behaviour by the property industry.

Another area we have targeted in recent times has been disadvantaged and vulnerable consumers. We use this term widely, and it can incorporate everything from door to door salesmen exploiting people with intellectual disabilities to sell them products they don't need or can't afford to those preying on the sick and elderly with false promise of health cures.

Such campaigns are focussed on strategic litigation and the use of publicity to bring about behavioural change in a way that benefits consumers, and, we believe, business whose reputation can only be enhanced by fair and ethical behaviour.

- ***Consumer protection remedies***

Touching on remedies in the Part V area we are also looking at our mix of cases and the remedies we seek. In the area of consumer protection we have two courses of action available to us under Part V of the Trade Practices Act in respect of what I will broadly call misleading and deceptive conduct. The first is to proceed by way of civil proceedings, which has its advantages but also its limitations. It enables us to obtain orders to restrain by means of injunction the continuation of the issues that are the subject of potential breaches of the Act—to obtain, for example, orders for corrective advertising, so that consumers can cease being misled—and to require compliance programs to be put in place by the offending business to prevent further breaches..

We have been giving more serious consideration in recent times to the alternative process available to us under the Act - criminal prosecutions for breaches of the consumer protection provisions.

Criminal prosecutions do raise challenges. They affect both the process of investigation that we undertake, obviously, in terms of the admissibility of evidence, and they involve collaboration with the Director of Public Prosecutions. I am pleased to say that, in close collaboration at the most senior levels of the DPP, we have established protocols for working well with the DPP to ensure the efficiency of taking matters through to the criminal prosecution stage if that becomes appropriate.

We are contemplating future criminal prosecutions for breaches of the consumer protection provisions where consumers have been deliberately defrauded, and where we believe that it is appropriate to elevate the level of prosecution to that of a criminal action.

The internet and the increasing popularity of e-commerce has also made Australia an increasing target for various consumer frauds operating from overseas.

The ACCC will continue its focus on enforcement in this area. In doing so, it will utilise cooperation agreements with overseas regulators. Last year, the Full Bench of the Federal Court upheld a finding that a Gold Coast company was part of an international pyramid selling scheme based on the internet.[1]

The scheme was fragmented, with a company in the British Virgin Islands having overall control, and service companies contributing to the scheme

[1] ACCC v Worldplay Services Pty Ltd [2004] FCA 1138 (2 September 2004)

operating from Britain, Gibraltar, the Netherlands Antilles and Australia. Consumers recruited into the scheme came from a number of countries, including Canada, the United Kingdom and Norway.

Importantly, despite the fragmented international nature of the scheme, the Court found it had still breached the Trade Practices Act and that Australian companies taking part in pyramid selling schemes were acting illegally. An appeal by the company was dismissed, with costs, by the Full Bench of the Federal Court in May this year.[2]

These types of cases are important in testing jurisdictional issues in Australian courts and enhancing our operational arrangements with overseas regulators, including through ICPEN (International Consumer Protection and Enforcement Network) in a common objective to stop such conduct.

The ACCC recognises that Australia should not be become a haven for perpetrators of illegal conduct that affects overseas consumers. This would only damage Australia's welfare and standing within the global community.

- **Some repositioning in consumer protection**

In addition to establishing improved databases and systems for our enforcement activities, we have, in the consumer protection area, also shifted our focus somewhat in respect of local consumer protection matters.

Through a process of consultation and collaboration with state consumer affairs bodies we are selecting and carefully moving a number of the local consumer affairs matters to the state consumer affairs bodies, where they are more appropriately dealt with. This enables the national regulator to focus its resources on matters of national importance and of significant, widespread consumer detriment.

However, the states must be willing and able and have the resources to deal with any matters we transfer to them. Where they don't have the resources or the willingness to act, the ACCC will continue to take responsibility for the matter.

The states are also working on processes to enable them to take collaborative action in relation to conduct which crosses one or more state borders, and specifically bearing in mind their joint commitment to nationally beneficial outcomes. We have also noted that individual states have obtained successful litigation outcomes that have effects beyond their borders.

The ACCC has always placed a high priority on consumer product safety, and our role in this area has recently been greatly enhanced with the transfer from Treasury to the ACCC late last year of direct responsibility for product safety.

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[2] Worldplay Services Pty Ltd v Australian Competition & Consumer Commission [2005] FCAFC 70 (6 May 2005)

As a result, the ACCC is now responsible for not only enforcing product safety regulations, but in advising government about what regulations are needed, and what form they should take.

Unconscionable Conduct, Small Business and Franchising

The ACCC has long recognised that small business doesn't have the same sort of resources as big business to address education and compliance and for some time now we have had a dedicated small business unit within the ACCC to focus on the sector.

But one of the most difficult tasks the ACCC faces is balancing what I refer to as "the small business expectations gap" – the gap between what the ACCC can do to protect small business, and what some in small business believe we should be doing to protect them from tough competition.

It is not the role of competition policy to favour one sector over another - competition policy is not about preserving competitors, it is about promoting competition.

This was perhaps best put in the final report of the Senate Committee considering the effectiveness of the Trade Practices Act in relation to small business, which noted

> *"…the Committee recognises that there is a significant difference between protecting competitors, and protecting particular competitors. The entry and exit of competitors from the market is a normal part of vigorous competition. Market efficiency is often enhanced by driving inefficient competitors from the market*
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> *To summarise the Committee's views on this issue, the purpose of the Act is to protect competition. This can best be achieved by maintaining a range of competitors, who should rise and fall in accordance with the results of competitive rather than anticompetitive conduct. This means that the Act should protect businesses (large or small) against anticompetitive conduct, and it should not be amended to protect competitors against competitive conduct"*[3]

The difficult task for governments and regulators is to strike the balance – to distinguish between vigorous, lawful competitive behaviour that is likely to lead to significant and sustained benefits for consumers and unlawful inherently anti-competitive behaviour that is likely to disadvantage consumers.

Contrary to some recent claims, the ACCC has not turned its back on section 46 of the Act. Small business needs to be careful, however, not to place undue reliance on the misuse of market power provisions.

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[3] Senate Economics References Committee *"The effectiveness of the Trade Practices Act 1974 in protecting small business"* page xi, para E.3

While section 46 has long been heralded as the champion of small business it has many limitations. The misuse of market power provisions require that business actions are motivated by the purpose of, damaging specific competitors. It is not enough to point to the fact that competitors, even small competitors, are being damaged by the actions of a larger, more powerful business.

Most importantly, section 46 requires as a precondition to its application, that the offending business have a substantial degree of market power. It is very rare that businesses that have this sort of power in a market concern themselves in the competitive environment with very small businesses. They are more concerned with larger businesses which do, or might, impose real competitive constraints on them.

That's why, in the opinion of the ACCC, small business with a genuine grievance about harsh and oppressive behaviour on the part of more powerful businesses with which they are transacting, are much better served by focussing on Part IVA – the provisions introduced in the late 1990s to deal with unconscionable conduct. But it needs to be emphasised that the conduct targeted by Part IVA is that which the courts interpret as unconscionable or harsh and oppressive behaviour by those in more powerful negotiating position in dealing with those businesses in an inferior bargaining position. The provisions do not deal with what might be ordinarily described as tough commercial negotiations

For the last 7 years the ACCC has put significant effort into tackling unconscionable conduct against both consumers and small business.
In addition, in recent months the ACCC has moved to prioritise investigations covering cases involving fraud in the franchising area.

The overwhelming success of franchising has attracted a small number of unscrupulous operators looking to capitalise on the spectacular growth in the sector, by deceiving potential small business owners with offers of bogus or unworkable small business 'opportunities'.

As a consequence the ACCC is already examining a number of different scenarios which we believe are criminal and are taking steps to not only shut down the perpetrators but, where possible, to also impose criminal sanctions.

This is just one area we are targeting. But the diverse nature of small business, and rapid change, such as has occurred with the explosive growth in franchising in recent years, again makes this an area where we have to constantly reassess our compliance - enforcement mix.

ACCC Enforcement statistics

So how is all this reflected in the work we do? In the 2004-05 financial year, the ACCC Infocentre received a total of 68 231 calls and emails, of which 43,827 complaints and inquiries related to the Act.[4]

Of these, just 5412 were escalated to initial investigation 174 then went to in depth investigation. We issued 487 Section 155 notices, instituted litigation in 30 separate matters, intervened in one Federal Court matter and accepted 55 section 87B undertakings. [5]

It's a fact of life that the ACCC does not have unlimited resources and therefore needs to be selective.

The ACCC has therefore had a consistent position of being selective in its choice of enforcement actions involving litigation and of giving priority to cases which are best likely to improve overall compliance with the Act.

The kinds of things that influence the ACCC in our decision making when potentially unlawful conduct is detected and investigated include:

- whether the conduct involves a blatant disregard of the law
- whether the person, business or industry has a history of previous contraventions of competition or consumer laws
- the detriment caused by the conduct and avenues available to redress that detriment
- whether the conduct is of major public interest or concern
- whether the conduct is "industry wide" or is likely to become widespread if the ACCC doesn't intervene
- the potential for action to educate and deter future conduct

Blended into these factors as an important consideration is the compliance culture of a firm. When a firm is on the ACCC's radar and facing a serious investigation, then some consideration of its past and current compliance culture is an important consideration for us.

A pattern of non-compliance points to a company ignoring its obligations to comply with the Act or a company exhibiting a serious compliance system failure which may not be being recognised nor addressed.

There are many benefits from having a robust compliance culture:

- it helps the company avoid breaching any of its statutory obligations and thus damaging its reputation
- builds long term trust in consumers and minimises complaints

[4] ACCC Annual Report 2004-05 page 36
[5] ACCC Annual Report 2004-05 page 39

- indirect consequences of non-compliance could include work ‘down time’, reduction in staff morale and damage to reputation
- it will be taken into account in the event of a breach of the Trade Practices Act.

When the ACCC does decide to act we have a range of approaches we can take, from a simple administrative arrangement to detailed litigation. In certain cases negotiating an outcome will be more appropriate than litigation.

But litigation remains the very sharp end of the ACCC’s enforcement action.

We institute court proceedings when we believe they will bring about an effective result. If a company finds it is the focus of the ACCC’s enforcement activities, it can expect quick, tough, unrelenting court action.

As the South Australian Solicitor-General Chris Kourakis put it at a conference organised by the ACCC in 2003:

> *“Negotiation and mediation alone cannot work. In the business world decisions as to whether to comply with the law are much more likely to proceed on a calculated cost benefit analysis than is the case for most other law breakers….Litigation has the effect of education, change of culture and specific and general deterrence.”*

Litigation is necessary where we need to have a court declare certain conduct unlawful, so we can put an end to that conduct. It is also a useful tool to reinforce that particular anti-competitive behaviour will be not be tolerated within an industry.

The ACCC will not hesitate to act when business ignores or deliberately flouts its obligations under the Act and the most recent statistics back this up.

Litigation commenced & undertakings accepted

	02/03	**03/04**	**04/05**
First instance litigation	39	22	30*
Undertakings	29	33	55
Total	69	55	85

** The ACCC intervened in a matter before the Federal Court taking the total number of matters litigated to 31 for the 2004/05 financial year.*

Whilst litigation is an integral part of the ACCC’s enforcement action, in certain cases negotiating an outcome is more appropriate particularly when it provides much quicker relief for consumers.

It’s no secret that the ACCC has made greater use of section 87B court enforceable undertakings.

In the 55 section 87B undertakings accepted during the 2004/05 financial year the ACCC has been able to:

- elicit quicker responses from traders in breach of the law

- put firms on the radar for future monitoring. This means we can more easily identify recidivist offender that is those with a culture of non-compliance who warrant litigation in future matters
- obtain restitution of consumer damages for example refunds in the Pest Free and Tyco ADT Security matters
- initiate more innovative responses than would be provided by the Court after pursuing lengthy litigation. The most recent example of this is the $8million fund to educate consumers about the detrimental effects of smoking low yield tobacco cigarettes
- establish a foundation for better compliance in the future. This has been done by improving and clarifying the ACCC's requirements in relation to compliance programs. The ACCC has adopted a systematic review process to ensure that compliance programs are effective and are properly followed through.

The greater use of Section 87B undertakings has lead to more efficient and timely outcomes for consumers and in some instances reduced the extent of consumer harm or detriment. I expect the ACCC will continue to be innovative in bringing about better outcomes in a timelier manner for consumers.

Examples of the more notable undertakings recently accepted by the ACCC included those from Flight Centre which forced a change in its marketing including the abandonment of its well established slogan and using a major industry player to deliver a broader educative message as happened with Berri Fruit Juice matter.

Priorities in enforcement & compliance
In terms of areas of conduct, it is useful to reflect on three key areas - restrictive trade practices, consumer protection and unconscionable conduct.

Part V matters remain on top of the list in terms of the number of first instance litigation and matters resolved through undertakings. In fact, during the past financial year they accounted for 81 percent of all enforcement matters resolved.

Breakdown of litigation commenced & undertakings accepted

	Part IV	**Part IVA**	**Part V**	**Total**
04/05	12 (14%)	4 (5%)	69 (81%)	85
03/04	13 (24%)	3 (5%)	39 (71%)	55
02/03	21 (31%)	2 (3%)	46 (66%)	69

Part IV restrictive trade practices
The focus in Part IV matters remains, as always, on areas of high economic and consumer detriment. That conduct includes:

- resale price maintenance

- clear or blatant misuse of market power involving large powerful corporations
- horizontal or vertical arrangements where there is significant impact on the competitive process
- secondary boycotts involving conduct with clear detriment
- and of course, cartels – price fixing, bid rigging, market sharing and output restriction.

The past 12 months has in particular seen a deliberate move by the ACCC to raise the profile of our cartel investigation activity backed up by work in the field. That publicity has been very clearly calculated to raise the public's awareness of cartels — what they mean and the impact they have on the community at large, on the Australian economy, on consumers and, frankly, on businesses.

I make no apology for describing cartels as a form of theft, and a silent extortion of the economy that are bad for business, consumers and the economy.

Some critics have suggested this is too simplistic and have pointed to what they describe as authorised cartels, or anti-competitive behaviour authorised by the ACCC.

This misses the point that unlike cartels, which are secretive, and have no public benefit, these sorts of agreements are only authorised after first being subject to a rigorous and independent test to ensure that they have public benefits which outweigh the anti-competitive detriments. This authorisation process is in itself transparent and invites submissions from all affected parties.

Cartels contain no such benefits and no such public exposure. They are created purely for the benefit of the cartel participants.

The major reason cartels continue to flourish is that cartels are potentially so highly profitable. Cartels artificially create market power, and so create monopoly rents for cartel participants. By way of example, in Australia it has been estimated that the participants in the express freight cartel, which operated for approximately 20 years through the 1970s and 1980s in a market worth between $1 billion and $2 billion dollars annually, ripped-off Australian consumers in the order of $3 billion - $4 billion.[6]

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[6] This estimate is based upon OECD calculations included it the *2002 OECD Report on the Nature and Effect of Cartels* that suggest the average price rise may be in the order of 15 to 20 percent. There is however debate about the exact extent of price rises caused by price fixing. In 2001 W. Wils [*Does the Effective Enforcement of Articles and 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, in Particular Imprisonment?* 2001 EU Competition Law and Policy workshop/proceedings] stated that:

- the risk of detection is estimated at between 13% and 17%. That is, only one in 6 or 7 cartels is detected
- that the average length of a cartel is six years

All OECD jurisdictions see fighting cartels as a high priority.

In Australia, the Government and the ACCC both regard the impact of cartels seriously. Indeed, the Government has introduced legislation into Parliament to significantly increase the penalties for those found to have participated in a cartel and has announced its intention to introduce criminal penalties.

The ACCC has had some success prosecuting cartel offences:

- Earlier this year the Federal Court ordered $23.3 million in penalties against eight companies and eight individuals for petrol price fixing in the Ballarat region in Victoria. These arrangements maintained higher petrol prices for consumers in the Ballarat region[7]. Apco and its director were subsequently found by the Full Federal Court to have not demonstrated the necessary commitment to the price fix and were absolved[8], although the ACCC has sought special leave to appeal the Full Court's decision to the High Court.

- In 2004, George Weston Foods was fined $1.5 million because a former divisional chief executive telephoned a competitor seeking to fix the wholesale price of flour even though the competitor did not agree to the scheme.[9] The intent alone was enough.

- Also last year the Federal Court imposed record penalties totalling $35 million in relation to an electricity transformer cartel – in which, for several years, companies fixed the tender price of power transformers through secret meetings that took place in hotel rooms, airport lounges and private homes across Australia.[10]

The ACCC has also commenced proceedings recently in a number of cases including:

- ACCC v Admiral & Ors – airconditioning installation (Western Australia)
- ACCC v Barton Mines Corp & Ors – industrial garnet production – (national)

- that prices of affected commodities increase by 10%.

Using these estimates, Wils calculated that a penalty would not deter price fixing unless it was at least 150 percent of the annual turnover in the products concerned in the violation. The research does support the conclusion that cartels are so profitable and difficult to detect that it may be impossible to set a pecuniary penalty at a level adequate to deter collusion without threatening the very existence of offending firms.

[7] ACCC v Leahy Petroleum [2004] FCA 1678 (17 December 2004)

[8] Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission [2005] FCAFC 161 (17 August 2005)

[9] Australian Competition & Consumer Commission v George Weston Foods Limited [2004] FCA 1093 (25 August 2004

[10] Australian Competition & Consumer Commission v ABB Power Transmission Pty Ltd [2004] FCA 819 (7 April 2004)

- ACCC v Auspine Ltd & Ors – Timber costs estimating (South Australia)
- ACCC V Gullyside Pty Ltd – petrol retailing (Queensland)
- ACCC v Leahy Petroleum Ltd & Ors - petrol retailing (Victoria).

And the ACCC is ramping-up even further its fight against cartels. It has embarked on a clearly defined and calculated campaign to raise awareness of cartels and to prioritise cartel detection and prosecution.

Anyone who has paid even the smallest attention to the media in recent months will know that being caught and prosecuted is now more of a risk than ever.

Participation in a cartel is still seen as an acceptable risk by some in the pursuit of corporate profits or an easy life – rather than the corporate fraud that it is. The proposed amendments to the Trade Practices Act that will substantially raise the penalties for offenders and the proposed introduction of criminal sanctions for cartel conduct following the Dawson Committee review of the Trade Practices Act, may change this calculation. The amendments demonstrate the consensus that exists about the importance of tackling cartels and the need for effective deterrence.

The ACCC has advocated strongly for, and supports, these legislative developments.

Indeed, I believe the very fact that the maximum penalty will be raised to be the greater of $10 million or three times the gain from the contravention (or, where the gain cannot be readily ascertained) 10 percent of turnover of the body corporate and all its interrelated companies, is likely to give rise to higher penalty orders being made by courts.

Finally, in relation to penalties, the Dawson Committee recommended that Australia adopt a provision similar to that existing in s80A of the New Zealand *Commerce Act 1986* prohibiting a corporation from indemnifying a director, servant or agent against liability for payment of a pecuniary penalty. The Dawson Committee recommended that this prohibition extend to "indirect as well as direct indemnification". This would cover incidental pay rises or bonuses whose ultimate purpose is to assist an employee meet a penalty liability. It has been suggested that such an amendment, which has been included in Schedule 9 of the *Trade Practices Amendment Bill (No. 1) 2005*, is unnecessary because of the operation of sections 199A and 199B of the *Corporations Act 2001*. Clearly the Dawson Committee would disagree. The amendment to the Trade Practices Act will make the position absolutely clear.

The Dawson Committee also recommended that courts have the power to make orders excluding individuals found to have been implicated in a contravention of Pt IV of the TPA from being a director or manager of a corporation.

There is also an increasing culture of cooperation between international regulators to meet the challenge of cracking cartels that operate internationally. The ACCC is in the forefront of this effort and is working increasingly closely with other international agencies, particularly with our counterparts in the European Union, Canada and the United States.

Today I would like to cover several important developments and other issues in the ACCC's cartel enforcement effort including:

- our strategies to enhance cartel detection
- preparation that is under way for the anticipated criminalisation of cartel conduct
- the ACCC's new Immunity Policy – what are the changes and how will the policy operate
- the ACCC's processes for investigating alleged cartels – and some of the challenges we face in prosecuting these collusive agreements and
- the role of private damages actions

Cartel detection

Cartels usually involve secrecy and deception. Collusion is difficult to detect—there may be little documentary evidence and parties often go to great lengths to keep their involvement secret. In these circumstances, discovering and proving the existence of cartels can be more difficult than other forms of corporate misconduct.

The ACCC has undertaken a number of initiatives to heighten cartel detection and prosecution. The ACCC has:

- created a new national unit – the criminal enforcement and cartel branch – to apply the ACCC's extensive skills and experience in cartel matters in a more structured and focussed manner. The branch is in the process of ensuring that the ACCC is geared-up to handle criminal investigations and prosecutions from day one. For instance the branch is well advanced in re-designing the ACCC's evidence gathering and management systems to satisfy criminal standards. The ACCC is consulting with numerous other regulators and the DPP on this project
- developed and disseminated an interactive CD package aimed at raising cartel awareness among government procurement officials – and we are seeking to work with industry to deliver a similar package to private industry before the end of the year
- provided advanced training to enhance the skills of our investigators

I expect that these initiatives will bear fruit quickly. Indeed, the ACCC is already investigating information received from a number of government agencies that has been reported following publication of the procurement package. The ACCC will continue to sell its cartel message to those involved in procurement.

But perhaps the most important initiative is the ACCC's newly released Immunity Policy. The Immunity Policy makes it more likely that cartel participants will break ranks and report illegal conduct to the ACCC, and more likely that perpetrators will be caught and punished. This dramatically changes the risk weighted cost benefit analysis massively against involvement in a cartel.

No matter how secretive the cartel, and how carefully it is disguised, there is now the ever present risk of a co-conspirator rushing to our confessional to claim the advantage from the immunity policy.

So there's a much greater chance of being exposed, and when the cartel is exposed, the new fines mean the cost for any company will outweigh the gain.

Before examining the ACCC's investigation and prosecution processes, I want to discuss the ACCC's new Immunity Policy – how it will work and why it has been crafted in the way it has, but most importantly how it will operate and assist in the conduct of ACCC investigations.

The Immunity Policy

It is precisely because cartels are difficult to detect that we have an Immunity Policy. International experience is that immunity policies help break open the secrecy that is the foundation stone of cartel activity. Encouraging businesses and individuals to blow the whistle on cartels assists the ACCC to detect otherwise covert arrangements, to stop the harm they cause and prosecute participants.

The ACCC's 2003 Leniency Policy offered full or partial immunity to cartel participants who blew the whistle on their co-conspirators. The Leniency Policy was introduced to enhance the incentives then existing under the ACCC's 2002 Cooperation Policy for cartel participants to blow the whistle.[11]

The Leniency Policy proved to be a most effective weapon in our fight against cartels.

About half of the ACCC's in-depth cartel investigations are as a direct result of people taking advantage of this policy.

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[11] In 2002 the ACCC published its cooperation policy for enforcement matters (cooperation policy). The cooperation policy (which replaced an earlier 1998 version) is expressed in general terms and applies to all potential contraventions of the *Trade Practices Act 1974*. The cooperation policy essentially acknowledged what had been happening in practice, where leniency was given to those parties that disclosed illegal conduct or assisted the ACCC in its investigation and any subsequent litigation. The nature and extent of leniency under the cooperation policy was assessed on a case-by-case basis having regard to the factors it set out.

The cooperation policy provides more discretion than the leniency policy. It allows the ACCC to give parties the full range of benefits for cooperation, from immunity from prosecution and or penalty, to penalty discounts. These benefits are available to persons who do not qualify for leniency.

The benefit of the Leniency Policy is that it increases certainty for corporations and individuals in the way they will be treated by the ACCC if they are the first to self-report involvement in cartel conduct. In contrast, the cooperation policy affords additional discretion to the ACCC and therefore less certainty to industry.

The new Immunity Policy, which came into effect on 5 September 2005 supersedes the ACCC's 2003 Leniency Policy. The introduction of the Immunity Policy follows a review of the operation of the 2003 policy and takes account of experiences here and overseas. The changes seek to maximise incentives for cartel participants to report cartel conduct.

The ACCC published interpretation guidelines that accompany the Immunity Policy and explain how the policy will be interpreted and applied by the ACCC.

It should be remembered that the Immunity Policy, as its title suggests, grants immunity from prosecution to a person who has confessed to the ACCC their involvement in a cartel.

In the absence of immunity they would be prosecuted and liable to substantial financial penalties and in the near future jail sentences. Under the Immunity Policy they will get off scot-free. The Immunity Policy recognises that there is a benefit in busting secret cartels if participants are given an incentive to confess and co-operate with ACCC efforts to investigate and prosecute.

A strong Immunity Policy is recognised by anti-trust authorities around the world as a valuable cartel busting tool.

The Immunity Policy delivers benefits to all Australians. It also provides a powerful disincentive to the formation of cartels because businesses perceive a greater risk of ACCC detection and court proceedings.

Some companies that are penalised may regard this as unfair. They see their competitors who may have been equally culpable in the cartel getting more favourable treatment. However, Australian courts accept the principle that those who are the first to expose a cartel and assist the ACCC investigations deserve more lenient treatment.

In the December 2003 *Tyco* case[12], Justice Wilcox noted:

> *"It is sufficient to say that, because of the existence of the leniency agreement, there can be no valid argument for parity in outcome as between Tyco and FFE. If this approach leads to a perception amongst colluders that it may be wise to engage in a race to the ACCC's confessional, that may not be a bad thing."*

Last year we saw the first real race to the ACCC's confessional from companies in one alleged cartel that was under investigation. As the solicitor acting for one of a number of (too late) leniency applicants wryly observed: "What you're telling me is that the leniency carrot has already been eaten." Since then, the ACCC has, on a number of occasions turned leniency and immunity applicants who had delayed reporting the conduct away[13].

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[12] *Australian Competition and Consumer Commission v FFE Building Services Limited* [2003] FCA 1542, at para 29-30

[13] Under the Immunity Policy, the ACCC can queue subsequent immunity applications.

How does the Immunity Policy work?
I want to explain how the Immunity Policy operates using a simple example. More detailed information is available in the Immunity Policy Interpretation Guidelines.

Assume you are a company director and the CEO reports to the board that a senior manager of the company has been colluding with competitors to set prices.

Your company has a choice. It could sit on its hands and hope not to be caught. Alternatively, it could report the conduct and cooperate with ACCC investigations. Sitting on its hands would not be a good option. The chances are higher than they have ever been that if your company does not report the cartel, a co-conspirator will.

The policy makes it easy to apply for immunity.

Under the previous policy it would have been necessary for the company to apply for leniency in writing and describe the conduct in some detail. Under the Immunity Policy a cartel participant has the choice of providing a detailed application in writing or by telephone. Alternatively, if the potential applicant is unable to provide details of the alleged cartel conduct at that time it can gain protection by placing a marker (providing it has a genuine intention to cooperate).

It is even possible to ring the ACCC on a hypothetical basis and ask whether immunity would be available for cartel conduct in a certain industry. If immunity is available, it is then possible to place a marker.

If your company places a marker, the ACCC will give you a reasonable period to conduct an internal investigation. At the end of this period, the company will be required to report fully on the conduct. If it does not report by the end of the marker period and no extension of the period has been granted by the ACCC, the marker will lapse. At this point you, and the company, are vulnerable again; it is open to another cartel participant to approach the ACCC. But as long as the company holds the marker, no other person involved in the same cartel will be allowed to take your place in the immunity queue.

I anticipate that most applicants will take advantage of the marker process.

If your company places a marker and conducts an internal investigation into the conduct; it must then provide the ACCC with sufficient information for the ACCC to determine whether it satisfies the conditions for immunity.

The requirements that must be satisfied for conditional immunity are set out in the policy as follows:

(i) the corporation is or was a party to a cartel

(ii) the corporation admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the TPA

(iii) the corporation is the first to apply for immunity in respect of the cartel

(iv) the corporation has not coerced others to participate in the cartel and was not the clear leader in the cartel

(v) the corporation has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel

(vi) the corporation's admissions are a truly corporate act (as opposed to isolated confessions of individual representatives)

If these requirements are satisfied, the company will be entitled to automatic conditional immunity.

However, it's important to stress here that markers are not cross jurisdictional – if a company has applied for a marker in another country, but not in Australia, it is not covered, and leaves the way open for its co-conspirators to grab the Immunity carrot. So companies involved in international cartels which are contemplating co-operating with overseas authorities, need to make sure they inform us at the same time, or this risk missing out on the benefits of the Immunity Policy. Some commentators have suggested an immunity application in one country should give protection in other jurisdictions. Such a proposal would potentially give rise to intractable conflicts and confidentiality issues.

Full cooperation

Full, frank, expeditious and continuous cooperation is essential. The ACCC has high expectations. This obligation should not be underestimated.

Be under no illusion, receiving conditional immunity is not a free pass. Full cooperation is likely to be costly, onerous and time-consuming. It is only with full cooperation that the ACCC can hope to obtain evidence that would be useful in prosecuting a cartel.

An immunity applicant must provide all evidence and information in their possession, or available to them where ever it is located, and at their own expense. Examples of how the obligation to cooperate has played out in recent investigations include:

- requiring a company to engage forensic IT experts to analyse electronic records – this process allows the ACCC to review all electronic documents, including documents that may have been deleted.
- requiring the applicant to review telephone records
- requiring the applicant to deliver up for analysis mobile telephones and original diaries

- requiring that an executive based overseas travel to Australia to make a statement

As part of an immunity applicant's obligations to cooperate with the ACCC, the immunity applicant must not disclose that it has applied for immunity without first informing the ACCC. On a number of occasions immunity applicants have announced to the Australian Stock Exchange or another foreign regulator that they have applied to the ACCC for immunity in relation to cartel conduct. The ACCC understands that under the ASX listing rules and the Corporations Act corporations are obliged to continuously disclose information that may have a material affect on their share price in order to maintain an orderly and informed share market.

However, immunity applicants need to be mindful that disclosure may jeopardise ACCC investigations, particularly covert investigations. It should be possible to manage the timing of disclosure so as not to put an investigation at risk.

In some circumstances, making public statements could be completely inconsistent with the obligation to cooperate and may in fact jeopardise the protection otherwise afforded the corporation under the Immunity Policy.

The ACCC is not seeking to encourage any company to evade its lawful duty of disclosure to the stock exchange.

However, it is important to remember that Australian Stock Exchange rules state that continuous disclosure is only required of, and I quote "any information concerning it that a reasonable person would expect to have a material effect on the price or value of an entities' securities".[14]

The ASX rules also contain explicit waivers from the application of the continuous disclosure rule although strict conditions apply to the application of the waivers.[15]

It is very easy for company secretaries or legal counsel to advise a board to make disclosure anyway, regardless of whether or not it is legally required, just to be on the safe side.

However, this will no longer be the safe option, as immunity applicants who unnecessarily disclose information about ACCC investigations may now lose their immunity. In short – inappropriate disclosure could cost you immunity, and its consequent protection from big fines and possible criminal prosecution.

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[14] Australian Stock Exchange Market Listing Rules; January 2003, Chapter 3.1, page 302
[15] Ibid, pp 302-303.

What if the ACCC has already commenced an investigation into the conduct?

Another important development that will increase certainty for those contemplating self-reporting cartel conduct is that conditional immunity will be available even if the ACCC has commenced an investigation into the alleged cartel – provided that the ACCC has not received advice that it has sufficient evidence to commence proceedings. Immunity may even be available to a company that has been issued with a notice under section 155 or whose premises have been searched pursuant to a search warrant. This is a major initiative. Under the 2003 policy, only partial protection (from penalty) was available if the ACCC was "aware" of the alleged conduct. It can no longer be argued that an applicant does not know how it will be treated when it approaches the ACCC.

Second applicant

A further reform to the Immunity Policy is that if the first to apply for immunity is unable or unwilling to meet all the requirements for immunity, a subsequent applicant may still qualify for immunity. This maximises the incentive for applicants to cooperate fully with the ACCC. The first applicant knows that if it fails to satisfy the requirements for conditional immunity, its place will be taken by a co-conspirator. The first applicant will then be vulnerable to prosecution.

What if it becomes apparent during an investigation that the leniency applicant was a ring leader?

It remains important to determine whether an immunity applicant was a ring leader.

A corporation will not be eligible for corporate conditional immunity if it has coerced any corporation to participate in the cartel or is the clear leader in the cartel. Similarly, an individual will not be eligible for conditional individual immunity if his/her employer has coerced another corporation to participate in the cartel and he/she has played a role in coercing the other corporate participants.

But the ACCC recognises that in many cartels there is no coercion or clear leader. There will need to be strong evidence of coercive behaviour. In particular, there must be clear evidence that the coercer pressured unwilling participants to be involved in the cartel conduct.

The investigation process – gathering evidence

Beyond immunity applicants, the ACCC learns of allegations of cartel conduct from a number of sources including anonymous whistleblowers, suspicious customers, disgruntled employees and counterpart agencies in other jurisdictions.

Investigations into cartels are some of the most complex and difficult investigations that the ACCC undertakes. Proving a criminal cartel offence will take that difficulty to a new level. The inherently secretive nature of cartels and the measures taken to avoid detection often necessitate time consuming and resource intensive investigations.

The ACCC gathers information from a wide range of sources. In a typical investigation, the ACCC will usually gather information about communications between competitors (for example by analysing telephone records and emails). An example from one recent case that illustrates how resource intensive a cartel investigation may be is that the ACCC analysed more than 20 archive boxes of telephone call records. This revealed more than 1600 calls between competitors.

In another case, the ACCC is reviewing over 1.1 million electronic documents copied from the computers of an alleged cartel participant.

Another important task for ACCC investigators will usually be to fully review pricing information with a view to establishing any correlation between pricing movements and communications between competitors.

The ACCC is also likely to interview a wide range of people including customers, suppliers and industry bodies. Some interviews will be less formal, but others will involve the use of the ACCC's coercive powers under Section 155. Interviews with represented individuals can give rise to particular challenges, including apparent conflicts of interest of lawyers representing several potential respondents.

One misconception is that information from an immunity application will 'stitch-up' the other cartel participants and deliver the ACCC a successful case. The immunity applicant's information is usually very useful, but it is only the beginning of an investigation to find sufficient evidence to litigate successfully.

Unlike in some jurisdictions, the success or otherwise of an immunity application is not dependent upon the quality or value of the evidence provided by the applicant. That said, the Immunity Policy is a great tool to break open cartels. It certainly helps the ACCC obtain evidence, but it is only one component of a cartel investigation.

While it is not unheard of for an immunity applicant to supply a 'smoking gun document', it is more usual that the ACCC receives a 'road map' of the cartel. It will always be necessary for the ACCC to investigate the admissions from other sources to validate the information provided and prove our case. Exactly what investigative steps are required will vary from case to case.

What must we prove?

To prove a breach of the Act, the ACCC must demonstrate that there was an agreement between competitors and/or that *that* agreement was put into effect. Because of the nature of penalty cases under the Trade Practices Act the ACCC must prove these matters to a standard that is higher than the usual civil burden of 'balance of probabilities'.

The ACCC must prove its case to a *quasi-criminal* standard, where the existence of the material facts must be proved 'clearly', 'unequivocally', 'strictly' or 'with certainty'.[16]

When criminal sanctions are introduced, and it is necessary to prove matters 'beyond reasonable doubt', the evidentiary hurdles will be even higher.

Cartel cases come in a variety of shapes and sizes. Some, a very few, have written agreements. These are the easiest to prove. More common, there is no express agreement and the ACCC must rely on a mixture of direct and circumstantial or inferential evidence to prove a contravention. Courts are increasingly challenging the value of inferential evidence in proving that the parties made, or gave effect to, an agreement that was the result of a 'meeting of the minds'. University of NSW associate professor of law, Frank Zumbo, recently commented that:

> *Circumstantial evidence may be the smoke, but there needs to be more.*[17]

Some cartels are given effect infrequently in circumstances where participants are likely to remember specific instances of conduct, such as the allocation of a small number of major tenders.

In contrast, some cartels, particularly price fixing cartels, are given effect much more frequently. The collusion becomes part of the normal course of doing business. In these circumstances, it may be very difficult for participants to recall specific instances of giving effect to the cartel. Obtaining direct evidence that an agreement has been given effect can be problematic in these circumstances.

In the recent Ballarat petrol case[18] the ACCC succeeded in proving price fixing allegations against eight corporations and eight executives.

The ACCC's case was based on evidence which included records of telephone conversations between competitors and the correlation between the calls and the timing of price rises.

Justice Merkel stated that:

> *In summary, the price-increase information and the pattern of calls … are consistent with and supportive of the inference the ACCC seeks to draw, particularly when the direct evidence about the content of the communications between the corporate respondents is considered.*[19]

Two parties, Apco Service Stations Pty Ltd and its managing director successfully appealed this decision on the grounds that there was no agreement or commitment between the appellants and the other parties to increase prices.

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[16] *Briginshaw v Briginshaw* (1938) 60 CLR 336.
[17] *ACCC's price-fixing win overturned*, David Hughes, Australian Financial Review, 18 August 2005.
[18] ACCC v Leahy Petroleum [2004] FCA 1678 (17 December 2004)
[19] ACCC v Leahy Petroleum at 281-91.

At first instance, it was found that the Apco managing director was:

> *aware of the purpose of price-increase and follow-up calls…received and acted upon those calls… and determined whether to substantially match them…*[20]

And further that the managing director was:

> *aware that the price-increase and follow-up calls were part of a long standing and collusive process…*[21]

On the basis of these findings, His Honour concluded that:

- *the calls to [the* managing director*] were a significant aspect of any pricing fixing arrangement;*
- *the calls increased the likelihood of APCO increasing its prices…*
- *the calls made it more likely that the price increase would be taken up by APCO and would therefore 'stick' [among the other retailers].*[22]

On the other hand, the Full Court said:

> *If [the respondents] were not committed to increase prices, the fact that sometimes they did so is consistent with them exercising their own judgment on those occasions. Unilaterally taking advantage of commercial opportunity presented is not to arrive at or give effect to an understanding in breach of the Act.*[23]

The ACCC is in the process of seeking special leave to appeal this decision to the High Court.

There have also been moves in the Federal Court toward a preference for oral testimony from witnesses over affidavit evidence. While in principle this is a good idea, it also has the potential to extend enforcement proceedings and introduce more uncertainty to litigation – it is difficult to know how any witness will perform in the witness box, and what effect this might have on the case.

This will increasingly be important if the credibility of witnesses as to the existence of agreements between parties becomes central and the value of inferential or circumstantial evidence is reduced.

Search warrants

The burden of proof in a criminal cartel prosecution is of course higher than in civil proceedings. To assist us obtaining necessary evidence, the government has introduced legislation that will give the ACCC powers to seek a search warrant from a magistrate to search for and seize evidentiary material relating to contraventions of the Act.

These new powers will bring the Act into line with powers available to other competition enforcement agencies around the world, such as the US

[20] Apco Service Stations Pty Ltd v ACCC [2005] FCAFC 161 (17 August 2005), [40]
[21] Ibid.
[22] Ibid. [31]
[23] Ibid. [56].

Department of Justice, European Commission, and the Canadian Competition Bureau and will assist us in gathering evidence.

The ACCC's view is that having search warrant powers is vital, particularly in an environment where cartel participants face significant sanctions, including jail. The capacity to search and seize the evidence is an important development in the ACCC's ability to gather evidence using an element of surprise, rather than relying on the information and evidence provided by the company in response to a section 155 Notice, which compels recipients to produce relevant information or documents or attend an interview.

Protecting the integrity of our investigations

For some time the ACCC has been concerned that responses to section 155 notices have been less than thorough. The ACCC has been carefully monitoring responses to its statutory notices and discussing our concerns with the DPP. The ACCC is concerned that less than candid responses may be becoming more common. There are penalties under the Trade Practices Act for non-compliance with such notices including imprisonment for up to 12 months.

As I have mentioned, investigations also usually involve numerous voluntary interviews, not under section 155. You may not be aware that it is also an offence under the Criminal Code, punishable by up to 2 years in jail, to provide false or misleading information to a Commonwealth officer in such an interview.

Further, destruction of documents to prevent them from being used in legal proceedings is prohibited under the *Crimes Act*,[24] as is giving false testimony,[25] fabricating evidence,[26] intimidating witnesses,[27] corruption of witnesses,[28] deceiving witnesses[29] and preventing witnesses from attending court.[30] Penalties for any of these acts range from 1 to 5 years imprisonment.

It is critical that the integrity of the ACCC's information and evidence gathering processes are maintained. We regard this issue very seriously and we will not shy away from pursuing a matter with the assistance of the DPP where there is evidence that a person has not complied with his or her obligations under a section 155 notice or has lied to, or misled, ACCC investigators.

Instituting proceedings

There has been some media comment in the context of the successful appeal I have already mentioned in the Ballarat petrol case, that the ACCC institutes legal proceedings inappropriately.

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[24] 1914 (Cth) section 39.
[25] Section 35.
[26] Section 36.
[27] Section 36A.
[28] Section 37.
[29] Section 38.
[30] Section 40.

In a recent article in the *Australian Financial Review* it was suggested that:

> *It is time for the ACCC to … publicly provide an assurance that the [Immunity Policy] in future cartel matters shall be subject to stringent guidelines and practices to ensure that the policy is not misused or abused, or results in unnecessary damage.*[31]

Ironically, such comments contrast with a contrary perception sometimes promoted that the ACCC is 'gun shy' and will not institute proceedings unless it is almost certain of victory. Such comments, from either end, are misinformed and misleading.

Our investigations are undertaken in a responsible and thorough manner and are supervised by a number of committees drawing on the expertise of senior staff and commissioners. Avenues of investigation are pursued in response to information provided to the ACCC. We are required under the Commonwealth Legal Services Directions to have external legal advice that we have reasonable prospects of success before we are able to institute proceedings. In the Ballarat case it is also relevant that the Federal Court, at first instance, found our case proved.

Litigation is a complex process and there are many contingencies. It cannot be expected that the ACCC will win every case. Nor can it be expected that a respondent will never succeed in an appeal against a decision in the ACCC's favour. But to suggest that the ACCC is careless when issuing proceedings is just wrong.

Additional complications arise where multi-national cartels are involved. For instance, there are practical issues of service of process and enforcement of court orders.

However the ACCC will continue to investigate and where appropriate, take enforcement action to prosecute international cartels because international cartels impact adversely on Australian consumers.

Media

It is crucial that the ACCC is transparent and accountable – the ACCC will continue to make measured, fair and accurate public comment about ACCC processes and enforcement decisions. Transparency and accountability is one of the keystones of public confidence in the administration of the Act.

Making public statements about 'real life' ACCC enforcement actions and processes educates consumers and businesses about their rights and obligations under the Act and is the most effective way of promoting compliance with the law.

[31] Van Moulis, special counsel representing Apco, quoted by Duncan Hughes and Richard Kerbaj, *The loneliness of the corporate whistleblower*, AFR 29 August 2005, p53.

However, the ACCC has two overarching considerations when making public comments. The publicity should not prejudice the right to a fair trial and it should not cause any unnecessary damage to reputation.

The ACCC will issue a news release when it decides to institute proceedings in relation to an alleged contravention that accurately describes the allegations and does not imply that the allegations are more than allegations.

In practice, the ACCC rarely makes public comments regarding an investigation because of the potential detrimental impact on the reputation of the parties.

Publication of ACCC policies such as the Immunity Policy also plays an important role in maintaining transparency.

The ACCC policy is clear: a person who has engaged in cartel conduct and applies for immunity will get off even if they are a major player in the cartel.

Immunity is not some secret deal completely at the ACCC's discretion. The Immunity Policy describes what is required of the immunity applicant and explains the public policy reasons behind the policy. It recognises that cartels are inherently secret and difficult to detect and that there is a public benefit in providing an incentive for cartel participants to break ranks. In some, but not all instances, the immunity application will lead to an investigation that culminates in successful proceedings to punish the other cartel participants. Even if no proceedings result, the consequence of an application will be to put an end to the cartel. This, in itself, is an important outcome.

Private damages proceedings

The ACCC's prime focus is on deterring, stopping and prosecuting cartels. But there seems to be a growing recognition by victims of cartels that they are entitled to seek redress. This coincides with an increased interest from private legal firms (and litigation funders) to pursue such private claims. Compensating victims in private damages actions has been the norm in North America for some time. My expectation is that compensation is set to become more common in Australia too, and this will surely act as a further deterrent.

The ACCC has been approached by both private legal firms and litigation funders seeking whatever assistance the ACCC can offer in the development of private damages claims. The ACCC sees private proceedings as a legitimate and valuable avenue of redress. However there are limits to what role the ACCC should play in such proceedings and what assistance it can provide.

For instance, it would not be possible for the ACCC to share information that had been obtained using the ACCC's compulsory information gathering powers under Section 155 of the Act. Similarly, the ACCC obtains information on a confidential basis. It would not be possible to share this information without the consent of those who provided the information.

It has also been suggested that the ACCC should actively seek findings of fact that will assist private damages claimants. The ACCC will not shy away from this in appropriate circumstances. However, there may be legitimate reasons in a particular matter for the ACCC to obtain findings that do not cover all instances of certain conduct, or indeed, not pressing for findings of fact at all. The ACCC would not wish to jeopardise the public interest of obtaining an agreed penalty or other outcome merely because this would not advance a private damages action, or would advantage certain private parties over others.

Working with the Director of Public Prosecutions

As I have already mentioned, the Government has announced its intention to criminalise cartel conduct. This acknowledges the seriousness of cartel conduct and underscores that cartels are, in truth, a fraud on consumers and the economy and are, as has been noted by Justice Finkelstein, "morally offensive"[32].

Criminalisation also recognises that financial penalties alone are not the answer. A US study of almost 400 firms convicted of price fixing[33] estimated that optimal penalties would have bankrupted at least 58 percent of those firms. And even if a company does survive, penalties will often ultimately end up being passed on to the consumer in the form of higher prices.

On the other hand, jailing an executive guilty for participating in a cartel is a penalty from which no company or shareholder can be forced to pick up the cost.

Jim Griffin, who recently resigned from the position of Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division, told ACCC staff that in his 25 years prosecuting cartels he had listened to many accused say they would gladly pay a higher fine to avoid imprisonment but he had never once heard anyone offer to spend extra days in jail in exchange for a lower penalty recommendation.

To illustrate, he spoke of a senior executive who explained that:

> *'So long as you are only talking about money, the company can at the end of the day take care of me – when you talk about taking away my liberty, there is nothing that the company can do for me.'*

Before long, this equation will, I hope, play on the minds of Australian company executives.

The ACCC does not underestimate the additional hurdles that will be involved in gathering evidence that will be admissible in a criminal court and that will persuade a jury of 12 men and women to jail a person whom society has placed in a position of trust; a person who may have a reputation as an

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[32] Speech to ACCC Cracking Cartels Conference 24 November 2004.

[33] Cray Craft and Gallo *Anti trust sanctions and a firm's ability to pay* (1997) 12 Review of Industrial Organisation 171.

upstanding member of the community and who donates time and money to charities and community groups.

Justice Finkelstein noted recently in the Vizard case[34], that it is the positions of trust such people occupy in the community that may facilitate the commission of their crimes.

The ACCC already enjoys a good relationship with the DPP, but with the introduction of criminal cartel sanctions it will be absolutely critical that the two agencies work well together. It is after all the DPP who decides whether to lay criminal charges in a particular matter.

The ACCC and the DPP will enter into a formal, publicly available, Memorandum of Understanding (MOU) that will establish high standards of cooperation at both the investigation and prosecution stages.

In addition, the ACCC will issue guidelines, prepared in consultation with the DPP, outlining what factors will inform decisions about whether an investigation should be pursued with a criminal prosecution in mind.

The ACCC accepts that criminal penalties are not appropriate in all cases, and should be reserved for only the most serious cartels. That is why we are entirely supportive of the factors announced by the Treasurer that the ACCC will be required to consider before referring matters to the DPP. These factors underscore that criminalisation is intended to apply to hard core cartel conduct. These factors are:

- whether the conduct was long standing or had, or could have, a significant impact on the market in which the conduct occurred
- whether the conduct caused, or could cause, significant detriment to the public or loss to one or more customers
- whether one of more of the participants has previously participated in cartel conduct
- whether the value of affected commerce exceeded $1 million within a 12 month period
- whether, in the case of bid rigging, the value of the successful bid or series of bids exceeded $1million within a 12 month period

The Treasurer also announced factors the DPP will need to consider in deciding whether to launch a prosecution – these factors are:

- the impact of the cartel on the market
- the scale of the detriment caused to consumers or the public, and
- whether any of the cartel members have previously been a party to a cartel

[34] Australian Securities and Investments Commission v Vizard (with Summary) [2005] FCA 1037 (28 July 2005)

Cooperation between the ACCC and the DPP will be significant from the early stages of a matter. It is anticipated that the ACCC will liaise with the DPP as soon as it appears that a matter may warrant criminal prosecution and will take advice on what evidence will be required and how an investigation may best be managed to gather that evidence. There will also be very close cooperation where a cartel participant has sought immunity. The ACCC and the DPP will work closely together to ensure that there is certainty in relation to immunity from both civil and criminal liability. Both agencies understand that if this certainty cannot be delivered the Immunity Policy will be compromised.

I expect there will be instances when the DPP will not want to lay criminal charges in a matter referred to it by the ACCC. For instance, if the DPP does not believe the evidence will satisfy the criminal (beyond reasonable doubt) burden of proof.

The ACCC and the DPP will have dispute resolution mechanisms in the Memorandum of Understanding. However, the ACCC understands that it is ultimately the DPP's decision whether or not to commence criminal proceedings. If the DPP does not consider a criminal prosecution to be warranted, the Trade Practices Act will specifically provide that the ACCC may commence civil proceedings.

Conclusion

The last two years have been a period of substantial change, both at the ACCC and in the Trade Practices Act we administer.

In that period 5 of our seven commissioners have been replaced and we have introduced significant changes to make better use of our resources and target matters of national importance and of significant, widespread consumer detriment.

This has resulted in an increase in the number of Part V matters we have taken to court, but also an increased use of section 87B undertakings.

The Commission has also significantly stepped up its fight against cartels, and been assisted in this fight by our new Immunity Policy and some pretty handy weapons in the form of criminal sanctions and much tougher penalties for law breakers.

At the same time, two major reviews of the Trade Practices Act have led to perhaps the most significant changes to the Act since the Hilmer National Competition Policy reforms of the 1990s with changes to merger procedures and collective bargaining.

But through all this, everything we do at the Australian Competition and Consumer Commission continues to be governed by five guiding principles:

- Transparency – that is, no private deals. Every resolution of an enforcement matter whether it be through litigation or a settlement is publicised.
- Confidentiality – we do not discuss investigations, we do not discuss matters before the courts. My stock standard response to any question concerning such matters is that it is not my practice to comment on matters we may or may not be investigating.
- Timeliness – investigative process and decision as to resolution of enforcement matters should be made as efficiently as possible to avoid costly delays, business uncertainty and reduced impact of the enforcement process.
- Predictability – we don't make ad hoc decisions and we are setting a clear direction as to our focus to give business certainty about our actions.
- Fairness – striking the right balance between voluntary compliance and enforcement while responding to many competing interests. I don't mind us being accused of being too tough, but I don't want the Commission to ever be accused of being unfair.