Australian Competition & Consumer Commission

Competition Law Conference 2010

Current issues on the ACCC's radar

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INTRODUCTION

- Vast number of legislative changes that has occurred over the past 12 months.
  - component pricing (25 May 2009)
  - unit pricing (took effect December 2009)
  - water trading (since 2007)
  - gas and electricity (including staggered transition of retail powers from the states to the AER).
  - criminal cartels (commenced 24 July 2009)
  - Session later on this afternoon with Justice Middleton, Peter Kell, and Jacqueline Downs and David Howarth dealing with ACL. Will note that the first ACL Bill has been passed by Parliament and the ACCC is working through applying the new tools.
- The topics that I am going to address today are:

1. Part IV – tougher sanctions

2. Cartels – in particular the process that applies following the passage of the criminal legislation last July

3. Mergers – some of the issues that have arisen over recent times following several oppositions to transactions.

PART IV – TOUGHER SANCTIONS

- Recently returned from Europe – discussions with lawyers, judges and regulators from around the world on issues of anti trust enforcement and penalties that apply.
- Considerable focus on the level of financial penalties and imprisonment.
- The Australian Parliament has recognised the critical importance of strong sanctions in detecting, deterring and punish cartel behaviour and other forms of anti-competitive conduct.
- With the introduction of stiffer financial penalties for anti-competitive conduct in general in 2007, and criminal penalties specifically for cartels in 2009, the bar has been raised.
- Corporate penalties are only going to go up.
- The ACCC will use its investigative powers to obtain information from firms and establish the benefit gained from anti-competitive conduct.
- The new regime brings Australia in line with international jurisdictions.

The new penalty formula

- For roughly 14 years the maximum penalty for anti-competitive conduct, be it a misuse of market power or cartel conduct was $10 million per contravention.
- We saw cases where the profit from the conduct for the company far outstripped the reach of the penalties being sought by the ACCC and being awarded by the courts - which, to put it crudely, made anti-competitive conduct fairly good business.
- In my view that the financial penalties in Australia don't reflect the true damage done by anti-competitive conduct, and this reflects both the level of penalties that have been sought by the ACCC and those that have been awarded by the courts. A cultural change is now necessary.
- For example in the Visy matter the ACCC sought and obtained a record penalty of $36million. We never calculated the damage that was done as a result of that cartel.
- However there have been two claims reported that seem to suggest that the potential profits to be gained from the box cartel far outweighed the penalty imposed:
  - Reported claim by Cadbury Schweppes - $236m
  - Reported economic analysis undertaken for the Maurice Blackburn Class action (Jarrah Creek case) suggests that the damage done by the cartel - $466m plus interest $231m.
- I make no comment at all about the veracity of those claims.
- It is important to remember that there were two parties involved in this cartel Amcor and Visy.
- However, whichever way you look at it, if you take the totality of the estimated claimed damage sustained from the operation of the cartel, it far outweighs the penalty obtained.
- In January 2007 the penalty regime for anti-competitive conduct underwent significant change. The maximum penalty became the greater of:
  - $10 million; or
  - three times the value of the benefit that one or more persons obtained from the cartel; or
  - where that value cannot be determined, 10% of annual turnover of the company (and its related companies) during the period of 12 months ending at the end of the month in which the conduct occurred.
- The ACCC is now entering a new era – cases that we are investigating and pursuing are now starting to fall within the ambit of the new penalties introduced in January 2007.

What this means for investigation of anti-competitive conduct

- Companies will be compelled to open up their books – the ACCC will use its investigative powers to obtain information from firms and establish the benefit gained from anti-competitive conduct.
- Forensic accountants will have a greater role in our investigations.

- The ACCC will be putting information before the courts to assist them to determine what is the greatest of $10 million, three times the gain or 10% of turnover.
- The ACCC will be pressing for any penalty to be calibrated against whatever might be 'the maximum', which will vary depending upon the circumstances of the case.
- The Trade Practices Act now has within it a mechanism for imposing penalties which will more effectively deter unlawful conduct. This is because Courts can now set penalties by having regard to the economic gains associated with unlawful conduct and the size of the business concerned.
- These recent amendments bring Australia into line with significant other antirust regimes USA, EU, Canada, Japan by focusing on the impact of the conduct to calculate penalties and determine appropriate sanctions.

CARTELS

- They are theft, by well dressed thieves carrying brief cases.
- Cartel operators are corporate fraudsters who defraud their customers and Australian consumers.
- Cartels are a cancer on the Australian economy.
- 2009 was a record year for cartel litigation with proceedings instituted in 13 cartel matters and secured over $20million in penalties. These included:
  - the ACCC's ongoing action against the air cargo cartel
  - the marine hose cartel, an alleged cartel involving electric cable manufacturers.
- Of the cartel proceedings instituted in 2009, so far 7 have concluded with penalties totalling $26.3 million ordered.

Sanctions for cartel conduct

Civil penalties

- Under the penalties for cartel conduct a company may be ordered to pay:
  - $10 million, or
  - three times the total value of benefit 'obtained by one or more persons' from the cartel, or
  - when the value of the illegal benefit cannot be ascertained, 10 per cent of the turnover of the corporate entity (including related corporate bodies) in the preceding 12 months.
- Disqualification of a person from managing corporations - for such period as the court thinks fit.

Criminal penalties

- The effect of a serious cartel is best summarised in the words of Heerey J in the Visy cartel case when he said:

  > *Every day every man, woman and child in Australia would use or consume something that at some stage has been transported in a cardboard box. The cartel in this case therefore had the potential for the widest possible effect.*
  >
  > *Price fixing and market sharing are not offences committed by accident, or in a fit of passion. The law, and the way it is enforced, should convey to those disposed to engage in cartel behaviour that the consequences of discovery are likely to outweigh the benefits, and by a large margin.*
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  > *Critical to any anti-cartel regime is the level of penalty for individual contraveners. We tend to overlook the fact that corporations are constructs of the law; they only exist and possess rights and liabilities as a consequence of the law. Heavy penalties are indeed appropriate for corporations, but it is only individuals who can engage in the conduct which enables corporations to fix prices and share markets.*
  >
  > *Many countries with free market economies have recognised this reality by enacting laws which make cartel conduct by individuals subject to criminal sanctions, including imprisonment. In the United States this happened as long ago as 1890 with the Sherman Act 15 U.S.C. More recently, as shown by the Organisation for Economic Co-operation and Development report Hard Core Cartels – Third Report on the Implementation of the 1998 Recommendation, Paris, 2006, the following countries have laws providing for terms of imprisonment for cartel conduct: Canada, France, Germany, Ireland, Israel, Japan, South Korea, Mexico, Norway, Slovak Republic and the United Kingdom.*

- After a gestation period of over 4 ½ years, Australia has added its name to this list. And now, to quote Scott Hammond, the Deputy Assistant Attorney General of the U.S. Department of Justice, “Australia will cement its place in the big league of international anti cartel enforcement.”

- There are clear indications from the parliament and the judiciary that they regard serious cartel conduct as deserving serious penalties.

- This is of intense interest. At every boardroom function I attend around the country, of all the subjects that people want to raise – it is the criminalisation of cartel conduct that comes up consistently.

- Effective 24 July 2009 and will apply to all serious cartels that are initiated or given effect to after that date.

- 10 years, directed to serious hard core cartel conduct, not small business inadvertent cartel activity – refer ACCC/DPP MOU.

- This will empower the ACCC, in conjunction with the CDPP, to prosecute participants in the most serious hard core cartels with a view to securing criminal convictions and jail sentences of up to ten years.

- The capacity to conduct civil proceedings will remain in the Act including substantial financial penalties and disqualification of a person from managing corporations for such period as the court thinks fit.

- This could hypothetically permit civil proceedings against the corporate entity and criminal proceedings against culpable executives – although this would be

contrary to our Guidelines which state that serious cartel activity should be prosecuted criminally whenever possible.

- Corporations will have a bit more thinking to do – not only might they lose their executives to an Australian gaol for a number of years, they might also have to pay up to three times of any benefit they or their co-cartelists derive from the cartel's impact upon Australian commerce.

- The start of criminal sanctions means those who engage in some of the most serious forms of theft from consumers and businesses, will be treated like the criminals they are. You may carry a briefcase rather than a gun, but if you steal millions, you too will be exposed to the prospect of time behind bars.

International interest

- The passing of this legislation brings Australia into line with other similar jurisdictions like the USA and countries in the EU.

- Our transition to criminal penalties is of intense interest internationally. In terms of penalties for participation in cartels, Australia has been seen as the soft underbelly in international cartel operations. In relation to immunity and investigation cooperation cartel participants placed dealing with Australian regulators as a matter of second order priority. Internationally, you face jail for involvement in a cartel. In Australia, you could simply use part of the money you have stolen to pay a fine – and keep the rest!

- The Australian cartel offence carries a maximum term of imprisonment of ten years per offence. It's a bit hard to say what an average sentence will be under the new offence as each case will have its own circumstances that the judge will have to take into account.

- However given the maximum term of imprisonment is 10 years, I would think it's fairly certain that any person who is found guilty of the criminal offence will be deprived of their liberty. This would be consistent with the experience in the US which also has a 10 year offence for cartelists.

- 2007 was a record year in which 87% of defendants sentenced by US courts for cartel conduct were imprisoned. The average term of imprisonment for those cartelists was 31 months.

- 5 defendants were sentenced to other forms of confinement, such as house arrest, for an average of around 7 months per person.

- In 2009 80% of defendants sentenced for cartel conduct in the US were imprisoned with an average sentence length of 24 months.

Implications for immunity applications and third party damage claims

- Until 24 July 2009, cartel operators did a simple calculation – if I get caught I will simply have to pay a fine out of the money I have stolen and I get to keep the rest!

- However, the consequences of a third party damages claim became part of the financial business calculation.

- Application for immunity secured relief from potential prosecution and resultant financial penalty, but the confession of participation in the cartel, implicit in the immunity application, opened up the inevitability of a third party damages claim.

- While such a claim might be resisted and participation in the cartel denied in the damages suit, the requirement to provide full cooperation to the ACCC to secure immunity from prosecution resulted in substantial evidence being provided to the ACCC of participation in the cartel.
- ACCC has endeavoured to protect that evidence from third party claimants, not to discourage their claims, but to protect its immunity policy.
- That position has created a tension where the ACCC has seen itself aligned with cartel participants in endeavouring to resist calls for production of evidence it has gained from its investigations that might assist a third party damages claim – which the ACCC sees as an integral part of the anti-cartel enforcement regime.
- Decisions of the Federal Court in the Cadbury Schweppes/Jarrah Creek case have highlighted some issues for the ACCC, immunity applicants and third party plaintiffs on the production of such evidence.
- Criminal sanctions significantly changes the risk weighted cost benefit calculation.
- Not only do cartelists need to be concerned that their fellow conspirators will reveal the existence of the cartel to avoid prosecution, but their employees and ex-employees who wish to avoid jail now have significant incentives to apply for immunity.
- Criminal sanctions make the incentives to confess so overwhelming there will be only one decision left to make – confess, or risk a term in jail. The financial calculation pales into relative insignificance.
- Criminal sanctions turn the minds of executives away from the company's financial losses to their own personal futures. The threat of being sent to jail remains by far the biggest weapon in this fight
- We are not just assuming this, there is already strong international evidence that shows us jail sentences are a far greater motivator for cartel members to confess than the threat of losing large amounts of money.

ACCC now has powerful tools to deal with cartels

- Given the clandestine nature of cartels very few prosecutions result from evidence provided by consumers.
- Telephone intercepts – in conjunction with AFP.
- Immunity Policy - Under the ACCC's immunity policy cartel participants who do the following received immunity from ACCC initiated court proceedings:
  - are the first to report their involvement to the ACCC
  - are not the ring leaders or have coerced others into the cartels, and
  - cooperate with the ACCC's investigation and any subsequent litigation,

In the case ACCC v FFE Building Services Limited [2003] FCA 1542 (the Tyco case). Justice Wilcox said, in relation to the ACCC's leniency policy:

> *"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."*

Criminal enforcement

- All cartel conduct (entering into or giving effect to a cartel) post 24 July 2009 are being treated as a potential criminal prosecutions and are initially investigated under the criminal investigation process.
- There have been a number of matters that have come before us having a post July 2009 element.
- At a point in time we will make a decision at either the Enforcement Committee level or in more complex matters at the Commission whether to relegate to civil investigation.

The criminal/civil divide: What conduct should be criminal and what conduct should be civil?

- Not possible to precisely and exhaustively set out a full list of scenarios or indicia beyond that provided in the cartel offences.
- Nothing new to Commonwealth law enforcement agencies – ASIC, ATO (recover tax moneys by civil debt recovery proceedings or refer the evasion of tax to the Director of Public Prosecutions for a criminal prosecution. ACCC in the consumer protection area - Part VC of the Act, or civil proceedings under Part V.
- A MOU has been negotiated with the CDPP in relation to the prosecution of cartel conduct.
- Important that we have certainty and transparency for immunity applicants dealing with the ACCC in the criminal context, and a close and predictable working relationship with the CDPP.
- Guided by the ACCC's broader enforcement principles (transparency, confidentiality, timeliness, consistency and fairness) – the MOU sets out the factors that the ACCC and the DPP will consider in deciding whether to prosecute a cartel criminally.

The factors include:

- whether the conduct was longstanding
- the impact of the conduct – did it or would it have had a substantial impact on the market?
- detriment – did it or would it have created a substantial detriment to consumers?
- past history – do the alleged participants have a history of participating in cartel conduct? and
- the size of the cartel – did it affect more than $1 million of bids or commerce within a 12 month period?

The ACCC has issued guidelines on those factors that are, in all the circumstances, most likely to lead it to refer an activity to the DPP as a possible criminal cartel offence. Legal profession has been seeking more specificity. BUT these guidelines cannot provide specific binding rules as to when the ACCC will proceed criminally or by civil prosecution.

The CDPP has also published an Annexure to the Prosecution Policy of the Commonwealth so far as it relates to immunity applications in relation to cartel offences. This annexure provides that the Director will exercise his independent discretion in considering a recommendation as to immunity from the ACCC, but where the Director is satisfied that that the applicant meets the ACCC's criteria the Director will grant immunity.

ACCC interaction with CDPP on criminal prosecutions

- The ACCC has a public duty to refer all matters which may warrant criminal prosecution to the CDPP, together with relevant evidence.
- The CDPP is a statutory authority independent of the ACCC; it has extensive experience in prosecuting Commonwealth offences, and will only take on a prosecution if there is a genuine case to be tried and if it is in the public interest to do so.
- The CDPP determines whether a criminal prosecution will proceed. He does so pursuant to the Prosecution Policy of the Commonwealth (set out in detail below). That policy has two pillars:
  - that there are reasonable prospects of conviction (beyond reasonable doubt burden of proof), and
  - that the prosecution is in the public interest.
- The conduct of a criminal prosecution is controlled by the CDPP. Throughout the case, the CDPP has continuous regard to these two pillars of the prosecution policy – reasonable prospects of conviction, and whether the pursuit of the prosecution remains in the public interest
- The separation of the responsibility for the conduct of the investigation (the ACCC) from the prosecution decision and the conduct of the prosecution proceedings (the CDPP) is a vital part of the criminal enforcement process.

The evidentiary burden

- The initial consideration in the exercise of the discretion to prosecute or not prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the alleged offender.
- When deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution the existence of a bare prima facie case is not sufficient to justify the prosecution. Once it is established that there is a prima facie case it is then necessary to give consideration to the prospects of conviction. A prosecution should not proceed if there is no reasonable prospect of a conviction being secured. In indictable matters this test presupposes that the jury will act in an impartial manner in accordance with its instructions. This test will not be satisfied if it is considered to be clearly more likely than not that an acquittal will result.
- The decision as to whether there is a reasonable prospect of a conviction requires an evaluation of how strong the case is likely to be when presented in Court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and the useless expenditure of public funds.

- In assessing the evidence the CDPP has regard to the following matters:

  a) Are there grounds for believing the evidence might be excluded bearing in mind the principles of admissibility at common law and under statute? For example, prosecutors will wish to satisfy themselves that confession evidence has been properly obtained. The possibility that any evidence might be excluded should be taken into account and, if it is crucial to the case, may substantially affect the decision whether or not to institute or proceed with a prosecution.

  b) If the case depends in part on admissions by the defendant, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the defendant?

  c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the defendant, or may be otherwise unreliable?

  d) Has a witness a motive for telling less than the whole truth?

  e) Are there matters which might properly be put to a witness by the defence to attack his or her credibility?

  f) What impression is the witness likely to make on the arbiter of fact? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability which is likely to affect his or her credibility?

  g) If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case?

  h) If there is a lack of conflict between eye witnesses, is there anything which causes suspicion that a false story may have been concocted?

  i) Are all the necessary witnesses available and competent to give evidence, including any who may be abroad?

  j) Where child witnesses are involved, are they likely to be able to give sworn evidence?

  k) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the defendant?

  l) Where two or more defendants are charged together, is there a reasonable prospect of the proceedings being severed? If so, is the case sufficiently proved against each defendant should separate trials be ordered?

- This list is not exhaustive, and of course the matters to be considered will depend upon the circumstances of each individual case, but it is introduced to indicate that, particularly in borderline cases, the prosecutor must be prepared to look beneath the surface of the statements.

- In addition

  – the CDPP has an extensive duty of disclosure that will be applicable to the ACCC's investigation. Note the collapse of the OFT criminal case against a number of BA executives because of failure to disclose key evidence to defence

  – the distinguishing fault element in the criminal offence – the need to establish that an alleged cartelist intended to enter into an agreement with his or her competitor, and that the alleged cartelist knew or believed that the agreement contained a cartel provision;

- the committal process - for a cartel offence committal proceedings will be heard before a state or territory magistrate, or in the Federal Court - the magistrate must determine whether the charges the person is facing are sufficiently strong for a trial before a jury; and
- finally, if the person is committed to stand trial, there is a requirement firstly to prove the charge beyond reasonable doubt, and secondly that there be a unanimous jury verdict.

The public interest criteria governing the decision to prosecute

- It has long been recognised that not all criminal offences must automatically result in a criminal prosecution. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with appropriate vigour those cases worthy of prosecution.
- The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.
- It follows that the objectives previously stated - especially fairness and consistency - are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.
- Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.
- The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While many public interest factors militate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution (for example, the seriousness of the offence, the need for deterrence). In this regard, generally speaking the more serious the offence the less likely it will be that the public interest will not require that a prosecution be pursued.
- Factors which may arise for consideration in determining whether the public interest requires a prosecution include the following non-exhaustive matters:

    a) the seriousness or, conversely, the relative triviality of the alleged offence or that it is of a 'technical' nature only;

    b) mitigating or aggravating circumstances impacting on the appropriateness or otherwise of the prosecution;

    c) the youth, age, intelligence, physical health, mental health or special vulnerability of the alleged offender, a witness or victim;

d) the alleged offender's antecedents and background;

e) the passage of time since the alleged offence when taken into account with the circumstances of the alleged offence and when the offence was discovered;

f) the degree of culpability of the alleged offender in connection with the offence;

g) the effect on community harmony and public confidence in the administration of justice;

h) the obsolescence or obscurity of the law;

i) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;

j) the availability and efficacy of any alternatives to prosecution;

k) the prevalence of the alleged offence and the need for deterrence, both personal and general;

l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

m) whether the alleged offence is of considerable public concern;

n) any entitlement of the Commonwealth or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;

o) the attitude of the victim of the alleged offence to a prosecution;

p) the actual or potential harm, occasioned to an individual;

q) the likely length and expense of a trial;

r) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;

s) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the Court;

t) whether the alleged offence is triable only on indictment;

u) the necessity to maintain public confidence in the rule of law and the administration of justice through the institutions of democratic governance including the Parliament and the Courts;

v) the need to give effect to regulatory or punitive imperatives;

w) the efficacy, as an alternative to prosecution, of any disciplinary proceedings that have been found proven against the alleged offender to the extent that they encompass the alleged offence; and

x) the adequacy in achieving any regulatory or punitive imperatives, of relevant civil penalty proceedings, either pending or completed, and whether these proceedings may result, or have resulted, in the imposition of a financial penalty.

- The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.
- As a matter of practical reality the proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution.
- Although there may be mitigating factors present in a particular case, often the proper decision will be to proceed with a prosecution and for those factors to be put to the Court at sentence in mitigation. Nevertheless, where the alleged offence is not so serious as plainly to require prosecution the prosecutor should always apply his or her mind to whether the public interest requires a prosecution to be pursued.
- In the case of some offences, the legislation provides an enforcement mechanisms which is an alternative to prosecution. Examples are the customs prosecution procedure under the *Customs Act 1901* and the administrative penalties that can be levied under various taxation Acts. The fact that a mechanism of this kind is available does not necessarily mean that criminal proceedings should not be instituted. The alleged offence may be of such gravity that prosecution is the appropriate response.
- However, the availability of an alternative enforcement mechanism is a relevant factor to be taken into account in determining whether the public interest requires a prosecution.
- A decision whether or not to prosecute must clearly not be influenced by:
    (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
    (b) personal feelings concerning the alleged offender or the victim;
    (c) possible political advantage, disadvantage or embarrassment to the Government or any political group or party; or
    (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.
- A prosecution should only proceed in accordance with this Policy. A matter which does not meet these requirements, for example, a matter which tests the law but which does not have a reasonable prospect of conviction, should not be proceeded with.

Plea bargaining – the ACCC's position

- A criminal cartel prosecution is not negotiable – you will not be able to buy your way out of a criminal conviction and gaol.
- The ACCC will not put itself in a position where there might be a perception that it is using the possibility of a referral of a matter for consideration of criminal prosecution to obtain cooperation or resolution of civil proceedings.
- The ACCC will not engage in discussions with parties under criminal investigation as to the possibility of a civil resolution (financial penalty), until it has formed the view as to the seriousness of the conduct and either the ACCC or the CDPP have formed that view that a criminal prosecution should not be commenced. We will not even discuss the proposition: "Is there a way that we can pay a significant

penalty, that is a financial penalty, to avoid the prospect of a jail sentence?" We will walk out of the room.

- In the case of serious cartel activity, no matter how fat your cheque book, nor to what lengths a corporation will go to defend the position of its executives, there is no amount of money that will remove the risk of you going to jail.
- The great strength that gives us is this: The prospective defendants know that the moment a criminal investigation has started it cannot be stopped; you can't buy your way out of jail. This will be an inflexible policy position by the ACCC - that the only way that an investigation will move from criminal to a civil investigation would be if the ACCC/CDPP determined during the course of the investigation that it would not be possible to satisfy both of the CDPP's criteria – reasonable prospect of prosecution, and it being in the public interest to criminally prosecute.
- Lawyers should not concern themselves with trying to second-guess the line between the possibility of a gaol term or civil penalty. They should simply advise their clients not to participate in any cartel. You do not fix prices, you do not rig bids, you do not allocate customers. This is the kind of conduct which could expose your client to gaol. The ACCC will use the full force of the law to bring you to account, either financially or through incarceration!

CO-ORDINATED BEHAVIOUR – CAU and FACILITATING PRACTICES

- There is a policy issue that is currently being addressed by Government.
- In Petrol Prices and Australian Consumers, Report of the inquiry into the price of unleaded petrol of December 2007, the ACCC referred to what we considered to be a loophole in the law that developed as a result of the Ballarat and Geelong cartel cases.
- The loophole is simple: even though we may be able to demonstrate and prove the existence of a meeting or communication between parties and indeed, an agreement to communicate prices, if we can't demonstrate a commitment to adjust prices accordingly, the Courts have made it quite clear that we don't have a CAU.
- This legal precedent, combined with stiffer penalties has affected the way businesses conduct themselves.
- The ACCC is conscious that cartel like outcomes can be achieved by competitors agreeing to share pricing intentions but denying the existence of a commitment to adjust prices accordingly.
- And indeed in the practice of running the cartel, to deviate from the understanding on several occasions just to demonstrate that there was no commitment.
- Conduct can take place which does not constitute a cartel arrangement under current law but helps competitors to eliminate strategic uncertainty and coordinate their conduct more effectively. Such behaviour removes the competitive tension and facilitates patterns of behaviour to the detriment of consumers.
- As the law stands, if competing firms get together and agree on a uniform price that is unlawful.
- But signalling pricing information to competitors is not caught by the existing cartel prohibition because it does not involve a commitment to act in a certain

way. But the outcome can be just as anti-competitive as a cartel as currently prohibited.

- In the ACCC's recent investigation of the Caltex Mobil transaction we looked closely at the co-ordinated behaviour associated with the jump in fuel prices as part of the weekly price cycle in several capital cities.

- The ACCC has indicated that this co-ordination is facilitated through the frequent exchange of pricing information between competitors, currently primarily implemented through a subscription service for fuel retailers called Informed Sources.

- A practice that facilitates co-ordinated behaviour between competitors is known in anti trust parlance as a facilitating or concerted practice.

- The ACCC publicly raised the concept of facilitating practices in the context of its decision relating to the proposed acquisition by Caltex of Mobil's retails operations.

- In the Petrol Price Monitoring report (December 2009):

  > The operation of the restoration component of the price cycle was an issue of concern in the ACCC's consideration of the proposed acquisition of Mobil Oil's retail assets by Caltex. The ACCC concluded that it was likely the proposed acquisition would increase the effectiveness of the current market practices which act to limit competition in petrol retailing….
  >
  > The ACCC considered that this coordination is facilitated through the frequent exchange of pricing information between competitors via the Informed Sources Oil Pricewatch system. The ACCC considered that the enhancement of coordinated conduct resulting from Caltex's acquisition…was likely to substantially lessen competition in contravention of s50 of the TPA.
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  > While the ACCC was able to take into account the increased capacity to engage in coordinated conduct in its consideration of the proposed acquisition under s50 of the Act, the ACCC is concerned that facilitating practices which assist such coordinated conduct do not appear to be adequately addressed under now well-established court interpretation of s 45.

- In the United States it has been observed that tacitly collusive behaviour has increased as enforcers have become more aggressive in their pursuit of cartel activity and sanctions have become more severe. Firms have been induced by these developments to devise 'more subtle and less direct means for communicating intentions and exchanging assurances about future behaviour.' There is no reason to think that Australian business is any different in this regard. (Refer comments by William Kovacic, Commissioner, US FTC and Ass. Prof. Caron Beaton-Wells, Director of Studies, Melbourne Law School, Univ of Melb).

- Laws prohibiting these facilitating or coordinated practices already exist in the US, the UK and in Europe. While there are some differences in their approaches, the jurisdictions make unlawful conduct which has an anticompetitive effect in an industry. Civil prohibitions apply.

- EU and UK – prohibit concerted practices that have the object or effect of preventing, restricting or distorting competition. In terms of mutuality, a concerted practice occurs where traders knowingly substitute practical co-operation for the risks of competition.

- United States – US law approaches facilitating practices under the general prohibition in Section 1 of the Sherman Act. It requires an agreement and proof of

effect; that the conduct unreasonably restrains trade (in interstate or foreign commerce). While there is a need to prove an agreement, the test for agreement is more easily met in the US than in Australia.

- Facilitating practices in the US and EU broadly encompasses:
  - Disclosure of future prices between competitors (when the future price has not been announced to the public)
  - Disclosure of price lists between competitors (where the price list is not distributed to customers)
  - Disclosure of highly detailed, timely and accurate information between competitors – current prices, discounts, rebates per customer, per product etc that could not have been obtained without the cooperation of the sender
  - Disclosure of future market strategy, such as an intention to end a price war
- The Government is considering the issue of facilitating practices as part of its review of the adequacy of the TPA's 'understanding' to capture anti-competitive conduct.
- Treasury developed an issues paper (January 2009).
- These issues will also be addressed at the upcoming OCED meeting in October 2010.

MERGERS

- Refined informal process was set in place in 2004.
- The flexibility of the process allows for responsiveness to individual transactions and circumstances. ACCC always looking to make process as efficient and effective as possible without compromising fundamental principles of transparency of process, protection of confidential information, timeliness and fairness of review process.
- Over the past 12 months a number of complex merger reviews where the ACCC has taken a position of opposition.
  - NAB-AXA
  - Caltex - Mobil
  - Link - Newreg
  - Thomson Reuters – Ernst and Young
  - Cargill – Goodman Fielder
  - GUD – Breville
- Well aware of the fact that these more complex merger reviews tend to be handled by a few major law firms who have developed expertise in competition law and M&A transactions.
- The ACCC is in continuous engagement with practitioners in these areas to ensure our merger processes are working efficiently.

- Working to achieve the dual objective of providing

  - Practitioners and their clients with an efficient means of dealing with their merger processes, but at the same time

  - Allowing the ACCC to effectively deal with the enforcement of the Act

Recent issues

- Some concerns expressed by the commercial and legal community (insofar as they represent acquirers) about the way in which the ACCC undertakes its merger review process.

- Many of the practices that have come about reflect the ACCC's desire to undertake comprehensive merger reviews in a timely manner.

- One of the more visible of these to legal practitioners has been the use of section 155 notices.

- Other issues have been raised that the informal process is perceived as rigid, and less transparent, as a result of:

  - A perception that the merger process has become too formal, particularly because of the use of formal information gathering powers (section 155 examinations being used too often)

  - Issues regarding transparency

    1. That in the process of deliberation and evidence gathering, merger parties are disadvantaged by not having direct access to third party submissions

    2. There is some lack of transparency in both the deliberation and decision processes of the ACCC in that some acquiring parties argue there is insufficient information on the ACCC's concerns or third party concerns

  - SOI's not a good indicator of the final views of the ACCC

- ACCC welcomes comments on our processes as it is a good opportunity for self review and, where indicated, we will look to implement changes. That is the benefit of the informal system in that we are not locked into the legislative processes and timeframes required under formal merger clearance regime.

- While some concerns appear to be about the merger processes becoming too formal, proposals for change would actually increase the degree of formality.

- Not surprisingly, the concerns have been uniformly expressed to us by those whose mergers have been opposed. Parties whose mergers have been cleared and third parties involved in merger investigations have been universally supportive of ACCC merger review processes.

- May be helpful to discuss some of these issues and the ACCC's approach before inviting comments

Section 155

- Practically speaking, there has been only a relatively small increase in the level of use of formal informal gathering powers (section 155s). It is an exaggeration to suggest they are overused.

- The number of matters in which 155s are issued is very low against the number of reviews undertaken by the ACCC. Only around 8 matters of over 250 matters that have either been reviewed or pre-assessed as not requiring review so far in the past financial year involved use of 155s. In almost all cases, the merger was opposed or undertakings accepted.

- ACCC is scrupulous about using 155s in matters where substantial competition concerns are apparent.

- In the vast majority of reviews, voluntary information requests provide the relevant information for the ACCC to assess a merger. However in some cases 155s notices are determined to be necessary to obtain the necessary information and within a specified timeframe – for example

  - when we are not receiving full and accurate disclosure of all relevant information in a timely way from merger parties or third parties

  - or when issues can't be verified from other sources for example regarding the likely counterfactual

  - when requested to do by parties – for example due to confidentiality restrictions

- 155s ensures compliance within a specific timeframe and provision of all relevant information – neither can be guaranteed if a voluntary request is made. Access to this type of material in a timely fashion is critical to the decision making process which goes to efficient operation in the public interest.

- It is recognised that these notices impose a level of responsibility on the ACCC regarding their use given they impose a burden on recipients – usually the merger parties but also sometimes third parties.

- We are also conscious of the fact that when I sign off a section 155, that is expressed in very formal terms -

  - WHEREAS, I, Graeme Julian Samuel, Chairman of the Australian Competition and Consumer Commission (ACCC), have reason to believe that Company X is capable of furnishing information and producing documents relating to matters that constitute or may constitute contraventions of section 50 of the Trade Practices Act 1974 (the Act), namely: THE MATTERS THAT CONSTITUTE OR MAY CONSTITUTE CONTRAVENTIONS OF SECTION 50 OF THE ACT

  - a business person thinks "what is going on?"

- We endeavour to scope the notices as narrowly as we can to balance the need to obtain the relevant information for our assessment under section 50 of the TPA.

  - However, this is a balancing exercise since the narrower the scope of the notice, the greater the risk that the ACCC will not obtain information highly relevant to the assessment.

  - Minimal requests for variation of substance of notices seems to support that this balance is being achieved

  - Further, it is not in ACCC's interest to have large amount of unhelpful information in merger reviews that necessarily involve tight timeframes. ACCC therefore careful about focusing s155 requests.

- 155s are an invaluable tool in obtaining truthful information. In a recent matter, the information provided on a key issue (regarding future price rises post-merger) completely contradicted the information voluntarily provided by the merger parties. In other recent matters, a small amount of information had been returned voluntarily, whereas 155s asking the same questions generated substantially more comprehensive and accurate information (which should have been provided initially).

Transparency issues

Access to third party information

- It is understandable that merger parties would like access to third party submissions so that they can see the issues directly and respond to them

- The merger review process is heavily reliant on third party assistance and therefore care needs to be taken to preserve this – in particular through our treatment of the information they provide. In the majority of cases, third parties freely provide us with information on the basis that this information (and often the fact that they are assisting us) will not be disclosed to the merger parties and therefore will would not affect their ongoing relationship with either of the merger parties – whether or not the merger proceeds.

- The ACCC is aware of the importance of providing merger parties with the opportunity to respond to third party submissions – and allows this to happen while maintaining confidentiality.

- In every case where it has identified marketplace concerns, the ACCC has raised those concerns usually both in writing and orally with the merger parties, to allow the parties an opportunity to address them.

- We are sometimes referred to the practices in overseas jurisdiction as support for making third party submissions publicly available. These comparisons are superficial. For example, the EC's practice of allowing merger parties access to the investigation file is correct but importantly, the file is redacted of all confidential information, and in any event is more comparable to our discovery process given the EC is an administrative rather than prosecutorial regime, and makes final decisions unlike the ACCC.

- We note that some members of the trade practices community consider that the formal merger clearance system would be more open in respect of third party submissions. This should not be assumed – the ACCC will assess any claims for confidentiality and therefore the level of public disclosure of third party submissions will be dependent on the claims made.

Lack of transparency in both the deliberation and decision processes

- Following on the issue of access to third party submissions, criticism from the legal community is that the ACCC's competition concerns that arise following the publication of a SoI are not clearly communicated to merger parties.

- In particular, there has been comment made regarding a reluctance of staff to express the Commission's views on the merger. In dealing with staff of the ACCC, practitioners need to appreciate that they are dealing with individuals who are quite conscious of the fact that the final decisions are to be made by the MRC or the full Commission.

- This comment is more about the merger parties not having advance notice of ACCC's final decision. Important to note that our process avails merger parties of

staff views and the transmission of third party competition concerns, not advance notice of the expected ACCC decision.

- In most cases, there will be no reticence by staff to express their views on potential competition issues or marketplace concerns that are being examined. The criticisms generally arise because staff are not in a position to say whether subsequent information provided to address those concerns are going to resolve those concerns to the Commission's satisfaction, or whether the merger is going to substantially lessen competition. Staff cannot be expected to forecast the ACCC decision, as much as merger parties would like that.

- There is distinction between the decision making body and investigative staff. There are good reasons for this – there is usually an ongoing investigation, and staff are cognisant that they are not the final arbiters – there is a formal decision making process through the Mergers Review committee and the commission which must be observed.

- Well aware that many business people would prefer to meet with commissioners, but the truth is these sorts of meetings don't take us far – they are relatively brief and superficial, and in all honesty, don't assist with the final deliberations. Further, the Commissioners will not be able to express a view as to what their decision will be prior to making it.

- Important for advisers to give us access to the main players – communications lines can break down through advisers and lawyers.

- ACCC will never satisfy merger parties in matters that ACCC opposes, no matter how transparent the engagement.

- Notwithstanding this, we recognise the need for merger parties to be informed of the key issues on which the ACCC is making its decision. The ACCC is currently reviewing how these issues are conveyed to merger parties and assessing whether any improvements can be made that preserve the confidentiality of third parties while providing adequate information to merger parties so there are no surprises in the final decision.

- One issue we have noticed is that advisers from time to time may be over-promising ACCC clearance before an investigation is complete, and this shapes expectations of merger parties regardless of how staff views may be expressed.

SOIs not a good indicator

- SOIs are not necessarily a good indicator of the final decision, and never intended to be a draft decision, but rather to provide preliminary guidance on ACCC's concerns, focus market attention, provoke comment and information flow on areas of interest. To that end, SOI's are usually issued early in the process mostly between week four and six of a merger review.

- The information received after the SoI may well raise new issues or perspectives – this is their fundamental purpose - and these may have an effect on the final decision, so they should not be regarded as indicative of that final decision.

The merger process guidelines state that -

> A statement of issues is not a final decision on a proposed acquisition, and may perform a spectrum of functions such as indicating the ACCC's unresolved concerns, the type of further information it would like and in some cases may go so far as to provide the ACCC's preliminary view as to whether a merger is likely to SLC.

Public competition assessments are not decision documents

- PCAs are intended to be a guide to merger parties and the outside world as to the principal reasons for the ACCC decision.

- Contrary to current hype regarding the release of the PCA on a recent decision, the preamble to the PCA clearly states that it is not the definitive and all embracing statement of the ACCC's reasons. Other matters may potentially be raised if the matter goes to court. And while PCAs may be interesting for close watchers of ACCC merger activity, the merger parties are always fully aware of the issues well before the PCA is published.

Timelines

1. Agencies are generally cautious about measuring their performance by the average time (and indeed the number) of their merger reviews. This is because mergers can differ in their complexity, the availability of relevant information, (the ACCC often doesn't receive all information upfront like other jurisdictions) and the level of cooperation provided by merger (and other interested) parties. Having said that, there are clearly links between average timing of reviews and efficiency of operations. As one dissects the types of matters reviewed and time taken, you get a better picture of the performance of the agency in dealing with complex merger reviews.

2. The timeframes in which the ACCC conducts merger reviews are considerably shorter than many other jurisdictions.

   ACCC merger review timings 2010 to date – as at 31 March 2010

Time taken (cumulative)	1 Oct – 31 Dec 2009	1 Jan – 31 Mar 2010
2 weeks or less	6%	8%
4 weeks or less	46%	36%
6 weeks or less	73%	68%
8 weeks or less	88%	76%
> 8 weeks	12%	24%

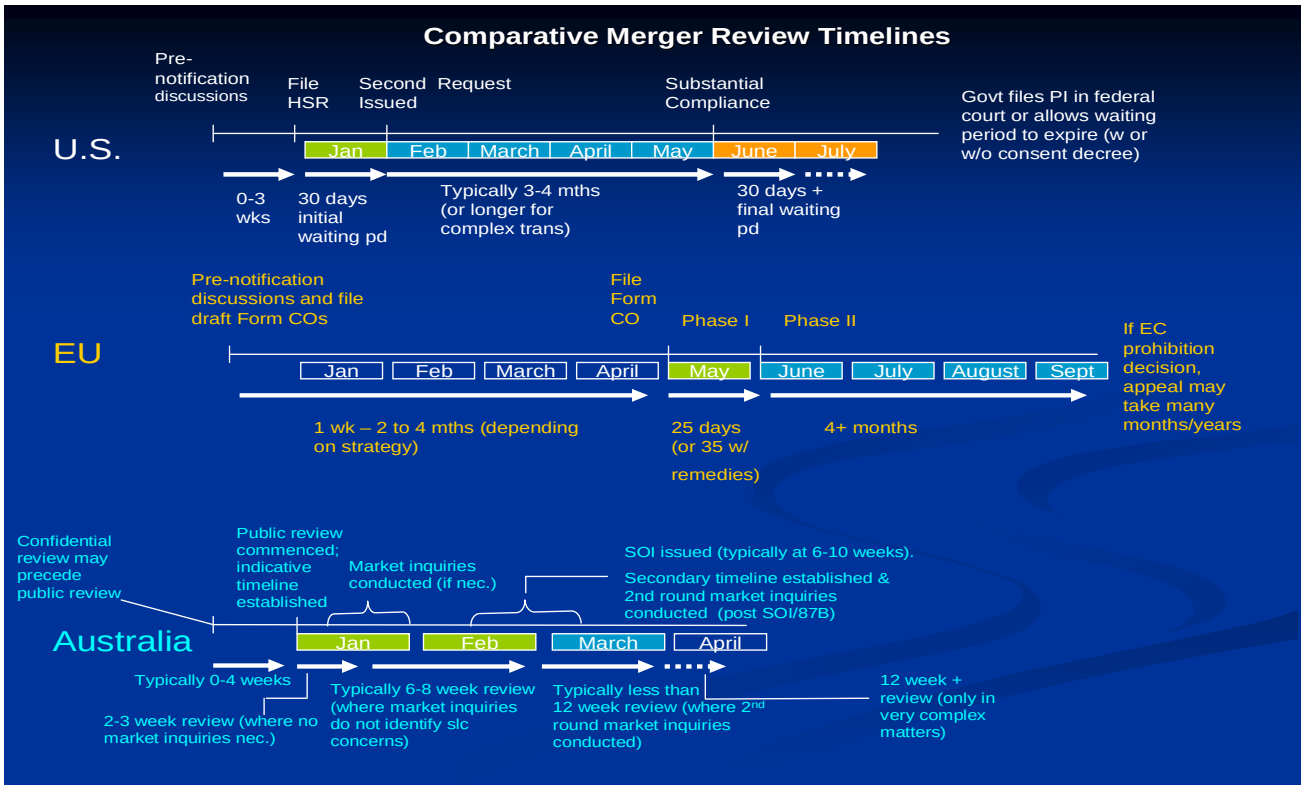
   Note: The table excludes matters that were 'pre-assessed' as not requiring investigation and review because no competition concerns were apparent—a significant proportion of these were assessed in less than two weeks. However, timing statistics from quarters before the December quarter 2009 included these matters, which makes comparison with those figures difficult.

3. By comparison:
   - EC merger reviews – phase 1 completed within 5 weeks. Reviews that proceed to Phase 2 investigations generally extend the review period by 18 weeks and may be extended by a further 3 weeks if remedies are offered.
   - US merger reviews – initial waiting period completed within 30 days. The timelines for matters that undergo a second request are open-ended but are usually 3-4 months (or longer in complex cases).

   - UK merger reviews - where a formal merger notice is filed, OFT has 4 weeks (extendable by 2 weeks) to decide whether to refer a matter to the

Competition Commission. Where OFT refers a matter of concern to the Competition Commission, the Competition Commission must publish its report within 24 weeks (this period may be extended by a further 8 weeks).

- Compared with overseas merger regulators, the ACCC's timelines for merger reviews are best practice.
- ACCC's Mergers and Acquisitions Group has as a KPI the timeliness of its merger reviews.
- Each merger review is different, and some will take longer than others by virtue of their complexity.
- US- typically a merger review will take 3 to 4 months – can be longer in more complex matters.
- EU – generally 2-4 months for phase 1, phase 2 can extend the timeline by a further 4 or more months.
- ACCC process generally much quicker than either US or EC.
- The ACCC's quick (2-4 week) confidential clearance process is widely regarded as a valuable service to the business community, and can truncate subsequent public reviews.
- Note that any proposals to change the current review process (eg making third party submissions etc) would likely have an adverse impact on timelines.



CONCLUSION

- Trade Practices and consumer protection law in Australia has undergone some of the most significant changes over the past 12 months as we have seen in the 36 year history of the Act. And it can be expected that the law will be subjected to constant scrutiny both as to its letter and its administration. For the Act has implications for all businesses operating in Australia and for all consumers in almost every aspect of their daily activities.

- The ACCC remains constantly mindful of the increasing responsibilities conferred on it by Australian Governments – and the expectations held in the community as to the manner in which those responsibilities will be carried out.

- The ACCC now has deeply imbued in its culture its often expounded principles of confidentiality, timeliness, consistency, fairness and transparency with its resultant accountability. In addition our team have developed their skills of strategic analysis in determining the appropriate course of action to be taken in relation to all issues that come before them.

- We will be always sensitive to the implications of our processes and determinations on those affected by them, and adapt our approach to strike the appropriate balance between meeting the imperatives of businesses with whom we are dealing, consumers whose welfare is our fundamental mandate and the rigorous enforcement of the law pursuant to the duty entrusted to us by Australian Parliaments.