Competition and Trade Practices Summit

Cartels, consumers and the role of the regulator – proposed changes to the Trade Practices Act

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Good morning to you all. It's terrific to be here this morning at the inaugural Competition and Trade Practices Summit. I have reviewed the program for the next couple of days and see that, from my perspective at least, there are a number of very topical issues on your agenda over the next day or so.

Given that you will be hearing from subsequent speakers about the detail of some of the current reforms to the *Trade Practices Act 1974* (Cth), I thought it may be most useful for you, in this keynote address, to outline in broad detail the Commission's take on some of these issues.

I want to focus on two areas of the Commission's work today and I've chosen them because they are both topical and because they are particularly relevant for me as the Commissioner responsible with overseeing the Commission's enforcement work. These are the criminalisation of cartel conduct and the upcoming national Australian Consumer Law reforms.

However, before I go any further it may be worthwhile to tell you something about the work that I do on the Commission. I was appointed in May 2008 and while I had a close working relationship with the ACCC before my appointment, and thought I knew reasonably well what the Commission did, I have been surprised – and on some days somewhat overwhelmed – by the vast range of issues that the Commission – and therefore each of its seven Commissioners - deal with on a daily basis.

These include of course enforcement in the traditional sense, but also compliance and educative work with the community and industry sectors; reviewing merger and acquisition activity; making determinations in respect of certain anti-competitive conduct which is argued to be in the public benefit; the regulation of energy markets and access to critical infrastructure; communications; and most recently added has been water market regulation.

During the last financial year the ACCC became responsible for some functions relating to water resources in the Murray-Darling Basin, and under the *Water Act 2007* (Cth) the ACCC is now advising the Minister for Climate Change and Water on regulatory design, and will later enforce compliance with water market and water charge rules. So on any particular day I find myself participating in decisions from whether Westpac and St George should be allowed to merge, to determining what the price of a postage stamp should be!

I also chair the Commission's enforcement committee and one of the things I have been looking at is how we make our decisions in the enforcement area – of course, this is something that is increasingly relevant in the context of the proposed criminal cartel legislation.

It is of course the 'Commission' itself that has the statutory power to make decisions – no one person or area. The Commission meets weekly and receives written submissions from staff in all the areas that I have listed, together with staff recommendations as to the appropriate decision the Commission should make.

The Commissioners are therefore very reliant on staff, and the quality of staff papers and the internal expertise of Commission staff, is in my experience excellent. But Commissioners often disagree with or test staff's views, and in my experience the Commission's decision-making processes are thorough and rigorous, with very active Commissioner involvement.

Relevant to the matters I will be discussing shortly – some of the new and expanding enforcement powers of the Commission – we will soon have up on our website a new Enforcement and Compliance Policy which sets out how we make our enforcement decisions and the factors the Commission considers in that determination.

The Commission receives, as I understand it, upwards of 70,000 complaints or enquiries each year – and these are filtered down to the matters that we look at more closely by the consideration of a number of factors including: whether the conduct is of significant public interest or concern; whether the conduct results in significant consumer detriment; whether our action is likely to have a worthwhile educative or deterrent effect; involves a new or emerging market issue; is industry-wide and the like.

I should note here that the new policy does not represent any radical departure from the Commission's current decision-making in the enforcement area – rather it is an attempt to ensure that those processes are set out clearly and transparently for both consumers and traders.

It goes without saying that the ACCC exercises its enforcement powers independently, in the public interest, with integrity and professionalism and without fear, favour or bias. We aim for an enforcement response that is proportionate to the conduct and resulting harm, and the implementation of the ACCC's enforcement policy is governed by the following guiding principles:

- Transparency—this has two aspects:
    - the ACCC's decision-making takes place within rigorous corporate governance processes and is able to be reviewed by a range of agencies, including the Ombudsman and the courts;

- the ACCC does not do private deals—every enforcement matter that is dealt with through litigation or formal resolution is publicised;

- Confidentiality— investigations are conducted confidentially and the ACCC does not comment on matters it may or may not be investigating;

- Timeliness—the investigative process and the resolution of enforcement matters should be conducted as efficiently as possible to avoid costly delays and business uncertainty;

- Consistency—the ACCC does not make ad hoc decisions and sets its focus clearly to give business certainty about its actions;

- Fairness—the ACCC seeks to strike the right balance between voluntary compliance and enforcement while responding to many competing interests.

So with those principles in mind let us turn to the new powers that the ACCC may receive in both the competition and consumer protection areas:

Cartels – the new criminal offence

The Bill providing for a new criminal cartel offence – the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* – was introduced into the Parliament in December last year. The Bill has passed the House of Representatives and is with the Senate for its consideration. A Senate Committee reported back on the Bill in February and recommended that it be passed in its current form.

The Commission has been on the record for a number of years as strongly supporting the introduction of legislation that criminalises cartel conduct. Indeed, after reading submissions to the recent Senate Committee Inquiry, the debate about criminalisation has now moved on – there seems to be general acceptance of the need for such legislation, and the new debate is about what that legislation should look like – and despite the Senate Committee's recommendation that the Bill be passed, the Commission is well aware that there remains some ongoing debate about the content of the Bill.

There are some within the trade practices advisory community that claim that some provisions of the Bill will create uncertainty for business, industry and advisors. Some of the issues I have heard discussed include:

- what distinguishes a civil cartel prohibition from a criminal cartel offence?
- will the ACCC pursue civil and criminal prosecutions simultaneously?
- how will the ACCC exercise its discretion in pursuing criminal cartel matters?
- various matters around the joint venture defence.

I do not intend to delve into the legal niceties of these various issues today, but I do want to make the point that while I understand that the prospect of criminal sanctions is sure to focus an executive's mind, in any consideration of the proposed legislation it is important to understand that the Commission's starting position is that the Bill does not add a raft of new conduct to the Act that would (if the Bill is passed) suddenly become unlawful if it was not so previously.

That is, what is currently unlawful under the Act in relation to cartel conduct will remain illegal in the future, and perhaps more importantly in the context of some of the current debate, what is currently lawful under the Act will remain lawful.

You would be forgiven, from reading some of the commentaries, for believing that the reach of the ACCC's powers was going to suddenly extend into a whole range of current legitimate business activity with immediate jail time the result. This is, in my view, most emphatically not the case. If the legislation is passed, a criminal prosecution would only be possible in a sub-set of those matters in which a civil prosecution is already available to the ACCC – that is, if industry is engaging in lawful conduct now, that conduct is not about to become criminal tomorrow.

So in my view speculation about the apparent impending criminal prosecution of doctors sharing rosters, or franchisors agreeing with franchisees to allocate territories, is not helpful. Such conduct is not suddenly going to be caught up by this new legislation if it is not already problematic under the Act.

The only area where perhaps, as I understand it from a technical legal perspective, the Bill may have the potential for broader application is in the joint venture area. There have been a range of views expressed about the proposed new joint venture defence – some say it is too narrow because it excludes arrangements and understandings, and some say that it is too broad because it gives businesses engaged in joint venture activities the opportunity to disguise clandestine cartel activity under the cloak of a joint venture.

Without entering the technical debate, and while accepting that there are differing views on this aspect of the proposed legislation, my own perspective is that the joint venture defence as it currently stands is relied on in very few matters investigated by the Commission. So what is without doubt, based on our current experience, is that the joint venture defence – whatever its final form – will not be relevant in the vast number of cartels the Commission investigates and ultimately prosecutes.

Moving now to those matters, there have been a number of questions asked as to how the ACCC will conduct civil and criminal prosecutions against alleged cartelists, and in particular, how the decision will be made to proceed criminally.

The ACCC takes the view that serious cartel conduct should be prosecuted criminally – and the parallel operation of the criminal offence and the civil prohibition will enable a proportionate response to cartel conduct.

As you may be aware, we have prepared a memorandum of understanding with the Commonwealth DPP in relation to the prosecution of cartel conduct. In this, each agency recognises the other's respective role in the criminal investigation and prosecution. Both agencies understand the importance of close cooperation and consultation to achieve efficient and effective outcomes.

Guided by the enforcement principles that I outlined earlier – transparency, confidentiality, timeliness, consistency and fairness – the factors that the Commission will consider in deciding whether to prosecute a cartel criminally are set out in our MOU with the DPP. 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?
- the size of the cartel – did it affect more than $1 million of bids or commerce within a 12 month period?

There are of course a number of additional safeguards that preserve the rights of defendants in the criminal area:

- the role of the DPP – the DPP is an independent statutory authority with significant experience in prosecuting Commonwealth offences, and will only take on a prosecution if there is a genuine case to be tried and it is in the public interest to do so;

- the distinguishing fault element – the element that distinguishes the cartel offence from the civil prohibition in the Bill is the need to establish certain fault elements under the *Criminal Code Act 1995*; that is either knowledge or belief – to prove a matter criminally the ACCC/DPP will be required to show that the 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 the cartel offence committal proceedings will be heard before a state or territory magistrate, and the magistrate must determine whether the charges the person is facing are sufficiently strong for a trial before a jury; and

- if the person is committed to stand trial, there is a requirement to prove the charge beyond reasonable doubt with a unanimous jury verdict.

I should also note that of course selecting whether to take civil or criminal action is not a new concept for Commonwealth agencies – or for the Commission itself. In the consumer protection area this decision is made on a regular basis – that is, whether to take civil action or refer the matter to the DPP for prosecution pursuant to Part VC of the Act.

And finally, on the issue of the Commission's discretion, one of the recommendations of the Senate Committee Inquiry into the Bill was that following the passage of the Bill, the ACCC issue 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. The ACCC has agreed that it will do this.

That concludes what I want to say this morning about the criminal cartel bill – and you will hear I am sure a number of other perspectives on these matters in the coming days. Ultimately we should know in the very near future whether the Parliament decides to pass the Bill in its current form. Moving now to consumer protection.

Consumer protection

While there seems to have been a very significant focus by industry and trade practices advisers on the criminalisation of cartel conduct and some of the recent legislative changes to s46, in my view the very significant tranche of consumer law reform that has been agreed to by the Council of Australian Governments is likely to have, dare I say, an equal if not more significant role to play in the Commission's enforcement powers portfolio.

Australian governments have embarked on a very significant – and from the Commission's perspective a very exciting – program to modernise and reform consumer policy and consumer protection laws across the nation.

The background to the reforms was a Productivity Commission review of Australia's consumer policy framework, and all Australian governments have now agreed to a new consumer policy framework which comprises a single national consumer law and streamlined enforcement arrangements.

The Productivity Commission estimated the economic benefits to the community of the reform package, including the national consumer law, to be between $1.5 and $4.5 billion each year.

The single national consumer law for Australia will be based on the consumer protection provisions of the *Trade Practices Act*. Where it is generally agreed that the current provisions of the Act are inadequate, the Australian Consumer Law will incorporate into the Act provisions based on best practice in various state and territory consumer laws. This will strengthen what is already the key consumer protection law in Australia, and further build the ACCC's leadership role in consumer market regulation.

Enforcement of the national consumer law will be shared between the ACCC and state and territory offices of fair trading. States and territories will have the option to refer their enforcement powers for the new Australian Consumer Law to the ACCC.

Undoubtedly these new arrangements will require changes to how consumer law enforcement agencies currently interact with one another. While each jurisdiction will be given the same enforcement tools under the new consumer law, the coordinated use of these tools by the various agencies will be against the backdrop of broadly agreed nationwide enforcement and compliance priorities. It is to be expected, for instance, that the ACCC will continue take the lead with respect to consumer protection matters of national significance.

The government has recently announced its plans to bring forward the implementation of key pillars of the new law, and draft legislation is expected by mid-year with the new consumer law to be in place from the start of 2010.

The Commonwealth is currently consulting on the proposed changes in its discussion paper *An Australian Consumer Law: Fair Markets – Confident Consumers,* which was publicly released in February.

I would like to touch briefly on some of the new areas that the Commission is particularly interested in:

Unfair contracts

One of the most interesting aspects of the law is the implementation of a national unfair contracts regime. A similar regime has been operating in Victoria under the *Fair Trading Act 1999* since 2003.

Unfair contracts legislation will address situations where terms in a standard form non-negotiated contract create a significant imbalance to the detriment of the consumer and it is not reasonably necessary to protect the legitimate interests of the supplier. The new provisions will prohibit the use of such terms where they cause detriment or a substantial likelihood of detriment to consumers.

One of the significant aspects of an unfair contracts law is that it provides for a focus on *substantive* unfairness in consumer markets compared with much existing consumer protection law which focuses on *procedural* unfairness. In other words, the unfair contacts provision will not be another version of unconscionable conduct (where the focus is on procedural and behavioural unfairness), but rather a supplement to that existing law.

It is important to note that this is not an attempt to restrict the use of standard form contracts, which in many markets are a very efficient way of providing goods and services. Rather, it provides a more effective regulatory mechanism for ensuring that such contracts are fair.

Civil pecuniary penalties

In my view this is one of the most significant proposed changes of the new law, and one that has the potential to change the mindset of those involved in regular consumer protection infractions. At present, as you may be aware, in many consumer protection cases taken by the Commission the real deterrence for engaging in contraventions is not a direct financial imposition of any kind to the trader involved, but is rather embarrassment or reputational damage – unless the ACCC brings criminal proceedings in which case it can obtain an order for penalties. The introduction of civil pecuniary penalties will bridge the existing gap between the remedial measures currently available and the criminal penalty provisions – and, dare I say, focus the mind of some of those involved in contravening conduct in the consumer protection area in the same way that the criminalisation of cartels will do in the competition area.

Other remedies

Other new remedies and enforcement tools that may be available to the Commission if the Australian Consumer Law is passed include:

- *disqualification orders* – these would restrict individuals from holding a particular position in a corporation or engaging in particular business activities;

- *substantiation notices* – will require a trader to substantiate a claim or representation and can be used as a quick, efficient way to identify whether an alleged misrepresentation is true or not; and

- *infringement notices* – will require a trader to pay a fine where the ACCC has reason to believe that the trader has engaged in specified contraventions.

Consumer redress

Finally, turning to consumer redress, the Federal Court's decision in *Cassidy v Medibank Private Ltd*[1] has placed certain constraints on the ACCC's ability to seek redress for consumers. In particular, the ACCC cannot obtain compensation for consumers that are not named in proceedings unless it obtains written consent from each affected consumer to do so. This is a particular problem in cases involving large numbers of consumers and/or consumers who may not be readily identified.

The Commission is keen to have a cost-effective and appropriate legal framework in place to ensure the court can adjudicate on contested matters while also enabling all affected consumers to obtain redress. Both the Productivity Commission and the Ministerial Council have recognised this problem and have supported law reform that would allow regulators to take

[1] [2002] FCA 315

actions on behalf of consumers not party to court proceedings. The ACCC will watch these developments keenly.

Mergers and the global financial crisis

Before I conclude I would like to say a brief word about the Commission's approach to merger activity in the context of the current global financial crisis because there has been a lot of media discussion about the ACCC's role in these difficult economic times.

In short, the Commission's position on the global financial crisis is that its primary responsibility remains unchanged – and that is to protect competition, not only in the short term, but for the longer term. Reverting to protectionism in any form because of the current financial downturn is not the answer. And what we do today will have far lasting consequences for the future.

In the current climate there is a school of thought that merger regulation should be relaxed, regardless of the anti-competitive consequences. The ACCC does not share this view. Merger regulation is not part of the current problem and any attempt to ease merger regulation may instead worsen the problem by maintaining inefficient companies and delaying the recovery.

The argument is usually made in the context of the 'failing firm' – that is, if the ACCC does not wave through a merger one of the merger parties will fail. This is sometimes inaccurately referred to as a 'failing firm defence'.

However, a failing firm argument is not a merger defence, but rather it forms part of the likely counterfactual assessed by the ACCC. And our merger assessment process already contains the capacity and flexibility to accommodate failing firm arguments in the counterfactual analysis for any merger review. This means that the ACCC will assess the competition aspects of mergers involving a failing firm on their merits by comparing the future state of competition *with* the merger and the future state of competition *without* the merger. In the case of a failing firm, the counterfactual would be that the firm exits the market.

To be considered as a failing firm, a firm must demonstrate that it is in imminent danger of exiting the market completely and is unlikely to be successfully restructured. However, this is just the first step. Merely establishing that a firm is likely to fail without a merger is not sufficient to satisfy the ACCC that a substantial lessening of competition will not occur. There must also be no substantially less anti-competitive alternative to the merger – such alternatives may include purchase of the firm by a realistic alternative buyer or in some cases allowing the firm to fail may be less anti-competitive than the merger.

The analytical framework applied by the ACCC enables us to take account of the prevailing economic and market conditions in assessing a failing firm argument. We will seek to determine whether a firm is likely to exit the market

due to an inability to raise funds, or whether an alternative purchaser is unlikely due to difficulties in obtaining investment finance.

We are also aware that the timing of merger reviews is vitally important for merger parties and this is likely to be even more so in the case of failing firms. The ACCC's informal merger review process provides for considerable flexibility in review periods where there is a genuine commercial basis for doing so and it does not prevent the ACCC conducting its assessment.

We also recognise that failing firm claims are easily made and merger parties – and in some cases receivers and administrators – can have an incentive to make these claims out of self-interest. Accordingly, the ACCC will take a cautious approach by requiring the merger parties to provide compelling evidence to support their claims. Recent decisions by the ACCC to clear two mergers on failing firm grounds demonstrate that the information requirements are achievable.

What this all boils down to is that we should not allow anti-competitive structures to develop and undo the good work done over a decade of national competition policy reform. The ACCC is committed to ensuring that the economy remains competitive once the financial crisis has passed.

Conclusion

The proposed changes to the *Trade Practices Act* will lead to significant benefits to Australian consumers and businesses in terms of competition and consistency. Criminal penalties for cartel conduct will protect the fair and competitive conditions of the Australian marketplace, and those considering cartel conduct now need to weigh up the risk of imprisonment and significant financial penalties.

The Australian Consumer Law will mean that there is a single law to protect consumers and businesses. No longer will businesses have to deal with nine different sets of obligations – the single law will reduce compliance costs and provide a world class consumer protection regime for all Australians.

Both new functions bring with them new and extensive enforcement powers – and the ACCC is committed to exercising those powers responsibly and measuredly, while working to ensure that those who choose to engage in egregious conduct in contravention of the Act are promptly brought to account.

Thank you.