Australian Competition & Consumer Commission	**Global Competition Review** ***Law Leaders Asia-Pacific 2012* Conference** ***Keynote address*** **Rod Sims, Chairman** **2 March 2012, Singapore**

Good morning and thank you to the *Global Competition Review* for inviting me to deliver the keynote address at the inaugural *Law Leaders'* event in the Asia-Pacific region.

It's heartening to see such a turn-out of senior people to contribute to debate on competition law and enforcement in the Asia-Pacific.

It's also great to be back in Singapore.

Before I was appointed chairman of the Australian Competition and Consumer Commission I chaired an infrastructure development firm that was based here, so I have been a regular visitor.

Even so, it seems that every time I come the coastline has moved. It can be a little startling to find that a seaside restaurant you previously frequented is now inland - but that is all part of what makes Singapore so vibrant and fascinating.

As Chairman of the ACCC, I have been similarly fascinated to explore the development of competition law and regulation in the Asia Pacific region – and indeed the speed of that development.

While I am probably preaching to the converted in such company, I believe the rollout and implementation of effective competition policy and regulation is central to the sustainable economic success of the Asia Pacific region.

Of course, for businesses and governments the introduction and regulation of competition policy represents a substantial change.

And, once up and running, effective competition regulation means keeping up with changes in local, national and global markets and being ready to address cross-jurisdictional competition challenges in a regional and global economy.

A great strength of leaders in the Asia Pacific is not only to have the vision to implement change on a large scale – and there is little doubt that introducing competition policy and regulation is such a change - but to adapt to the new and make it work for us.

In this vein, I wanted to survey four areas this morning

- I will start with some observations on why competition policy, law, and enforcement is vital for this region's development.

- Second, I will draw on the Australian experience to make some wider points about developing competition policy and building support for it.

- Third, I will discuss why effective competition policy should encompass more than antitrust laws.

- And I would like to finish with some observations on building effective institutional co-operation, and where cooperation between competition regulators should be more active in the short to medium-term, especially in our region.

1. Why competition law and enforcement matters in the AP Region

As we all know, the benefits of sound competition law are:

- it promotes economically efficient behaviour among businesses, investors, and consumers

- it promotes innovation, as firms continually face competitive tension

- it provides the conditions under which investors and businesses can enjoy sustainable long-term returns on their decisions

Overall, sound competition policy should produce measurable improvements in the economic welfare of a community.

Taken at face value, most governments would sign up to such an idea.

Of course, the Asia Pacific region presents a picture of competition agencies and competition law at many different points of development.

Several countries, including Japan, Korea and Singapore, have competition agencies that are acknowledged worldwide as highly experienced and capable. The statutory and common law in these countries has developed over a number of years and the respective agencies have well-established practices in operation.

In other countries, for example in Vietnam, Indonesia and Malaysia, the agencies are new or relatively new, and are exploring the extent of new legislation.

There are a handful of countries where there is law but no agency. And there are a few where there is no agency and no law.

That presents a challenging picture for enforcement agencies that propose to cooperate with their peers across the region.

And it's also a challenge for businesses that are operating across the Asia-Pacific, as businesses need certainty and predictability.

Moreover, in an era when economic policy tends towards integration – as expressed in institutions like ASEAN – at least some degree of similarity in law and enforcement practice, across national borders, is desirable.

This is exactly the point that ASEAN recognised in 2007 when, as part of the agreement to establish an ASEAN Economic Community, the ten member states agreed to implement respective national competition law by 2015.

There can be a perception that these benefits from competition policy are only realised at the end of a cycle of economic modernisation - as some kind of icing on an economic cake.

To the contrary, I believe that competition law and policy can drive development. Development needs a market economy, but a market economy needs competition law.

A courageous story of leadership by a competition agency head from Papua New Guinea illustrates this.

Papua New Guinea is a country that I have lived in and visited many times.

It has a population of about six-and-half million people, and currently enjoys high rates of economic growth - around seven per cent in 2010.

But it is extremely rugged, and the vast majority of the population lives in small centres and villages, making communication difficult.

In 2005, the state-owned Telikom was the only provider of mobile telecommunications services in PNG, with a network that had about sixty thousand subscribers. Telikom's network did not serve the vast majority of PNG's population. It was widely recognised that a national mobile network, or at least something approaching it, would be a boon to PNG. To achieve this, the Government decided as part of a wide ranging reform agenda to introduce competition to mobile telephony to the country.

The PNG Independent Consumer and Competition Commission, and its then CEO, Thomas Abe, steered the Government's decision to implementation in circumstances that tested their professionalism as Telecom, and members of a new Government fought the move strenuously.

Two new providers, Digicell and Greencomm, won the right to offer mobile services in PNG.

The economic and social outcomes of introducing competition were then plain: Digicell put up 600 cellphone towers, many of them in very rugged country, that provided service to around one-point-three million people.

I saw first hand that the improved telecommunications literally opened up the world to those who needed it most. Weak infrastructure was replaced with new services, allowing people living in remote areas to access mobile banking services, schools and hospitals; and providing entrepreneurs with better information to do business.

Competition policy delivered for the people of PNG, and can do so for the expanding economies in many parts of the region.

2. The Australian experience of developing competition law

There is no question that introducing a competition regime is very challenging.

On the latest score, five of the ASEAN states have competition authorities, and a sixth country, the Philippines, is close to setting one up, and frankly of itself that is a great achievement.

From experience, Australia can attest that setting up effective competition regulation is a complex and time consuming task.

The history of Australia's experience with implementing competition regulation includes both successes and many pitfalls from which there may be useful lessons.

Australia's first foray into competition law was in 1906 when it introduced the *Australian Industries Preservation Act*- based on the United States anti-trust Sherman and Clayton Acts and an earlier Canadian statute.

1906 was also the year that Australia released the world's first feature length film, *The Story of the Kelly Gang*. Like Australia's apparently burgeoning 1906 film industry, the *Industries Preservation Act* turned out to be something of a false start.

At the time, the Australian economy was riddled with bid-rigging, cartels, price fixing, anti-competitive practices. However, *The Industries Preservation Act* was no panacea.

In 1912, the High Court of Australia declared most of the 1906 Act invalid, rendering it largely ineffective.

In Australia's case, despite being based on what over time became a very successful model, our first attempt at competition regulation clearly fell at the first hurdle. We had failed to ensure that the laws implemented met the requirements of our country's constitutional framework.

The mistake was costly. Amazingly as it took over 50 years before competition law re-entered the field of economic regulation in Australia.

After a number of public enquires a new Act, the *Trade Practices Act 1965*, came into effect. The 1965 Act did not cover mergers but did cover monopolisation and collusive bidding, and tendering.

The 1965 Act adopted the British model, whereby anti-competitive agreements were exempt from challenge if they were registered with the regulator, which was a predecessor of today's ACCC.

Under this Act, the regulator was required to examine the agreements and declare them to be either in, or against, the public interest. Due to the requirement for such oversight, the Act was considered slow and frustrating.

Such time consuming oversight could not support driving competition and business efficiency. It also failed to allow the regulator to take a light touch where appropriate.

The 1965 Act clearly did not strike the right balance between regulatory oversight and efficiency to see the benefits of competition regulation.

However, at least it fostered demand for a better competition law.

Nine years later, a new Trade Practices Act came into effect.

The 1974 Act sought to introduce a culture of competition in Australia – introducing effective laws prohibiting various forms of anti-competitive conduct including mergers, as well as introducing a national consumer protection regime.

Critically, the 1974 Act also provided the ACCC and its predecessor, the Trade Practices Commission, with the investigative tools and sufficient power to identify and take action against anti-competitive conduct.

And it provided the enforcement agency with discretion to seek a range of remedies which could shape pro-competitive outcomes in the market.

The creation of an effective, empowered and appropriately resourced enforcement agency was central to the development of a culture of competition in Australia - and in my experience this is universally the case.

These three essential elements – strong laws, a strong enforcement agency and flexible remedies – were the lynchpin of the success of the 1974 Trade Practices Act. The lesson is that an effective competition regime needs all three of these elements

3. Competition policy should be more than antitrust

Of course, this wasn't the end of the development of competition regulation in Australia.

The current Australian competition law, which is encapsulated in a single Federal statute, the *Competition and Consumer Act 2010,* has its roots in a major policy review that was conducted in the early 1990s.

Despite the existence of antitrust laws and an effective regulator, many areas of the Australian economy were not exposed to the rigours and discipline of competition.

By the late 1980s Australia faced a decline in relative economic performance. Greater exposure to international competition through tariff cuts, and the floating of the Australian dollar from 1983 were creating pressure for more efficiency.

By the 1990s, the link between competition policy and economic performance took centre stage in Australia. The next big shift in Australian competition policy grew out of the desire to modernise the Australian economy.

A substantial review – known as the Hilmer Review after the main author - was set up and reported in 1993. The result of the Hilmer Review was a national competition policy.

The policy laid the groundwork for the economy-wide application of law addressing anti-competitive conduct, and the widespread removal of structural and legislative impediments to facilitate more competition in the non-traded goods sector.

Overall, the Hilmer Review brought three notable changes.

- It extended competition law provisions so that they applied to activity by state-owned and unincorporated businesses; and made it harder for State laws to exempt conduct from the anti-competitive provisions under the Trade Practices Act.

- It established a regime to facilitate third-party access to services of certain infrastructure facilities such as railways and electricity networks that exhibit natural monopoly characteristics and to which businesses require access in order to compete in upstream or downstream markets.

- And finally, and extremely important, it required all Governments to review legislation that restricted competition and implement competitive neutrality principles, so that government business enterprises do not have a competitive advantage simply as a result of their public ownership.

Importantly for the success of the reforms the federal government could cut payments to State governments if they did not adopt these principles and put them into practice.

Areas of the economy that had previously been sheltered from competition, such as state-owned enterprises of electricity generation and transmission, gas pipelines, airports and rail links, were opened up to competition by bringing them under the *Trade Practices Act.*

Today, Australian competition law has a wide remit and the capacity to regulate and influence the structure of Australian industries.

The bigger point though is that the Hilmer report directly linked competition policy, and the statutory law that grew out of it, to wider economic objectives. The force of the arguments for a major policy shift were hard for anyone to resist.

When last assessed, the Australian Productivity Commission estimates that the competition reforms brought in post-Hilmer have raised Australia's real GDP by around two-point-five per cent or $20 billion in 2005-06 dollars.

These policy reforms when combined with the advocacy of policy makers, academics, opinion leaders and the regulator, drove community and business support for competition as a key driver of economic prosperity in Australia.

Indeed, the momentum that was set in motion in 1993 continues today. The national competition policy, more or less, continues to have broad support in politics and business.

This emphasises my final point about implementing competition law – that competition policy is most effective when it is driven and sustained by broader economic objectives that are shared by policy advisors, legislators, and the community.

However, it is worth noting that it took Australia seventy (70) years to implement the early foundations of Australia’s modern anti-trust regulation. And it took another twenty (20) years to introduce a national competition policy that opened up previously closed markets to competition.

I should note that the experience in many developed countries including in the United States, Canada and the UK has not been very different. Indeed ASEAN members have an opportunity to give competition law and its enforcement a much better start than in Australia!

I wanted to convey this history not only to draw out examples of some of the pitfalls those introducing competition laws may face – but to emphasise the long gestation of Australia’s transition compared with what a number of you in this room have already achieved or are seeking to achieve.

However, support for effective competition regulation is not uniform either in countries with established regimes or those developing them.

Many Asia-Pacific economies enjoy growth that is among the strongest in the world.

Such growth rates could easily obscure the need for sound foundations in competition law. When times are good it might seem unnecessary to regulate to ensure or promote competition. But as we all know, times are not always buoyant.

The national competition policy reforms of the 1990s have significantly contributed to assisting the Australian economy during the global financial crisis at a time when other developed nations are struggling.

So not only is the development and maintenance of a robust competition policy regime critical in the development of a strong market economy, it is also vital in building resilience.

Of course, in an increasingly competitive and globalised economy, most regulators recognise the need to act quickly and in consultation with each other.

In this vein, I want to turn to some ideas on how cooperation between competition agencies in the Asia Pacific region may be enhanced.

4. Fostering cooperation between regulators in the Asia Pacific

Anti-competitive conduct does not respect borders.

Value sapping cartel or monopolistic arrangements in the region affect our markets. Such conduct needs to be identified and deterred through sufficiently strong enforcement action and clear advocacy about the costs to local economies.

Similarly, businesses can be more efficient operators in the region where there is improved convergence of procedures and confidence in regulatory decision making.

The global economy is increasingly reliant on the Asia-Pacific, Africa and South America for new development and growth, which I personally think is a great thing, particularly for poverty alleviation.

To ensure investment and returns to businesses and consumers in the Asia Pacific are maximised, institutions and particularly competition regulators in the region need to be seen as effective not only individually but collectively

This is the key opportunity I see arising from this conference.

Gatherings of regional leaders in competition law provide opportunities to develop sophisticated cooperation networks among our regional competition authorities and also to ask our colleagues in the private bar where they see opportunities for convergence in the region.

I see three key benefits in international co-operation:

- First, cooperation is required to assist nations advocate for, develop, and implement a competition regulatory regime – it is particularly the responsibility of mature agencies to assist in this regard

- Second, cooperation is required to build the effectiveness of competition agencies – we must all learn from each others' experience

- And third, cooperation in active enforcement and mergers investigations effecting multiple countries' markets must become commonplace - the speed and scale of global commerce highlights the need to work closely together to deal with anti-competitive behaviour affecting the region.

As was the case in Australia, the best policy or law counts for little unless there is a credible threat that a contravention of the law will be detected and that it will be penalised.

That requires capable agencies acting on behalf of governments to enforce the law. Developing the appropriate framework and confidence to do that can take time, but there is much expertise in the region and in this room which is available in support.

Here I wish to recognise the commendable efforts in regional agency-effectiveness that have been underway for a number of years.

The ACCC along with our international counterparts have provided support through meeting delegations, secondments, telephone conferences and in side meetings at international events.

The region's regulators have also been keen participants in regional and international networks to assist policy makers and newer agencies develop effective competition regimes, for example:

- The ASEAN Experts' Group on Competition (AEGC), designed to promote the exchange of information, experience, and cooperation as part of the commitment to implement competition policies in the member states by 2015.

- The International Competition Network (ICN) advocacy implementation support program (AISUP), which supports competition agencies, especially younger ones, to improve their competition law and policy. The Japanese Fair Trade Commission has had an important role leading this work.

- The OECD-Korea Policy Centre Competition Programme, developed in 2004 as a hub for competition officials from the Asian region to meet regularly to share experiences and enhance their capacity in competition regulation.

- A number of countries in the region participate in the annual East Asia Top Level Officials' Meeting on Competition Policy Agencies, with the most recent and seventh meeting hosted here in Singapore last year.

These efforts and the keen participation of countries in the region have seen a number of regulators take huge strides in a short time.

Of course, this exchange is always two-way. At the ACCC we have much to learn about how to effectively regulate under changing economic conditions and some of the newer regulatory approaches developed in the region may well be innovative responses to emerging challenges

Which brings me to my third element – the well acknowledged need to work closely together; to share information and cooperate at a practical level within our region.

This will not only enhance our effectiveness as regulators but it will also serve business and consumers well in all our nations. This applies equally in mergers and anti-trust investigations.

Mergers and acquisitions in the Asia Pacific region are among the biggest in the world. Cartels and other anticompetitive conduct here affects us all and we all face the challenge of obtaining evidence stored in other jurisdictions.

Merger investigations provide an example of effective inter-agency co-operation where the need arises.

As has been recognised by the ICN and OECD, efficient merger reviews with predictable, transparent assessment processes are key to ensuring companies can change hands efficiently and competition regulators intervene only where the merger is likely to be anti-competitive.

So long as regulators are seen as effective, merger parties are likely to cooperate by both providing the evidence sought and allowing discussions between regulators. However, this information is often confidential and each regulator's merger analysis is highly sensitive.

Yet with the permission of merger parties, the ACCC regularly discusses sensitive information including its merger analysis and timetables in incomplete merger reviews with some of our regional counterparts.

In relation to cartel investigations, immunity policies encourage immunity applicants to provide waivers; allowing agencies to share information that can be used in cartel investigations. This will be most effective where agency polices are complementary and support this approach.

The main proposition I want to put to you today is that while co-operative efforts in the region have served us adequately up until now, we need to ensure our focus shifts over the next 5-6 years from friendly co-operation to building strong partnerships. I want to suggest we strengthen institutional ties within our region to entrench cooperation – to make it a more than ad hoc, it must become the standard way we work.

Partners work together on cartel investigations.

Partners assist each other in merger reviews.

Partners consider where inconsistent competition analysis or procedures may be hampering business efficiency.

Partners share intelligence about anticompetitive conduct and work together to design systems to exchange information supporting enforcement action.

So how do we move towards such partnerships?

Essential elements will be trust, mutual understanding and institutional support, which takes time and commitment to build and maintain, but is achievable and invaluable.

It is my view that formal links between the region's competition agencies at a range of levels is the most important next step in building a strong and cohesive regional approach.

Institutional arrangements can take a number of forms. For instance, the ACCC has also developed a number of agency-to-agency arrangements with Asia-Pacific counterparts in Korea, Fiji, Papua New Guinea and Taiwan, and is negotiating an agreement with Japan.

There are also tri-lateral arrangements in place. For example, last year the ACCC, the New Zealand Commerce Commission, and the Competition Commission of Singapore established the *Australia–New Zealand–Singapore Sharing Arrangement (ANZSSA).*

Under the pilot agreement, the three agencies have regular discussions covering investigations, intelligence activities, awareness and compliance, technical cooperation, and law and policy.

Formal arrangements can also take the form of treaties which permit the exchange of evidence. Australia and the United States have a treaty on *Mutual Antitrust Enforcement Assistance*, which dates from 1999, and which mostly covers the sharing of evidence and confidential information.

Such arrangements have the potential to yield substantial results. Let me give you one example.

Australia recently obtained access to information from the UK Office of Fair Trading (UKOFT) under similar UK legislative provisions which was critical to the successful conclusion of a cartel case.

In April 2010, the Australian Federal Court, following the 2009 legal proceedings against four foreign marine hose manufacturers ─ the Marine Hose cartel ─ ordered the respondents to pay penalties exceeding $8.24 million for engaging in cartel

conduct. The ACCC alleged that the four foreign based suppliers of marine hose gave effect to global cartel arrangements in Australia from 2001 to 2006 by submitting “rigged” bids to supply marine hose to customers in Australia.

The ACCC's proceedings followed global enforcement action taken by multiple competition regulators including the US Department of Justice, the Office of Fair Trading UK, the European Commission and Japan's Fair Trade Commission.

Close institutional links were integral to the successful outcome of this matter. The actual making of the cartel arrangements occurred outside Australia.

However, cooperation arrangements are only as good as the information shared under them.

The ACCC was recently asked by the OECD to consider how co-operation in cartel investigations could be developed internationally.

Each regulator has to trust that the information or intelligence would be reliable. They have to understand that the other regulator has sufficiently robust procedures in an institutional framework that will ensure confidentiality will be maintained.

In short, to enhance effectiveness of competition law in the region, I believe we need to build effective agency partnerships, and importantly, we must understand each other’s regulatory frameworks and enforcement cultures.

We need to discuss for example how to address issues like:

- Confidentiality and balancing the need to maintain an effective immunity policy with international cooperation
- How and to what extent evidence can be shared between civil and criminal regimes
- Whether legislation within the regions adequately supports cooperation and information sharing

Existing institutions may provide an initial framework for this, but I believe that there would be much to be gained if all our region’s enforcement agency heads were to engage in a regular regional forum focussed on co-operation and mutual assistance.

Building greater and deeper cooperation will take goodwill and perseverance. It will take time, especially as we are faced with the widely diverging experience of many nations.

The challenge for us is to recognise our commonality of purpose, both in the agencies and law we already have, and into the future.

I have little doubt that if we commit to action we can identify pragmatic solutions.

I wish you well for this event and for your future deliberations.