RBB Economics Australian Conference

Sydney, 8 June 2011

'Developments in Competition Law'

Jill Walker

Commissioner

Australian Competition and

Consumer Commission

Introduction

Good afternoon everyone and thank you for inviting me to speak to you today. I hope you have had an interesting and useful morning discussing both procedural and substantive issues in merger review. As many of you know, merger regulation is something I have a keen interest in. I arrived at the then TPC in 1992, just as the new SLC test was about to be introduced into Parliament. I had two immediate tasks – one was to write a submission to a Senate inquiry into pay TV – whether and in what way it should be introduced – and to prepare the Draft Merger Guidelines for the new SLC test. Almost twenty years later, I find myself Chair of the Commission's Merger Review Committee.

But you are probably "mergered out" after this morning's sessions, so while I will talk a bit about mergers, I thought I would use my time slot to give you an overview of how I see the current "state of play" more generally, which might provide a segue into the next panel session discussing various specific developments in competition law.

I have had a long association with the ACCC and its predecessors the PSA and the TPC, going back as far as 1988 - on staff, as a consultant and now as a Commissioner. During that time we have grown from an organisation of around 150 staff, if memory serves me correctly, to an organisation of over

800, with ever expanding responsibilities covering mergers, cartels and other anti-competitive conduct, consumer protection and product safety, adjudication, regulation of markets with entrenched market power (energy, telecommunications, post, aeronautical, ports and rail), enforcement of water trading rules and a role in relation to copyright remuneration.

So what is the unifying theme of all these activities?

Section 2 of the *Competition and Consumer Act 2010* states that **"The object of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."**

Similarly, our recently published *Corporate Plan 2011-12*, states that the purpose of the ACCC is **"To enhance the welfare of the Australian community by fostering competitive, efficient, fair and informed markets."**

Economists tend to believe in competitive markets as an efficient means to transmit information, to allocate resources and to drive cost and dynamic efficiency. But we also know that the real world is not the textbook world of perfect competition. It is riddled with market failures and imperfections more generally.

Essentially, I see the role of the ACCC as being to **make markets work better**.

Everything the ACCC does is about addressing what economists call "market failure" in one form or another – situations where markets don't work well to produce efficient outcomes because of market power, transaction costs, information asymmetries, asset specificity, externalities, public goods, economies of scale or systematic bias in consumer behaviour:

- Regulation and enforcement action in relation to anti-competitive mergers, horizontal and vertical conduct (directed at the creation and exercise of coordinated and unilateral market power);

- Consumer protection (directed at overcoming problems associated with information asymmetries, transaction costs and behavioural bias);
- Regulation (of entrenched market power); and
- Adjudication (provides a means of balancing competing market failures – the object of the TPA indicates that competition is not an end in itself but a means to an end)

A large part of the ACCC's work deals with the regulation of prices and access in situations of natural or regulated monopoly and entrenched market power. Important as that work is, I'm going to put it to one side for today and focus on our competition work, in the broad sense, encompassing consumer protection and adjudication, since this is the area I focus on as a Commissioner who Chairs the MRC and sits on the Enforcement and Adjudication committees.

For many years the consumer protection provisions of the Act were in some ways the "poor relation" of the competition provisions. I can remember attending many Law Council trade practices workshops which were almost entirely devoted to the competition provisions of the Act, with a token consumer protection session last thing on Sunday before (or after!) everyone went home.

This has really changed with the advent of the Australian Consumer Law, a single national consumer protection regime with new investigatory and enforcement powers. Consumer protection law has been centre stage at more recent conferences. Only this morning there was a session on the economics of consumer protection at the 2011 Consumer Conference here in Sydney; and Ross Gittens, economics editor of the SMH, gave the Ruby Hutchison Memorial Lecture on Monday evening.

The importance of "joining up" competition and consumer protection policy is increasingly recognised. Where competition policy targets the acquisition and exercise of market power by firms, sometimes as buyers but more often as suppliers in markets, consumer protection is directed at empowering consumers to drive competition between firms in markets. Without

consumers who have access to information, can understand and act on that information, markets will not work well regardless of how many firms are competing for their business.

If consumer protection was the poor relation, adjudication has been the sleeping giant. But I'm a real fan of adjudication - the authorisation and notification provisions of the Act – which provide a unique opportunity under Australian and New Zealand law to balance competing market failure considerations under the public benefits and detriments framework.

But let's start with the competition provisions narrowly defined, dealing with the creation and exercise of market power, beginning with my old favourite - merger regulation.

Merger Regulation

Merger regulation is incredibly important. Where the other competition provisions of the Act deal with the exercise of market power, or mopping up the mess after the event, merger regulation aims to prevent the creation of market power. Health experts will generally tell you that prevention is better than cure and merger regulation is the preventive medicine of competition law. The more effective is merger regulation, the less we are likely to need to rely on the other restrictive trade practices provisions of the Act.

This is not always possible, of course. In some markets we have entrenched market power based on natural and/or regulated monopoly. In other markets, particularly in a small country like Australia, economies of scale may fall short of natural monopoly but there is only room for a small number of players, limiting the scope for competition.   Many industries in Australia were highly concentrated before we even had a merger law in Australia, although some of those have actually become more competitive over time, particularly as markets have been opened up to import competition.

A merger which might lessen competition to some degree may also increase productive efficiencies – merger specific efficiencies between firms operating

in the same market are often the very rationale for mergers.[1] Furthermore, it is important to maintain an active “market for corporate control”, to ensure poor management can be replaced by better management, and often those best placed to provide an alternative will come from the same industry.

So while every merger between competitors will lessen competition to some extent, the law does not prohibit all such mergers. Rather the threshold test has been set to make mergers unlawful where they result, or are likely to result, in a **substantial** lessening of competition in a market. This is a sensible threshold test for merger regulation, and competition law around the world has converged on this test or something similar.

Indeed, international convergence and cooperation in merger regulation was the theme of a panel I recently sat on at an ABA conference in Brussels. The panel included speakers from the United States, Europe, Brazil, China and Australia and it was noted by several panellists how much the world of merger regulation has changed over the last decade or two with the globalisation of firms and therefore of mergers and the increasing number of competition authorities involved in the review of global mergers. Convergence and cooperation in those reviews is clearly important, both for the parties being reviewed and for the efficient and effective operation of the agencies reviews.

Of course the test for mergers in Australia was not always SLC. Prior to 1992 we had a “dominance” test and the trade practices community were outraged at the prospect of the new test, which it was said nobody could understand. But the world has not collapsed and these days everyone seems quite comfortable with the test.

Australia is, however, relatively unique in the world of merger regulation in that our system for reviewing mergers is largely an informal one. While there has been a formal clearance process available since January 2007, following a recommendation of the Dawson Report, it has never been utilised. Rather firms have continued to use the informal review process, which is not founded

[1] Where mergers which would SLC are likely to produce offsetting efficiencies through capturing scale economies, these can be considered under the Authorisation framework.

in the statute but rather has gradually developed over many years and which importantly has provided a much higher level of transparency in recent years.

Where, during a merger review, significant issues arise for further investigation, we generally release a “Statement of Issues”. This is not a preliminary decision, it is part of a genuine review process where competition concerns are identified and further information is sought from the market. Following any decision to oppose a merger, where we accept undertakings or where significant issues of public interest arise, we will generally issue a Public Competition Assessment. While the aim of PCAs is to provide greater transparency in our decision making, they will inevitably be incomplete because of the vast amount of confidential information which we consider as part of the review.

The merger review system provides for a high degree of flexibility. Reviews can be tailored in size and scope to focus on the main competition issues (if any).

A significant proportion of the mergers that we look at are actually pre-assessed as not requiring review because competition issues are highly unlikely to arise. In the current financial year we have examined 345 mergers, of which only 129 have required review. All but the more complex merger reviews raising significant competition concerns are completed in a few weeks. 85% of reviews are completed in less than eight weeks. Certainly our time lines compare well with other jurisdictions around the world.

While the informal review process provides for speed and flexibility, we make no apologies for conducting a rigorous review of mergers which raise significant competition concerns and testing all the arguments and counter arguments against the evidence. Often the merger parties will not be aware of all the relevant evidence that contributes to our decisions. I realise this can be frustrating and we try to be as open as possible with parties during our reviews, but we must protect the confidentiality of information and the integrity of our processes.

We are not pre-disposed to any particular result in reviewing mergers, nor do we have any intrinsic desire to drag out the review process longer than necessary or plough through folders and folders of documents or conduct unnecessary inquiries. Our only client base is Australian consumers, which incidentally includes businesses in many markets. We are well aware of the efficiency benefits of mergers and take any decision to oppose a merger very seriously and only after careful consideration of all the arguments. But where, after careful consideration, we believe that a merger is likely to substantially lessen competition to the detriment of consumers and economic efficiency, I believe it is the Commission's job to oppose those mergers.

Only three mergers have been opposed outright in the current financial year (*NAB/AXA undertakings, Metcash/Franklins, Asahi/P&N)*, while six have been resolved through undertakings (*7-Eleven/Mobil, Peregrine/Mobil, Novartis/Alcon, Scandinavian Tobacco/Swedish Match, Aspen/Sigma Pharmaceutical, Onesteel/Moly-Cop*) and confidential concerns were expressed in four other matters.

I am often amused by some of the newspaper commentary on the ACCC's merger reviews. In the first year that I was a Commissioner and Chair of the MRC, there were various reports about how the Commission was suddenly blocking more mergers since my arrival and that coordinated effects was being cited more often as a theory of harm. Such comparisons are not comparing apples with apples – every merger is different and we could hypothetically block every merger one year and none the next while being entirely consistent. No doubt people think I have gone soft this year since we have only blocked three mergers compared to eight last year (4 resolved through undertakings) and coordinated effects have figured less prominently as a concern in recent reviews.

Recently the press has been saying that "Graeme Samuel is likely to clear the Foxtel/Austar merger". As Graeme is always saying, he is only one of four Commissioners on the MRC and six Commissioners who consider mergers at the full Commission level. Decisions are almost always reached by consensus.

Another amusing newspaper article recently was the one that suggested that if the GUD/Breville merger was revived, our incoming Chairman Rod Sims would be likely to take a more positive view than the ACCC did in 2009. [The same article said that while Rod is the new boss, Greg Medcraft is the new Chairman, so that might tell you something about the reliability of that particular report]. As I said before, we don't have any preconceived notions about the likely competitive effects of particular mergers, our decisions are based on evidence and analysis.

As I mentioned earlier, an increasing feature of merger regulation over the past decade has been international convergence and cooperation. The substantive threshold test of SLC, which caused such angst in Australia two decades ago, has become the norm internationally.

There is greater divergence in terms of process:

- administrative v Court based system;
- formal v informal clearance;
- voluntary v compulsory notification.

The fact that we are a small country geographically isolated from the ROW with a voluntary notification regime creates some unique challenges for us in reviewing global mergers. In our experience there are significant benefits from working with counterparts in cross-border merger control. Cooperation, especially in the early stages of a review, can enhance the efficiency of the review and the effectiveness of outcomes.

Parties in global mergers often focus their efforts on the larger jurisdictions, where the parent companies are located and notification is mandatory. Late notification can result in pressure on smaller countries to complete reviews in unrealistic timeframes. Fortunately we generally receive a high level of notification and cooperation from Australian business and their advisors, but occasionally we can get forgotten in a global context. We manage this risk by intelligence gathering and communicating with other agencies. In the case of New Zealand, we have a specific co-operation protocol.

It is helpful to both merger parties and regulators if we are able to share information and discuss views on market definition and theories of harm with other agencies in relation to global mergers. To this end we have used a standard confidentiality waiver since 2009. Of course, this does not mean that the relevant markets or potential competition concerns will necessarily be the same in all countries. Often they are not. Sometimes concerns arise in Australia but not elsewhere because the size and isolation of the Australian market means there will be fewer competitors left in the market post merger.

If the Commission ultimately determines that an SLC is likely as a result of a particular merger but remedies are possible, e.g. through divestiture of particular assets to remove the competition concerns, it is most helpful to everyone if those remedies can be coordinated across jurisdictions, as required, in the case of global mergers. A couple of recent examples of this are the Pfizer/Wyeth merger in 2009 and Agilent/Varian in 2010.

The Pfizer/Wyeth merger involved multiple animal and human health vaccines and pharmaceuticals and the ACCC identified competition problems in various markets for animal health products in Australia. We engaged in extensive consultation and coordination with both the EC and the FTC on both issues and remedies. The merger was able to proceed subject to divestiture remedies, provided by way of a court enforceable undertaking (s.87B), which were coordinated and consistent with those provided to the FTC.

The Agilent/Varian merger involved various markets for chromatographs and mass spectrometers (bio-analytical measurement). The EC had identified competition issues in the same product markets as Australia and required divestiture. The ACCC accepted an undertaking to comply with the EC divestiture requirements, to submit to the Federal Court of Australia's jurisdiction and seek ACCC approval of proposed purchasers.

The ACCC is an active participant in various forums which work towards convergence in international merger review. There are significant benefits to be gained from international convergence in merger analysis – both in terms of substantive issues and investigative techniques. The ACCC revised its

analytical merger guidelines in 2008 and had regard to the guidelines of other jurisdictions in undertaking these revisions as well as the work of the ICN in its recommended practices in merger analysis.

One particular analytical technique that has attracted a lot of attention recently is the use of UPP. Merger agencies in both the US and UK have adopted the use of tests to measure Upward Pricing Pressure (UPP), or its variants, in evaluating the potential unilateral effects of mergers involving markets for differentiated products.

UPP is an alternative to the standard approach of defining the relevant markets and assessing the level of, and increase in, market concentration, particularly in differentiated product markets. UPP is based on the gross profit margins of the products sold by the merger parties; the diversion ratio between the products; and the marginal cost efficiencies achieved through the merger.

The gross profit margin and the diversion ratio can be used to calculate the value of sales that would be diverted from one firm to the other following a price rise. The merger internalises the value of these diverted sales, thereby creating upwards pricing pressure. If the merger lowers marginal costs, this will create offsetting downward pricing pressure.

UPP is appealing because it is focuses on the closeness of substitution between the products of the merger parties, which is of key importance in mergers involving differentiated products. Furthermore, UPP places less importance on market definition, which can be difficult in differentiated product industries.

However, applying UPP in practice relies on robust estimates of diversion ratios, gross profit margins and merger induced efficiency gains to be available to the competition agency during the assessment of a merger. Based on the ACCC's experience this is unlikely to be the case. Firms may not have accurate estimates of their marginal costs and diversion ratios; and merger-specific efficiencies are often very hard to predict. It is also the case that because this data is specific to the merger parties and is likely to be

commercially sensitive, the ACCC could not test the validity of the information provided to it through market inquiries.

Another shortcoming of the UPP approach is that it can only indicate whether there is upwards price pressure—it does not provide any indication of whether any price increase will be substantial and sustainable. This can only be determined by considering a range of factors including the availability and closeness of other substitutes, the likely response of rival firms and the extent of barriers to entry.

The ACCC will continue to monitor the practices of overseas counterparts, including the development of new merger assessments techniques such as UPP. However, at this stage the ACCC does not expect that it will be practical to use UPP in most cases.

Just as economic tools for assessing mergers are developing, developments in market structure are raising some interesting analytical issues for regulators.

For example, in recent years we have seen the ongoing development of retail chains in many industries. Competition in these sectors often involves both localised competition (eg competition in terms of service standards, range, refurbishments etc) and competition at a broader level (eg national or regional pricing behaviour).

In assessing mergers involving chains of retail outlets the hypothetical monopolist test often leads to a finding of there being local geographic markets. This is because consumers shop in local retail outlets within a given travel time from their home or work.

Where the merger parties have stores that overlap, ie they are located within the same geographic market, it is customary to focus analysis on whether the remaining non-merger outlets in each local market will be sufficient to provide a competitive constraint.

However, some retail chains have a national pricing policy. Other key aspects of the retail offer may also be set nationally or on a regional basis. This issue has arisen in mergers we have considered involving banking, optometrists and cinemas, among others, in recent years.

The acquisition of two local cinemas by a national cinema chain provides an example of where a national approach to the setting of prices was taken into consideration by the ACCC. In this matter the ACCC initially identified possible competition concerns in two local cinema markets. However, further investigation revealed that while the cinema chain has regard to local competition, it applies a broader national network approach to the setting of prices at its cinemas which takes into account a range of factors other than the competitive dynamics in each cinema's local area.

Failure to take into account a policy of national pricing may lead to an important constraint on the merged entity's retail outlets in specific local markets being overlooked.

Equally, if the analysis focuses on the competitive dynamic in each of the local markets the ACCC may not properly consider the likely impact of the merger on rivalry at a regional or national level, where chains may be closer rivals to each other than to independent local operators.

The second issue arose in the Commission's consideration of Luxottica's proposed acquisition of Optifashion. In that matter, given Luxottica's position as the largest retail supplier of optical dispensing services by number of outlets, the ACCC examined not only the extent of competitive overlap between outlets on a local level, but also how the retail operations of Luxottica in a national context may impact on local optical dispensing and sunglass markets. While the ACCC identified local retail markets (given customers purchasing decisions are made on this basis, and stores had some discretion to respond to competition and promotions on a local basis), it was also noted that pricing, advertising, promotions and other strategic decisions were typically being made by retail chains on a national basis. We had some concerns about the ongoing ability of independent optical dispensing and

sunglass retailers to provide an effective competitive constraint on a large scale, vertically integrated chain such as Luxottica.

While the Commission found that, in light of the exclusion from the transaction of a number of retail sites in Western Australia which would otherwise have raised significant local competition concerns, the acquisition would not be likely to have the effect of substantially lessening competition in any market, national aspects of competition were also relevant. In particular, economies of scale held by large-scale vertically integrated optical dispensing retail chains (including in relation to branding, advertising and promotion), may be limiting the ability and incentive for new entry or expansion by small optical dispensing chains.

The UK Competition Commission and OFT recently released a commentary on retail mergers which noted that the UK approach to these issues is to consider both the local and the national effects of a merger, focussing particularly on whether the merger could result in the merged entity:

- flexing aspects other than price to take account of local competitive conditions
- changing its policy of setting prices nationally, and
- altering its national pricing to take account of the fact that it now has market power in some local markets.

If you are advising parties on proposed retail mergers, I would encourage you to consider both local and broader competition issues.

Anti-competitive conduct

Well I said I wasn't just going to talk about mergers, so I will move on now and talk about anti-competitive conduct. The reality is that markets are not generally characterised by perfect competition, or even necessarily by workable competition. Australia is a small country with small markets, many of which are characterised by relatively concentrated market structures. Inevitably, then, anti-competitive conduct will arise. From an economic perspective, anti-competitive conduct essentially falls into two categories:

- the exercise of coordinated market power by multiple firms, e.g. through a cartel or other horizontal agreement; and
- the exercise of unilateral market power by a single firm

From a legal perspective, of course, conduct must be characterised in terms of the various provisions of Part IV of the Act and often conduct can be covered by multiple or alternative (depending on anti-overlap provisions) sections of the Act.

Cartels

In terms of coordinated conduct, the major development, of course, has been the introduction of criminal sanctions for cartels (price fixing, output restrictions, allocating customers, suppliers or territories or bid rigging) in July 2009, as well as stiffer financial penalties. Just as the SLC test and its close relations are becoming the norm in merger regulation, so the combination of immunity policies and criminal sanctions are becoming the norm in anti-cartel enforcement.

The threat of a jail sentence is likely to be a more effective deterrent against cartel conduct than fines, no matter how large. In the words of Heerey J "… corporations are constructs of the law … it is only individuals who can engage in the conduct which enables corporations to fix prices and share markets."

Where cartels are operating, individual participants (who are not the ringleader, are the first to report and provide full cooperation) are encouraged to break ranks through the operation of the immunity policy (and the cooperation policy) and thereby avoid going to jail. While it is the CDPP's decision whether to grant immunity from criminal prosecution, the Annexure to the Prosecution Policy of the Commonwealth indicates that where the Director is satisfied that the applicant meets the ACCC's criteria for immunity, it will be granted.

The Commission's position is that serious cartel conduct should be prosecuted criminally wherever possible, taking into account factors such as the size and impact of the conduct, how longstanding it is and the past history

of participants. All instances of cartel conduct post July 2009 are initially investigated under the criminal investigation process (use of cautions, voluntary interviews, continuity of evidence principles, possible use of telephone intercepts and surveillance in cooperation with the AFP). At an appropriate time, we will decide in each individual matter whether it constitutes a serious cartel that should be pursued criminally or whether it should be relegated to a civil investigation.

However, there are different requirements on the prosecution of a criminal cartel case, such as establishing that the corporation and/or individual knew or believed that a contract, arrangement or understanding contained a cartel provision, proving an offence beyond reasonable doubt and obtaining the unanimous verdict of a jury.

Another significant difference is that while the ACCC investigates criminal cartels, the CDPP is responsible for prosecuting them and it makes the decision about whether to prosecute in accordance with the *Prosecution Policy of the Commonwealth*, which essentially hinges on two issues: prospects of conviction (admissible evidence, reliability of witnesses etc.) and the public interest (seriousness of the offence, need for deterrence etc.). The ACCC and the CDPP have a Memorandum of Understanding regarding the investigation and prosecution of serious cartel conduct.

By contrast, for civil litigation it is the Commission which makes the decision to prosecute, in accordance with the Commonwealth Government's *Legal Services Directions.*

In addition to criminal sanctions, civil penalties[2] were increased in January 2007, when the maximum penalty for a corporation became the greater of:

- $10 million;
- Three times the value of the benefit obtained from the cartel; or

---

[2] Similar penalties apply to corporations under the criminal regime.

- Where the benefit cannot be calculated, 10% of the annual turnover of the company during the period of 12 months ending at the end of the month in which the conduct occurred.

Three times the value of the benefit obtained from the cartel is more likely to provide an appropriate deterrent for cartel conduct than $10m (per contravention). In the Visy matter, where the ACCC sought and obtained a record penalty of $36m, the damages claimed in third party actions were reportedly in the hundreds of millions of dollars.

These higher penalties and criminal sanctions will start to work their way through the system as we start to see investigation and prosecution of post 2007 and post 2009 conduct.

Just as merger regulation has been characterised by international co-operation as well as convergence, so too have cartel investigations. Serious cartels will often have an international dimension to them. Agreements may be reached overseas which impact on markets in Australia, and witnesses and documentary evidence are often located offshore. Competition agencies around the world can be more effective where they co-operate in the investigation of these matters by sharing information and aligning their leniency policies.

International co-operation is assisted by various treaties, e.g. the treaty between the Governments of Australia and the United States on Mutual Antitrust Enforcement Assistance (1999) and by provisions in domestic laws, e.g. s.155AAA (12) of the CCA.

A recent example of this was the marine hose cartel, which involved bid rigging from 1999 to 2007 between suppliers around the world to allocate contracts around the world between themselves. The cartel came to a halt when the DoJ secretly recorded a meeting of the cartelists in Texas, arresting executives as they left, and there were coordinated raids by authorities in Europe. At the same time, a cartel member approached the ACCC seeking immunity, and subsequently provided information to us.

However, while the cartel had effects in Australia, it was organised offshore and much of the evidence was not located in Australia. Successful prosecution of this cartel hinged on the release of vital information by the OFT in the UK, the first time it had released such information to an overseas regulator under the UK's *Enterprise Act 2002* (which impose strict conditions on use and further disclosure) and also the DoJ in the USA. The ACCC achieved penalties of $8.24m in 2010 against Trelleborg, Dunlop, Bridgestone and Parker for giving effect to the international cartel in the supply of marine hose to large oil and gas producers in Australia, involving contracts to the value of around $16m (2001-6). In other countries, this cartel was able to be prosecuted criminally and people went to jail.

Even more current is the ongoing action in relation to the air cargo (surcharges) cartel, where we instituted proceedings against 15 airlines and have so far achieved penalties of over $46.5m through consent orders in the Federal Court.

Section 46

Moving from coordinated to unilateral conduct, this may be caught by one or more provisions of the Act, depending on the nature of the conduct. Section 46 prohibits a firm with substantial market power from taking advantage of that market power for an anti-competitive purpose. Essentially it is directed at firms engaging in "exclusionary" conduct which seeks to maintain or extend their substantial market power. The provision has caused some controversy over the years and several cases, including significant private actions as well as cases brought by the Commission, have been fought long and hard all the way to the High Court.

The first such case was *Queensland Wire* in 1989, where the High Court found that BHP had taken advantage of its substantial market power by refusing to supply Y-bar to its downstream rival Queensland Wire. That decision is well worth reading today. It is a well written, concise and cogently argued judgement.

While establishing (subjective) purpose may raise difficulties in some cases, the main area of controversy has been around the interpretation of "taking advantage". After a number of decisions which have caused some confusion and concerns around the potential effectiveness of s.46, particularly *Boral* and *Rural Press* in 2003, various amendments have been made to the Act, in particular the addition of s.6A relating to the interpretation of "taking advantage" in 2008.

While there is room for disagreement on the outcomes of particular cases, it is clear from the general thrust of the High Court decisions, reinforced by s.6A, that in principle "taking advantage" requires a causal connection between the conduct and the substantial market power. In economic terms, the substantial market power provides or facilitates the ability and/or the incentive to engage in the conduct for an exclusionary purpose. It is not inconsistent with "commercial" or "profit maximising" behaviour. Exclusionary conduct will only be rational where it is commercial and profit maximising over the long run. It is the protection or extension of market power which makes it so. By the same token, while a firm without SMP may be able to engage in the same conduct, it may not be profit maximising and therefore rational for them to do so. Profit maximising behaviour may be quite different under different market conditions.

There is no list of specified conduct which is prohibited by s.46, it all depends on the facts of the particular case. It might involve refusals to deal, predatory pricing, bundling, exclusive dealing or other conduct that is exclusionary.

Most recently the Commission achieved consent orders, including a penalty of $14 million, in its case against Cabcharge, which involved refusals to deal in relation to the processing of Cabcharge payment instruments by competing processing systems, and predatory pricing in relation to meters. The same new penalty regime applies to s.46 as to cartels and most of the Cabcharge conduct related to the period prior to 2007, so we can expect higher penalties in the event of future successful action. In his reasons for Judgement, Finkelstein J. noted that this was the largest penalty imposed for

contraventions of s.46, reflecting the new penalty regime and the seriousness of the contraventions.

The Cement Australia case remains before the Court and we have several ongoing s.46 investigations. So s.46 is alive and well.

Consumer Protection

As I said at the outset, consumer protection is no longer the “poor relation” of competition law. The introduction of a national consumer law with new provisions and new investigative and enforcement powers has placed consumer protection centre stage.

Beyond this, however, economists and regulators are increasingly recognising that competition and consumer policies are both important for well functioning markets. Consumers need to be well informed, to be able to assess the information they receive and be able to act on that information to drive competition.

Effective consumer protection policy will be informed by the economic analysis of markets, which recognises the importance of issues such as information asymmetry, search and switching costs, bounded rationality and systematic behavioural bias on the part of consumers.

One of the most famous articles in economics is “The market for ‘lemons’” by George Akerlof, which addresses the impact of information asymmetry on the (non) functioning of markets. The economists in the audience probably know this story but I will re-tell it for the rest of you. The article was ready for publication in 1967 and Akerlof submitted it to *The American Economic Review*, who rejected it with the explanation that the *Review* did not publish papers on subjects of such triviality. So he tried *The Review of Economic Studies*, with the same result. Next stop was the Journal of Political Economy and another rejection, which included as a reason that if this paper was correct, economics would be different! The article was finally accepted by the *Quarterly Journal of Economics* and published in 1970.

In 2001 Akerlof was awarded the Nobel Prize in Economics jointly with Michael Spence and Joseph Stiglitz, “for their analyses of markets with asymmetric information”. One year later, the prize was awarded to a psychologist, Daniel Kahneman, “for having integrated insights from psychological research into economic science, especially concerning human judgement and decision-making under uncertainty”. Most recently in 2010, the prize was awarded to Peter A. Diamond, Dale T. Mortensen and Christopher A. Pissarides *"for their analysis of markets with search frictions"*.

Consumers in real world markets have incomplete information, are boundedly rational and display behavioural bias in the way they respond to information - and firms can sometimes benefit from exploiting these characteristics of consumers. Economics can provide insights about the types of practices that are likely to cause consumer detriment, the likely extent of the detriment, whether competition is likely to provide incentives for firms to counter practices that adversely affect consumers and the likely costs and benefits of regulatory intervention in the market (including any costs for competition, as well as enforcement and compliance costs).

Consumer protection matters for the efficient functioning of markets and we have just had a major reform of consumer protection legislation in this country with the introduction of the Australian Consumer Law (phased introduction from April 2010 to January 2011). A single national consumer law has replaced multiple state laws and the Commission has new investigative powers and remedies. The rationalisation of consumer protection laws across the states benefits both business and consumers reducing compliance costs and consumer confusion. The Productivity Commission estimated the benefits from the ACL as being in the order of $A1.5 to $4.5 billion a year.

Examples of the changes include:

- the rationalisation of product safety standards across states, with 59 national consumer product safety regulations (37 safety standards, 3 information standards and 19 bans) replacing over 170 across multiple jurisdictions prior to the ACL; and

- the introduction of a new national regime for unsolicited consumer agreements, which replaced State and Territory laws on door-to-door sales and other direct marketing (which includes provisions relating to permissible hours and cooling off periods).

The ACL can be enforced by both the ACCC and state fair trading agencies, as well as ASIC where appropriate. The ACCC focuses its resources on matters of national widespread consumer detriment.

The new powers and remedies under the ACL are facilitating stronger and more cost effective enforcement outcomes. These changes are:

- Substantiation notices;
- Infringement Notices;
- Civil pecuniary penalties;
- Disqualification orders;
- Non-party redress; and
- Public warning notices.

The introduction of civil penalties and infringement notices is particularly important. In the past the only way in which the Commission could obtain financial penalties in consumer protection matters was by taking criminal proceedings, which tend to be complex, take time and require proof beyond reasonable doubt. Now we have two alternative options for achieving a financial penalty: civil pecuniary penalties and infringement notice penalties.

We can seek civil penalties of up to $1.1 million for corporations and $220,000 for individuals per contravention (other than s.52 of the TPA/s.18 of the CCA). Provision for civil penalties allows us to achieve a Court based outcome with financial penalties for breaches of the consumer protection provisions of the CCA, while avoiding the additional time and cost of criminal proceedings.

Already we have achieved penalties in ten consumer protection proceedings, including a penalty of $2.7 million in the Yellow Page marketing and publishing case (a small business scam involving misleading faxes and invoices attempting to obtain subscriptions to online business directories). In

this case, the ACCC also sought and obtained non-party redress by having over 4,000 contracts declared void and preventing the collection of over $6m from the scam.

Of course, criminal proceedings will continue to have their place in the most serious consumer protection matters.

Alternatively, where we have reasonable grounds to believe that a person has contravened various consumer protection provisions of the CCA, infringement notices can be issued. These provide for fines of $66,000 for listed corporations, $6,600 for other corporations and $1,320 for individuals, per contravention (also excluding s.52/s.18). Infringement notices provide a more speedy and cost effective remedy in the case of less serious conduct and first time offenders. To date we have issued more than 50 infringement notices. In many cases we have crafted effective remedies by combining a statutory undertaking with infringement notices.

The ACL has also introduced national unfair contract provisions (July 2010). Whereas many other consumer protection provisions deal with the way in which business interacts with consumers in selling their products, e.g. misleading and deceptive conduct, component pricing, unconscionable conduct and door-to-door selling, the UCT provisions address market outcomes.

Standard form contracts have become an increasingly common feature of consumer markets, associated with the increased importance of services v goods in consumer spending, e.g. tourism, aviation, mobile phones, car hire, gyms.

A Court can declare a clause in a standard form consumer contract (including oral, telephone and online as well as written contracts) unfair, and therefore void, if it satisfies three conditions:

- Causes significant imbalance in rights and obligations;
- Is not reasonably necessary to protect the interests of the advantaged party; and

- Would cause detriment (financial or otherwise) to a party if it were to be applied or relied upon.

The Court is also required to consider the transparency of the clause and how it sits in the contract as a whole.

The UCT provisions do not apply to terms that define the subject matter of the contract or the upfront price (but do potentially apply to “add on” and hidden price terms etc..)

If a Court declares a term to be unfair and a party then seeks to rely on it, this will be a contravention of the ACL. If the contract can still operate without the term, it will. (Neither pecuniary penalties nor infringement notice penalties apply to unfair contract terms. However, the Court can grant an injunction, an order prohibiting payment or transfer of money or other property; and the ACCC can seek non-party redress on behalf of consumers affected by an unfair term.)

The Commission’s approach to unfair contracts has been twofold. First, we have undertaken proactive industry reviews, focusing on areas of concern, based on the level of complaints or other intelligence, and working with firms to improve compliance. Particular features of a market may lead to “lowest common denominator” terms, e.g. some lock-in terms and termination penalties, where there is insufficient incentive for firms to offer consumers better terms. Equally, particular markets may have features which require what may appear to be “unfair” terms but are in fact legitimately required to protect the firm’s interests.

The Commission has reviewed contracts in industries such as domestic airlines, telecommunications and vehicle rental. Clauses which are one sided, provide for unfettered business rights to vary contracts or apply various fees and charges, or which limit consumer recourse have been the major source of concern. In many cases businesses have made amendments to potentially unfair contract terms without the need for litigation. It is also worth noting that many businesses have redrafted their contracts to make them more “consumer friendly”.

Secondly, we investigate specific instances where contracts allegedly contain unfair clauses. So the UCT provisions are another tool in our enforcement toolkit.

Adjudication

Finally, I would like to say some words about our adjudication work. The authorisation and notification provisions are unique to Australia and New Zealand. In some ways they are my favourite part of the Act because they provide a framework for taking account of broad economic efficiency considerations through a balancing of likely public benefits and detriments. It reminds us that competition is not an end in itself but a means to an end – the promotion of economic efficiency and the welfare of Australians.

The Australian Competition Tribunal established very early on that public benefit, while a broad concept, is essentially about economic efficiency:

> *…anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.”*[3]

While competition generally drives allocative, cost and dynamic efficiency for the benefit of consumers, this will not be the case where there is what economists call “market failure”, broadly construed. This means that competitive markets won’t necessarily generate the most efficient outcome. It may be necessary to restrict competition in some way to promote efficient outcomes and hence there may be justification for providing an exemption from the competition provisions of the Act.

This may be because of:

- economies of scale;
- externalities;
- public goods;
- transaction costs;
- asset specificity;
- information asymmetry;

---

[3] *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; see also *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677.

- search and switching costs;
- agency and moral hazard; or
- behavioural bias of consumers.

The authorisation and notification provisions of the CCA provide a framework for trading off the benefits of overcoming market failure with the costs to competition, i.e. looking at overall efficiency outcomes of conduct.

It is a forward looking test that asks whether the public will be better off (efficiency enhanced) in the future with or without the conduct that requires authorisation or has been notified. If there was ever room for doubt, the Tribunal in Qantas-Air New Zealand made it clear that the relevant standard is a "modified total welfare standard":

> *"In our view, the objective and statutory language of the Act, as well as precedent, support the use of a form of the total welfare standard as the most appropriate standard for identifying and assessing public benefit. We say a "form of" the total welfare standard because, as the passage cited from Re Howard Smith shows, whilst the Tribunal does not require that efficiencies generated by a merger or set of arrangements necessarily be passed on to consumers, it may be that, in some circumstances, gains that flow through only to a limited number of members in the community will carry less weight."*[4]

The Tribunal has also established that authorisation is not something to be given lightly, however. In *Medicines Australia* the Tribunal said:

> *"… the ACCC can require, in the proper exercise of its discretion, that the conduct yields some substantial measure of public benefit if it is to attract the ACCC's official sanction."*

Furthermore, the Tribunal went on to say that:

> *"…the ACCC may impose a condition on its authorisation which effectively requires that the relevant contract, arrangement, understanding or conduct yield a more substantial public benefit than is required to get over the threshold of the necessary conditions comprising s 90. Alternatively, it may impose a condition requiring that the public benefit identified be enhanced in terms of the likelihood of its realisation."*[5]

---

4 *Re Qantas Airways (2005),* para. 185

5 *Medicines Australia [2007]* ACompT4 [128]

While New Zealand has the same authorisation framework (but not notifications) as Australia, the NZCC receives far fewer applications. (There have been only 12 applications for authorisation of anti-competitive practices and seven applications for authorisation of mergers since 1997). I'm not quite sure why that is, but it may have something to do with the way Court decisions have been interpreted as requiring a high level of quantification of benefits and detriments (particularly *Telecom Corporation of New Zealand v Commerce Commission & Ors 1992*). The NZCC is currently considering updating its Guidelines, which were last revised in 1997, so that may perhaps encourage more applications.

To give you some idea of the numbers involved in Australia, in each of the last two financial years we have considered 35-40 authorisation matters (including minor variations) and around 300 notification matters (covering 550-750 notices).

In some cases the protection of authorisation or notification is required to avoid exposure to per se breaches of the CCA (e.g. cartels, exclusionary provisions and third line forcing) even though there may be no real competition concerns.

Some of the interesting areas of recent adjudication activity include aviation agreements (7 projects 2008-2011), codes of conduct (14), environmental externalities (15) and sporting competitions (8). I will just make a few comments about each of these.

Airline alliances

National restrictions on airline ownership mean that economies of scale and scope that would usually be achieved via merger often have to be achieved through co-operative arrangements. Hence, adjudication is particularly important in the airline industry.

Aviation agreements have the potential to deliver significant efficiencies through economies of scale and scope, improved scheduling, reduction of wingtip to wingtip flying and the reduction or elimination of double

marginalisation on complementary services. However, the greatest benefits will often flow from the most restrictive agreements, involving revenue sharing and agreements over prices, capacity and scheduling. Where there is sufficient remaining competition in the relevant markets, these efficiencies are also likely to be pro-competitive and to flow through to lower prices for consumers, but where competition is limited there is a trade-off to be considered.

Three of the most recent aviation matters we have considered all involved Virgin Blue seeking to enter into a series of alliances with Delta (December 2009), Air New Zealand (December 2010) and Etihad (February 2011), which together with the their own routes provide the Virgin group with a global network. The Commission granted authorisation to all three alliances but they each presented different issues for the Commission.

The agreement with Delta involved a high degree of coordination and hence potential benefits but also some risks for competition, by combining the two most recent entrants on the Trans-Pacific routes, who had been driving a significant increase in competition and fare reductions. On balance the Commission was satisfied that the coordination and efficiencies which the agreements would facilitate were likely to assist Virgin and Delta to compete more effectively against the incumbents – Qantas and United Airlines – across the Pacific and granted authorisation for five and a half years.

The agreement with Air New Zealand gave us greater cause for concern. The Commission identified competition concerns on a number of routes between Australia and New Zealand. At the draft determination stage the Commission proposed to deny authorisation because we were not satisfied that the public benefits were likely to outweigh the detriments. Between the draft and final determinations, the parties provided additional evidence to support their public benefit claims (more routes and frequencies, cost efficiencies and potentially lower fares) and our competition concerns were reduced, taking account of information that suggested Virgin Blue was less likely to continue as a strong competitor across the Tasman in the future without authorisation. Nevertheless, the Commission still had competition concerns, particularly on

routes where there was no or no likely competition from fifth freedom carriers or Jetstar, e.g. various routes between Australia and Wellington. Accordingly the Commission granted authorisation for three years only and subject to conditions, which required the airlines to maintain and grow the number of seats flown on the routes where the Commission identified competition concerns.

The alliance with Etihad was one of those matters that involved a technical breach of the per se provisions of the CCA but was highly unlikely to result in any detriment because the parties do not compete on any routes. The Commission considered it was likely to promote competition and generate public benefits for Australian consumers through new international services and increased online connections and granted authorisation for five years.

And of course we heard yesterday that Virgin is now proposing to enter into an alliance with Singapore Airlines, for which they will seek authorisation.

Codes of Conduct

Codes of conduct can provide significant benefits in overcoming various market failures, but they necessarily require competitors to talk to one another and to agree to restrict their market conduct in some way, e.g. the way in which products are promoted and/or the way in which they deal with retailers and/or customers. Consequently the Commission examines many codes of conduct under the authorisation provisions and some of these have raised concerns in recent years.

Indeed an earlier version of the Medicines Australia code of conduct was the last authorisation matter referred to the Tribunal (2006-7). That code provided for the members of Medicines Australia to:

- agree to restrict their advertising and promotion of prescription medicines to the public and to medical practitioners;
- agree to restrict the provision of benefits to medical practitioners (e.g. a ban on entertainment and restrictions on hospitality at educational events); and
- require training of medical reps (involving third line forcing).

The code addressed market failures associated with asymmetric information, agency and moral hazard. However, the Commission was concerned about effective enforcement of the Code and hence the magnitude of the benefits were uncertain. Accordingly the Commission granted authorisation subject to a condition requiring publication of the details of sponsored events for health professionals. The Tribunal agreed that the conduct met the test for authorisation but that the publication condition was required to increase the likelihood of benefits being realised.

In December 2009, the Commission re-authorised a revised version of the Medicines Australia code. This most recent edition of the Code fully incorporates the public reporting requirements that were previously imposed as conditions, as well as including other amendments which increase the level of fines, provide transparency around the support pharmaceutical companies provide to health consumer organisations and impose greater restrictions on advertising and promotional claims.

Last year the Commission also authorised the Generic Medicines Industry Association code of conduct, which regulates the marketing of generic medicines. The Code is a newly developed code which introduces obligations on members including educational event reporting, the development and implementation of internal complaints handling processes, and an external complaints handling process including the establishment of an independent Code Complaints Committee. In this case the Code was authorised subject to conditions which increase the transparency around the relationship between manufacturers and pharmacists. Broadly the conditions:

- extend the educational events reporting to apply to events held for pharmacists as well as doctors. This requires GMiA members to provide information about the costs of hospitality (food and beverages, entertainment, accommodation and travel) associated with educational events held for doctors and pharmacists. The GMiA will publish the information on its website.

- require members to report annually on the accumulated total cost of non-price benefits, other than more favourable trading terms, provided to pharmacists as well as listing the types of non-price benefits involved.

The Commission is currently considering a particularly controversial code of conduct proposed by Energy Assured Ltd, an association of electricity and gas retailers, relating to the conduct of door to door sales people in the energy retail sector. In April the Commission issued a draft determination proposing to deny authorisation to the Code, which was considered in some instances to provide less protection for consumers than existing legislation and had the potential to cause confusion. It was also considered to be inadequate in terms of public accountability and sanctions. Subsequent to the draft decision, Energy Assured has submitted a revised Code which seeks to address the Commission's concerns and the Commission will soon make a final determination.

Environmental issues

The authorisation process also provides an avenue for market participants to collectively address environmental externalities (i.e. costs to the environment arising from the production and/or consumption of products which are not reflected in market prices). Often this is achieved through an industry association and agreement to impose a levy on sales of the product, the proceeds of which are used to fund recycling and disposal activities which reduce the environmental costs of the activity. The Commission has authorised and re-authorised several such schemes over several years.

Most recently the Commission re-authorised Refrigerant Reclaim Australia (RRA) to continue to operate a scheme to recover, reclaim, store or safely dispose of refrigerant funded by a levy of $2 per kilogram. RRA is a not for profit organisation which operates the scheme for the refrigeration and air-conditioning industry to recover ozone depleting and synthetic greenhouse gases (commonly known as refrigerant). The product stewardship scheme has been authorised by the ACCC since 1994. This time the ACCC also granted authorisation to RRA to expand the scope of the scheme to enable them to set rebates paid to contractors and wholesalers to return refrigerant and to consider alternative disposal processes such as reclaiming the refrigerant to on-sell, and alternative destruction services.

The Commission considered that the scheme delivers a net public benefit by facilitating greater compliance with environmental regulations resulting in a reduction in the volume of ozone depleting substances and synthetic greenhouse gases released into the atmosphere. However, the ACCC has decided to grant authorisation subject to conditions that require RRA to enhance the transparency of its scheme by publishing its Annual Report and the methodology used to calculate recovery rates under the scheme on its website.

Another recent decision in this space is the Commission's authorisation of the Australian Paint Manufacturers Federation (APMF) to enter into an agreement with manufacturers and suppliers of architectural and decorative paint to impose a levy of two cents per litre on the wholesale supply of architectural and decorative paint in Australia. The levy will be used to fund a 12 month waste paint collection scheme trial in Victoria. The APMF is an industry association representing the majority of suppliers of A&D paint in Australia. If the trial is successful, the APMF plans to roll-out a national scheme to other States and Territories on a progressive basis.

The Commission considered that the trial would be likely to assist in the development of a national waste paint collection scheme while at the same time improving the efficiency of waste paint collection in Victoria and reducing the environmental harm caused by the improper disposal of paint in that State.

Other examples of environmental authorisations are the Agstewardship Industry Waste Reduction Scheme, which involves the imposition of a 4c per litre/kg levy on suppliers of agvet chemicals to support the recycling and safe removal of agvet chemicals and containers from the waste stream; and the Agsafe Code of Conduct for the safe storage, handling, transport and distribution of agvet chemicals.

So called "green agreements" were the subject of a recent roundtable discussion which I participated in at the OECD competition committee meeting in Paris last October. What came through clearly from that

discussion was that the authorisation provides for a much broader framework for the consideration of efficiencies arising from potentially anti-competitive agreements than is provided for in some other jurisdictions.

For example, Article 101(3) of the European Treaty seems to have been interpreted as only extending to the consideration of direct efficiencies accruing in the market in which the agreement takes place and does not extend to the consideration of wider benefits to society as a whole. Furthermore, authorisation does not require that the restrictions be indispensable for achieving the efficiency gains, that consumers receive a fair share of the benefits or that the agreement does not eliminate competition, which are all cumulative conditions for exception under Article 101(3).

Sport

Finally, I thought I would draw your attention to a number of recent decisions involving sporting competitions – and "competition between competitions". Sport is a unique product because it involves the supply of (sporting) competition itself and this inevitably requires the co-operation of sporting rivals. It has raised a number of competition concerns over the years and around the world, and has recently been at the centre of a Supreme Court decision in the US – *American Needle.* That case considered whether the NFL should be considered a "single entity" or a collection of independent teams for the purposes of antitrust. Roger Noll and a collection of other economists filed an Amicus Curiae brief opposing the "single entity" approach and arguing that sporting leagues should not be exempt from antitrust without having to prove that centralising decisions in the league is more efficient than decentralising them with teams, given that it eliminates competition.

The Commission has revoked a number of exclusive dealing notifications relating to ice hockey and motor racing, which sought to restrict competition from alternative sporting leagues/competitions in recent years.

Ice Hockey Australia lodged a notification under which it proposed to sanction, through suspension or expulsion, any member of Ice Hockey Australia who has participated, or is participating, in a non-sanctioned Australian or

international ice hockey game or league. In March 2010 the ACCC issued a notice revoking the immunity provided by the notification. In revoking the arrangement the ACCC considered that the notified conduct had the effect, or was likely to have the effect, of substantially lessening competition by creating barriers to entry for new ice hockey leagues and making it difficult for existing leagues to remain competitively viable. IHA is the recognised governing body for ice hockey in Australia by the IIHF and the AOC but faces competition from alternative local leagues, which many players and officials choose to participate in, in addition to competitions organised by IHA affiliates at the local level.

IHA claimed various public benefits around economies of scale, risk management and insurance and player management, but the Commission did not consider that the benefits were likely to exceed the costs to competition and accordingly revoked the notification.

This decision received considerable attention internationally. I have also noticed some recent Court action by a Youth Hockey League in Minnesota against restrictive practices by the incumbent league there.

The Commission has also considered a series of notifications by the National Association of Speedway Racing (NASR) and various specialist racing associations and tracks relating to:

- the supply of NASR licences on condition that licensees only race at tracks approved by NASR and obtain membership of the relevant national and/or state and/or regional club or association for the licensee's relevant speedway category (third line forcing);
- the supply of membership of various specialist racing associations on condition that members also hold a NASR licence (third line forcing);
- access to tracks conditional on holding a NASR licence (third line forcing); and
- the supply of NASR licences on condition that licensees only compete in speedway racing categories approved by NASR.

All but the final notice have now been revoked (which was not considered to SLC). Similarly to the IHA, NASR is recognised by the FIA through CAMS as the controlling body for speedway racing in Australia, but other bodies (NDRA and VSC) also provide speedway licences in Australia. Also like the IHA

matter, the Commission considered that the licensing conduct restricted competition from competing licensing bodies, events and tracks. These notifications also raised similar public benefit claims to the ice hockey notification, around insurance, driver conduct, safety standards and risk management. While the Commission accepted that there were benefits from effective enforcement of safety standards, the benefits from the notified conduct did not exceed the harm to competition.

In relation to the track notifications, the Commission initially allowed the first two notifications lodged by tracks near Perth and Melbourne to stand, on the basis of limited competitive detriment, but the Commission noted that it would be concerned if the conduct became widespread and these and three subsequent similar notices, for tracks around Brisbane, Melbourne and Adelaide, were subsequently revoked.

Concluding Remarks

Australian competition and consumer law has undergone some of the most significant changes in its history over the last couple of years, with the introduction of criminal cartel provisions and the ACL.

In my view the law is generally in good shape, our new powers under the ACL are being used to achieve speedy and effective outcomes and we can look forward to some new enforcement challenges involving criminal cartels and unfair contracts (probably not in the same case!).

And we are likely to get legislation on price signalling in some shape or form. I haven't commented on this since the matter is currently before Parliament, but I will be interested to hear the panel discussion which is coming up on this matter.