



The Law Council Competition and Consumer Workshop 2011

ACCC: Future Directions

**27 August 2011, Gold Coast
Rod Sims, Chairman**

Good morning, and thanks for the invitation to be with you. I welcome the chance to speak today because over the next five years I intend to have a close working relationship with the Law Council.

My address this morning will provide my perspectives on the future directions for the Australian Competition and Consumer Commission (ACCC). In doing so, I want to emphasise that people often exaggerate the influence of one person, albeit the Chairman. My comments today are already a mix of my initial perspectives and the influence of a month of discussions with the Commission and with many people within the ACCC.

The ACCC, as you all know, is a strong and professional organisation, full of talented people. This must and does bring considerable momentum. Indeed, no-one would want an organisation that completely changes with the arrival of a new Chairman.

I am an incredibly strong believer in the role of the ACCC. I would not have taken on this role if it were otherwise. I think the effective carrying out of the ACCC's role is pivotal to the proper functioning of a market economy; and that a proper functioning market economy achieves the best outcomes for our society.

Two famous quotes from Adam Smith in 1776 have always summed up my views in relation to the role of the ACCC.

The first quote says

It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own self interest.

I understand and believe in the power of a market economy. Coming from 17 years embedded in Australia's business community I have seen how productive private companies are and how effectively they can deliver for consumers.

For example, I have seen private companies with a strong profit motive take over functions from government. The increase in productivity can be immense, indeed often unimaginable. Provided, of course, that the terms of the new arrangements are appropriate.

This segues nicely in to my second, and better known Adam Smith quote.

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.

The behaviour in this second quote simply follows from the strong profit motive mentioned in the first quote. It works for the good of the community when there is adequate competition and effective regulation. Without these, the strong profit motive can lead to community detriment.

The ACCC's role is to enforce the community's competition and regulatory rules, and when appropriate to press for improved rules. I will have more to say later on this latter point.

Promoting competition and effective regulation are complementary functions. The ACCC promotes effective competition by, for example, making sure market power is not abused, making sure particular agreements and mergers do not substantially lessen competition, and ensuring consumers are not misled.

The ACCC's complementary regulatory role exists where markets do not, or cannot, have the foundations for effective competition. For example, where we have monopoly assets, such as electricity poles and wires, gas pipelines, rail tracks, ports, or in telecommunications the copper wire to the home, then effective regulation is needed. When faced with monopoly assets all the sections of the old Part IV and Part V of the Act on their own are manifestly deficient in yielding good community outcomes.

For me it follows from the above that the ACCC's core role is protecting and enhancing the long term interests of consumers. Such a role is exactly the outcome sought in the economic textbooks from a well functioning market economy.

It is worth focusing on the importance of this "long term" element when discussing the interests of consumers.

Some could argue that price controls and inadequate regulated rates of return would, by delivering lower prices, be in the best interests of consumers. I believe, however, that such mechanisms are not in the long term interests of consumers. While consumers may benefit from lower prices in the short term, supply side incentives will be damaged and the level of economic activity and innovation will be reduced over the longer term, to the detriment of consumers.

Consumers will be better off with strong competition, and effective regulation when competition is inadequate for one reason or another. Following this logic, the ACCC's mission is to protect and enhance the long term interests of consumers.

With that philosophical background I now want today to focus on the following perspectives.

1. First, as an enforcement agency, the ACCC will be strategic and it will take on more cases where the outcome may be less predictable. It also will ensure the broader community knows what it is doing and, equally important, why.
2. Second, the ACCC, will make full use of the ACL and, over time, outline more clearly how and when we will use our relatively new powers.

3. Third, the ACCC will take a co-ordinated approach under the Act and across the organisation as a whole.
4. Fourth, while our core responsibility is compliance, enforcement and regulation the ACCC will, when appropriate, be an important advocate for legislative change, but we will be clear that we are but one legitimate voice among many.
5. Fifth, while the vast majority of share acquisitions or mergers will continue to be approved, the ACCC will be vigilant in ensuring they do not bring a substantial lessening of competition.
6. Sixth, recognising that competition policy extends beyond anti-trust issues, the ACCC will, when appropriate, also contribute more broadly on wider competition issues.
7. Finally, I will leave you with my two high level goals for the ACCC.

Before proceeding, let me make a key point.

None of the perspectives I discuss today should be seen as seeking to contrast with the actions of my predecessors. The points stand on their own.

Indeed, I have not spent recent years monitoring the performance or views of my predecessors that closely.

I would, however, like to thank them. Graeme was exceedingly generous with his time and the access I had to the ACCC prior to taking on this role, and Allan has also been very giving of his time and has provided extremely helpful views.

Let me now elaborate on the above perspectives.

As an enforcement agency the ACCC will be strategic and it will take on more cases where the outcome may be less predictable. It will also ensure the broader community knows what it is doing and, equally important, why.

An effective enforcement strategy, as with any strategy, is about the choices we make.

Necessarily, the ACCC is reactive - we take action where we see contraventions, but even then we make careful decisions about where to allocate limited resources.

We must also, however, be strategic in deciding on which areas of the economy to give particular focus and over what time frame. To do this we must ask where is the largest consumer detriment and where do existing market structures or mechanisms need most support?

We have already achieved significant success in consumer issues in the telecommunications sector, and this will remain a focus. In relation to mobile premium services, for example, there has been a decline in complaints which we can trace back to our active enforcement in combination with some recent changes to the regulatory settings in this area.

Another essential service, electricity, will become a focus area. This is a crucial cost of living issue for Australians and the ACCC and the AER have a large role to play in relation to many aspects of this industry. Like telecommunications, there is significant potential for 'bill shock' and consumer distress in this rapidly changing, often confusing and critical market.

The online retail market place will also be an important area of future scrutiny. As it becomes more mainstream, the ACCC will be increasingly called upon to protect consumers. As you will be aware there are novel enforcement challenges for regulators.

Although the law applies to all traders that carry on business in Australia, online traders – unlike the more orthodox bricks and mortar operations – may have no physical presence here. There are a substantial number of transient online traders where we will frankly look for creative solutions to secure compliance and enforce the law. One successful method already employed has been to follow the money trail. We can and have stopped payments and used credit card and clawback arrangements to press for compliance and to secure redress for consumers who suffered loss.

In making our strategic choices we will also take a strong interest in the many oligopolistic markets in Australia. It is particularly important, for example, that the ACCC is vigilant against the potentially exclusionary conduct of firms seeking to protect or extend their market power against the threat of competition. Section 46, which prohibits the taking advantage of substantial market power for a prohibited purpose, is designed to cover this type of conduct.

There are almost no absolutes when it comes to exclusionary conduct. Conduct which may be exclusionary when engaged in by a firm with substantial market power may be benign or pro-competitive when undertaken by a firm without market power or by a firm with market power in a different set of circumstances. For example, with bundling or the acquisition of scarce inputs.

Further, there is nothing inconsistent between conduct being commercial, profit maximising or having a business rationale and that same conduct being exclusionary. Exclusionary conduct will only be rational where it is profit maximising; it is the protection or extension of market power which makes it so and which will make it of interest to us under Section 46.

There is a need, I believe, to test some aspects of Section 46 in the courts. Although there is some case law on "taking advantage of market power", the precise boundaries of that concept are not yet clearly defined.

There is also a need to test some relatively new laws. For instance, in predatory pricing, we have yet to test our view of what "sustained period" means.

It is in the public interest that these issues are tested, and the ACCC will take appropriate legal cases to do so.

The ACCC will also be increasingly assessing whether quick action in applying for interlocutory orders is necessary to stop conduct that is detrimental to consumers or the market.

Of course, for any competition regulator, a major area of interest is cartels. The ACCC's policy is to investigate all cartel conduct which occurred after July 2009 on the assumption that a brief will be referred to the Commonwealth Director of Public Prosecutions (CDPP). This happens unless and until we are satisfied that the conduct does not amount to serious cartel conduct.

I do not want to add much to this important topic today but I can tell you that we have a number of cartel investigations underway, and if we decide that they involve serious cartel conduct they will be referred to the CDPP as soon as possible.

Let me explain further what I mean by the need for the ACCC take on more cases where the outcome may be less predictable.

The ACCC's success rate in first instance litigation stands at almost 100 per cent. This is frankly too high. It may sound strange to say so, but benchmarking against our international counterparts we are sitting at a much higher level of success. Of course I'm happy with the implication that ACCC staff handle cases well, but the flip side is that we have been too risk averse. We need to take on more cases where we see the wrong but court success is less assured.

The two key outcomes from this approach are that action is seen to be taken when it should be; and that the law is tested.

Finally, in all aspects of our enforcement and compliance work, the communication effort is central – the ACCC needs to explain what it is and is not doing, and why.

The ACCC's announcements on enforcement action will need regular context like:

- Why this is in the interests of consumers?
- Is it part of a broader range of activity in this sector?
- Does it demonstrate the application of particular tools?
- And what do we want Australian business and consumers to understand from this action?

Where we choose not to take action may also warrant explanation, especially in areas of high public interest. This will allow us to make clear the legal standard we need to meet, and/or the evidentiary challenges in making out a case.

The ACCC will make full use of the ACL and, over time, outline more clearly how and when we will use our relatively new powers.

The ACL is new and profoundly important, marking a major advance in the fair treatment of consumers. The ACCC has a fundamental role as the national regulator in what has become known as the 'one law multi regulator' approach.

Given its recent introduction the ACL brings other areas of the law in need of more judicial exposure, like unfair contract terms and unconscionable conduct.

Co-ordination with ASIC and the state and territory agencies is going well, and we have already published many joint guides for consumers and traders. We will do all we can to ensure the committee structures function smoothly, and bring the regulators together to collaborate in compliance and enforcement.

The enforcement toolkit has been markedly enhanced with the introduction of the ACL and the addition of options like infringement notices and debarring orders to our old standards of undertakings and court action. These are a significant development in the spectrum of action we can take, and mean that we can more successfully match the response to the conduct we are addressing.

I have recently received a letter from the Law Council on the need for clear guidelines concerning the use of infringement notices. It is new law to all of us and further certainty and guidance will come as our collective experience grows. This is a topic I look forward to discussing with the Law Council.

One interesting example of the potential of the new law has been highlighted with the recent debate around the ACCC's role in carbon pricing. We see the use of substantiation notices as central to our enforcement in this area.

The ACCC will take a co-ordinated approach under the Act and across the organisation as a whole.

As I have explained, Australia benefits from the ACCC's unique range of competition and regulatory powers.

The ACCC's approach will always be to seek to promote and protect competition in the first instance, as competitive markets will deliver better outcomes for consumers. Regulation is second best, but it is a necessary tool.

Current consumer concern over cost of living pressures has much to do with utility prices. This is an area where the ACCC can assist consumers by utilising its tools and taking a whole-of-ACCC approach. Electricity is a good example of this. The combined forces of the ACCC and the Australian Energy Regulator will tackle this issue on a range of fronts.

The AER regulates the revenues of the network companies – the poles and wires – which make up around half the bill of a typical household. These network prices have risen significantly over the past four years. The AER has identified that the rules framework under which it works has been contributing to the increases, and will soon be putting forward vital rule changes seeking to address the imbalance in the regulatory regime between efficient investment incentives and fair charges for consumers.

Ensuring that consumers can effectively participate by making informed choices is a crucial component of a competitive electricity market. The AER/ ACCC will interact seamlessly in developing strategies to educate consumers about their choices, including development of the AER's national energy price comparator website.

The ACCC will do more to ensure that energy businesses play their part. The market is not truly competitive where there is bad sales behaviour, or where confused consumers don't understand price structures and are switching retailers against their interests. This will be an important ACCC enforcement focus in future, as I have already stated.

The ACCC and the AER will also work closely together to ensure the effective application of the ACL and the coming electricity consumer laws. There is considerable potential for confusion if this is not handled well.

The wholesale price of electricity makes up 40 per cent of household bills.

The AER and ACCC will be active in monitoring the wholesale spot market for illegal bidding and market manipulation.

Having an industry specific regulator, like the AER, as part of the ACCC, allows a holistic strategy to be developed and delivered in the interests of consumers.

The need for a co-ordinated approach is also clear in other utility areas such as telecommunications. An approach which includes both access regulation and the enforcement of competition law has been central in stimulating competition in the telco environment.

As a complement to regulating prices for access to Telstra's copper lines, the ACCC has used enforcement powers in response to industry complaints about lack of physical access to Telstra's telephone exchanges. This investigation resulted in a sizeable penalty of \$18.55 million, and a strong signal to the sector shaping future behaviour. The ACCC also took additional steps using its regulatory powers, such as revising model terms and conditions, to facilitate greater access to the exchanges.

A more competitive telecommunications sector might be expected to be characterised by fewer consumer complaints than we are seeing today. As I noted earlier, this sector will continue to be a key focus of our consumer protection activity.

Another sector where consumers have benefited from the ACCC's multi-faceted approach is in water trading. There has been widespread concern about the conduct and regulation of water market intermediaries – that is, brokers and exchanges involved in the trade of water rights. These concerns were one of the most significant in the ACCC's consultation on the water trading rules, conducted in the development of our advice to the Murray-Darling Basin Authority.

When establishing its approach to the monitoring and enforcement of water rules under the *Water Act 2007* the ACCC was able to draw on enforcement practice and procedure to move quickly in bringing two enforcement actions. This has resulted in the sector becoming keenly aware of the boundaries and consequences of a breach.

The ACCC will, when appropriate, be an important advocate for legislative change, but we will be clear that we are one legitimate voice among many.

The ACCC can do this in two ways.

First, we can do more to test the law where it is not clear, as I have discussed above.

Second, the ACCC has long standing expertise in both the theory and enforcement of competition law, which we should and will articulate in public when this is appropriate.

This is a controversial topic. The ACCC is an enforcement agency and a regulator, not a law maker. Our core activities must be in compliance, enforcement and regulation. Indeed, good governance requires that the two roles are separate.

That said, I believe the ACCC must go public when appropriate with its views on where the law needs improvement, based on its enforcement experience and expertise. The key point, however, is to do this in the full understanding that we are one voice among many, and that we should not be the loudest.

The ACCC could simply put its views to Treasury behind closed doors. To do only this, I believe, deprives others of the ACCC's views and lowers the quality of the public debate.

I believe it is appropriate that the ACCC publicly express its views, but I also believe that the best laws will be ones that reflect debate amongst all parties. Indeed, the best laws may well not be the ones that fully reflect the views of the ACCC.

To that end, I hope to have many future discussions with the Law Council on a wide range of issues.

While the vast majority of share acquisitions or mergers will continue to be approved, the ACCC will continue to be vigilant in ensuring mergers do not bring a substantial lessening of competition.

Let me share with you two relevant perspectives from my past deep exposure to a wide range of business issues.

First, in the large number of merger discussions that I have been party to, the gains from industry consolidation are often (but not always) the prime driver, albeit not openly stated. This is because, as any commercial strategist knows, an acquisition that delivers less active competition or increased market power is a better driver of profitability than seeking measures to outperform a like placed competitor. Such benefits are rarely written down as the merger parties are aware of the ACCC's role under section 50.

For the ACCC, therefore, since market structure underpins the ability and incentives for firms to compete, hence merger regulation is a critical component of competition law. I'm sure we all accept that preventing inappropriate mergers is better than trying to deal with the consequences of inadequate competition after the event.

Second, the argument that Australia needs national champions, or one large dominant firm in a sector, is not borne out by experience. Firms perform best when faced with competition; without it they lose their edge.

These points made, I am sure the ACCC will continue not to oppose the vast majority of mergers. Mergers can drive efficiencies and it is vital for Australia that we have an active market for corporate control.

I cannot discuss the topic of mergers without acknowledging that yesterday we received the full judgment in the Metcash case which, of course, we will examine closely. Today I will simply say that it is the ACCC's mandate under section 50 to prevent acquisitions that are likely to substantially lessen competition. We will not be swayed by a potential increase in the prospect of litigation.

Standing back, from my observations the ACCC's informal review processes are working well and generally provide for speedier and more efficient consideration of merger proposals than is the case in many overseas jurisdictions with formal merger review processes.

I also believe undertakings will continue to play an important role in resolving merger concerns. I favour structural over behavioural remedies, as behavioural undertakings can often prove to be ineffective, given the strong profit incentive behind a merger. Behavioural undertakings are also both difficult and costly to comply with and monitor, and can distort competition over time.

And a few comments on another very current debate – minority shareholdings. We will be casting a more critical eye over acquisitions of minority stakes where those acquisitions may fall short of control but where we consider competition issues arise. Minority shareholdings can affect both the ability of the acquirer to influence or control the target and the incentives to compete. While the recent review of acquisitions of minority interests in Channel Ten by Illyria and Consolidated Press was discontinued, it was not because we found that those minority shareholders lacked the ability and incentive to change the strategic direction of the company – even if they may not have controlled it outright.

It is not sufficient for parties to point to directors' duties in arguing acquirers of minority interests do not have the ability or incentive to lessen competition. An alignment of interests between minority and majority shareholders can have anti-competitive effects and not necessarily give rise to a breach of corporate law obligations.

The ACCC will also increase its scrutiny of mergers in local markets. The ACCC has been particularly active in reviewing local grocery store and liquor licence acquisitions in the past, but we will be considering whether local market acquisitions in other sectors warrant more attention. We may, for example, take a larger interest in the merger of two service stations in a regional town, if that might adversely affect competition.

Recognising that competition policy extends beyond anti-trust issues, the ACCC will, when appropriate, also contribute more broadly on wider competition issues.

Both the ACCC and the AER have valuable perspectives on the performance of markets across the Australian economy. Our regulatory role, for example, gives us a deep understanding of the sectors we regulate.

Our regulatory functions are informed by our commitment to competition and competitive markets. Through the course of our work, we gain an understanding of market dynamics, performance and observe fundamental changes in markets over time – for example, how technological change can fundamentally affect barriers to entry.

Sometimes these barriers can be addressed using existing powers, but sometimes they require a policy response. In these circumstances, I believe the ACCC, as Australia's competition regulator, has an obligation to raise the issues as we see them.

Of particular interest is our unique positioning in relation to how networks—be they water, energy or communications networks—relate to upstream and downstream competitive markets. Few others in the Australian economy have the same perspective in understanding how regulated networks and their related competitive markets can affect each other and how end use consumers can be harmed when policy settings are not as they should be.

A good example of this approach is the action being taken by the AER to review its own experience with the energy network regulation rules that I referred to earlier. The AER will be proposing changes that will better balance the network regulatory regime and the interests of energy consumers. As you may know, this is an issue that I am very familiar with and I am strongly supportive of the work of the AER in this area.

We all appreciate that electricity prices have risen sharply in recent times. More needs to be done to engage consumers on the drivers of these price increases. For example, there is very limited understanding of the impact of the choice of reliability standards for electricity network costs. It may seem obvious that if reliability standards—set by state governments—are increased, it will lead to increased prices via increased network investment. What is less clear is whether the reliability standards align with community expectations. I think it's important that consumers only pay for a level of reliability for which they are willing to pay. To this end, recent moves to review how reliability standards are set are welcome.

The ACCC also has the expertise to identify gaps between reform objectives and the tools available to achieve them. A recent example of this is in rural water markets where the ACCC has the role of improving trading outcomes by removing impediments to trade. Here, we provided advice on the rules and in most cases we are the agency responsible for enforcing them.

In providing its advice the ACCC has been active in explaining what the rules can and cannot achieve. For example, in our advice on the Trading Rules, the ACCC included a number of recommendations on issues that would promote the objectives set out in the *Water Act 2007* that can't be addressed by the rules.

Similarly, the ACCC has been proactive in monitoring reform outcomes and impediments. Our most recent report points to positive outcomes, but at the same time identifies problems beyond the ACCC's control. The two issues in this category are incomplete rule coverage in NSW, and the four per cent cap on trading in much of Victoria.

As a further example in a different context, the Australian Securities Exchange has to date held a monopoly over the trading of shares listed on the ASX. This monopoly is soon to end through the introduction of alternative trade execution platforms.

The ACCC identified a concern, however, relating to the ASX's control over a number of services essential for those seeking to compete with ASX. Given our concerns, we discussed the potential issue extensively with policy makers, market regulators, market participants and other stakeholders; and were pleased to ultimately see Chi-X and ASX sign an agreement for access to those services.

Finally, my two high level goals for the ACCC.

The first goal was left by Graeme Samuel. In his farewell speeches he continually said that under my chairmanship the ACCC would be stronger than it is now. He meant, of course, that all institutions grow and improve, and so would the ACCC.

Let me say, however, that I do not take this growth and improvement for granted. Just as the fortunes of the Australian cricket team can wax and wane, so can the standing of institutions.

Our society depends on the strength of its core institutions. The strength of the ACCC must be guarded and nurtured with care, and I intend to do this in my role as Chairman.

The second goal is even more important. It is that Australians see that a market economy and strong competition works for them and that they see the ACCC working tirelessly for the long run interests of consumers.

For many Australians this is a time of considerable economic uncertainty. For many, such uncertainty will cause them to question the merits of greater competition. On the basis of a clear understanding of people's fears, the ACCC will be a strong voice for the benefits of competition across the economy and its benefits for consumers.

Thank you for your valuable time today. I look forward to catching up with many of you through the rest of this conference.