Australian Competition & Consumer Commission	**Melbourne Press Club** **Melbourne, 10 October 2011** ***Some perspectives on competition and regulation*** **Rod Sims** **Chairman** **Australian Competition & Consumer Commission**

Introduction

Thank you Mark, and good afternoon everyone.

It is a pleasure to be here today to speak at the Victorian home of the fourth estate.

Often the ACCC and the media share a common label. The notion of the fourth estate rests on the idea that the media's function is to act as a guardian or a watchdog of the public interest.

The ACCC is also a guardian of the public interest. We each have our critics – the media and the ACCC – but equally we each play our part in checking various imbalances or excesses in our society.

With this point in mind, and as I have stated many times, I am a strong believer in the benefits of a market economy. I have also said, however, that the ACCC's role in realising those benefits is pivotal.

The profit motive works for the good of the community – but only when there is adequate competition and effective regulation. Without competition and effective regulation, the profit motive can lead to community detriment.

For me, the ACCC's core role is to protect and enhance the long term interests of consumers. This does not mean artificially holding down prices, or pressing for low rates of return that may restrict needed investment.

It does mean ensuring strongly competitive markets wherever possible, and providing effective regulation where this is not possible. Regulation is second best, but sometimes a necessary response.

Today I want to expand on these points.

First, I want to explain how the ACCC will best fulfil its mandate if it is strategic, if we sometimes take on cases where the outcome may be less predictable, and if on occasion we advocate policy change.

This approach recognises that the ACCC operates – thankfully - in a world where governments, the courts, and the media also play key roles.

Second, while the *Australian Competition & Consumer Act 2010* works to protect the degree of competition that already exists, I want to discuss how we need to ensure that competition is effective in more areas of the economy.

Third, I want to explain how, when setting regulatory arrangements, we must endeavour to provide a larger role for the users of bottleneck infrastructure.

Now let me elaborate on each of these points.

1. How the ACCC can best fulfil its mandate

At its heart, the ACCC is an enforcement agency.

To be fully effective, we need to:

- Be strategic
- Sometimes take on cases where the outcome is less predictable
- At times, advocate for policy change.

Let me explain what I mean.

An effective enforcement strategy - as with any strategy - is about the choices we make. We do not have, nor should we have, endless resources. We cannot investigate everything.

Necessarily, the ACCC is reactive. We take action where we see contraventions.

We must, however, also act strategically in deciding on which areas of the economy to focus, and over what time frame.

That requires us to ask where is the largest consumer detriment, and where do existing market structures or mechanisms need most support?

I have already identified publicly particular issues in telecommunications where we will be paying attention. Notably, we have already had success in mobile premium services, and we will continue to focus here.

And energy – including price comparison services and door-to-door selling – is another area of focus that I have named.

The online retail market place will also be an important area of scrutiny.

I have also said - in making strategic choices - the ACCC will take a close interest in the many oligopolistic markets in Australia.

The ACCC will of course also continue to pursue and punish cartel conduct with its insidious impact on both competition and consumers.

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

I have explained elsewhere that with a success rate in first-instance litigation at almost one hundred per cent (100%) we may have been too conservative in the past.

I am sure most of you are thinking that with the Metcash and Google decisions I am already doing my bit to change this statistic.

Of course, both sets of litigation predate my appointment to the ACCC.

I should state what I did not intend when I said – a few weeks ago – that we will take on more cases where the outcome may be less predictable.

- I did not intend that we will take on a host of marginal cases hoping we will "get up" on them in some sort of game of chance
- I also did not intend that we would turn companies – that are on the other end of these cases - into guinea pigs. After all, as a Commonwealth agency, we recognise our obligation to act as a model litigant

- And I did not intend that we will always go to court, rather than accepting undertakings where they are appropriate, or where there are other means to ensure compliance

What I did mean is that the ACCCC will back its judgement. If we see what we believe is a breach of the Act we will seek to enforce the law.

If there is uncertainty as to how the law applies in that situation, we will not shy away from our view on the law and its application. If this requires arguing the case before a court, the ACCC will pursue it so the law is clarified.

There are indeed a couple of recent examples that demonstrate this approach.

You may be aware that we took action against Google for misleading and deceptive conduct. The issue was the way in which Google characterised advertised content in search results, and how its functions diverted users, through a search term, to another site, sometimes that of a competitor company to that initially typed in.

The ACCC did not win in the Federal Court, but there is no question that the law in this rapidly expanding area of commerce needs clarification.

I should also add that there has been a worldwide change in some of Google's practices since the ACCC took this action.

Another recent example was a Queensland case – known as the Woollam case - which concerned a form of bid rigging in the building industry. It involved 'cover pricing' - apparently a longstanding practice among many builders - which manipulated the tender process and was a form of cartel activity.

The ACCC took the view that it was a clear breach of the law, but the builders strongly contested it. The Federal Court has recently found in our favour and made it clear that this practice is unlawful.

Looking forward, let me return to my mention of the many oligopolistic markets in Australia. In this context most people's thoughts turn to the grocery sector.

There have been some positive developments in this sector. For example, Coles are now actively challenging Woolworths, especially via price discounting, and we have relatively new entrants ALDI and Costco alongside the independents.

Inhibiting the recent new entrants and the existing independents had been at least two factors which the ACCC has sought to address.

First, restrictive covenants, written into leases that major supermarkets had with shopping centres, were a hurdle effectively preventing centre managers leasing space to competing supermarkets. The ACCC now has court enforceable undertakings from the major grocery retailers to phase out any existing provisions and to stop any new leases containing restrictive covenants.

Second, new entrants and the smaller players struggle to get access to the suitable sites. The ACCC now closely examines all site acquisitions for major supermarkets under merger laws.

The two major supermarkets still, however, have significant market power.

For example, many smaller suppliers to the supermarkets feel they lack a real ability to negotiate supply arrangements. The ACCC can and will watch closely to ensure any such dealings do not involve unconscionable conduct by the supermarkets.

To give another example, supermarkets sell both branded and their own private label products. This vertical integration in the supply chain needs close scrutiny to ensure the supermarkets do not misuse their market power under Section 46.

It may be that when we take on cases generally and gain clarification by the courts, we then see issues that require a policy or legislative response. If so, we will advocate for such a response.

However, as I have also said previously, we will do so with the understanding that we are one voice among many.

In the next five years you won't hear me criticise the courts, the Government of the day, or the Parliament. All these institutions have legitimate roles, and these must be respected.

The Government of the day - and the Parliament - establish the law. The ACCC enforces it, often by taking cases to court.

And the courts decide. We may sometimes appeal a decision, but the courts appropriately have the final say.

This is all a classic example of a separation of powers. We all have a job to do.

The ACCC's job is to decide which cases to take on; sometimes to appeal; and occasionally to advocate policy or legislative change.

In this sense, the process is self-reinforcing.

The media has a crucial role to play. Journalists report on our efforts and the court outcomes, occasionally applauding and often criticising – and I recognise that the criticism is a legitimate function.

Of course, there are times when I wish court wins and losses were not reported as if they are the outcomes of the AFL Grand Final.

I'd like to turn now to my second point today.

2. Ensuring the extension of competition policy more broadly

Whenever I turn to this topic, I am reminded of an account of a conversation that took place between a Treasurer and a national leader.

The Treasurer was setting out for the leader how he planned reforms to public service exams so as to provide recruitment on merit.

The somewhat perplexed national leader – wondering where public service exams fitted into the picture - turned to the Treasurer and asked: "Where is this principle of competition ever to end?"

The leader was Queen Victoria.

The Treasurer was William Gladstone.

And the conversation took place in 1853.

The anecdote serves to remind us how long is the road to sound competition policy ... evidently at least 160 years! And let's hope the principle of competition never ends.

Fred Hilmer provides us with a modern perspective. Fred was responsible for the review of Australian competition policy – in the 1990s – which resulted in the Hilmer Report of 1993.

That report provided the blueprint for the implementation of the National Competition Policy which led - among other things - to the Trade Practices Commission and the Prices Surveillance Authority becoming the ACCC.

More recently Fred has argued that Australia has seen declining national productivity since early 2000's. He then argues that our productivity depends on two factors.

The first is what Fred calls 'enablers'. A highly-skilled workforce is a good example of an 'enabler', as is the building of infrastructure. Generally, 'enablers' are on the supply side of the equation – what businesses consume or buy in the course of making something else or providing a service.

The second factor is what Fred called incentives. The most notable incentive mechanism is competition policy.

As Fred argued, the balance in Australian policy reform may have tipped further towards enablers than incentives. Yet appropriate incentives are the more powerful lever to achieve productivity growth. Indeed, Fred felt that the shift from a focus on competition and other incentives has contributed to our recent poor productivity performance.

A challenge the ACCC faces and will embrace is to keep the competition torch burning, and to maintain the pressure for policy which offers incentives.

Whenever policy is examined we need to ask whether the proposed changes will promote increased competition and the appropriate incentives for behaviour.

For example, even in the infrastructure sector alone, where much has been done, we can ask:

- do we have the right incentives for road use?
- are pricing signals sufficient to drive appropriate road/rail investment choices?
- can more public services (eg road maintenance) be put to competitive tender?
- is it sensible to introduce some competition into urban water supply?
- are there sufficient incentives for demand management in electricity?
- are the incentives faced by publicly owned energy, water and transport companies better than those that would be faced by well regulated private sector companies?

Sound competition policy – when it is carefully thought out – provides benefits for consumers and for society overall.

Prices are subject to competitive constraints, investment is contributed according to demand, and parties in commercial agreements reach fair deals.

Under my chairmanship I intend that the ACCC will be a sometimes noisy proponent of this view. We are the major Federal Government agency with the word '*Competition'* in our title. So I believe it is part of our job.

This leads me to the final section of my address to you today – when competition is not possible, we have to regulate to ensure markets remain fair, and that they serve the interests of consumers including businesses.

Let me turn now to our role as an economic regulator.

3. When setting regulatory arrangements, we need to find ways that give a stronger voice to Infrastructure users.

The ACCC regulates in the interests of consumers, business and the wider community.

One of the major questions the ACCC and all other regulators face is ensuring that our regulation provides systemic ways in which consumers and

bottleneck infrastructure users can have their voices heard in shaping regulatory outcomes.

This will be uppermost in our minds as we regulate the national broadband network (NBN), and as we regulate the transition to the NBN. In the transition to the NBN, Telstra will remain the national supplier of services through its copper network.

The interim equivalence and transparency arrangements that Telstra will need to put in place as part of its Structural Separation Undertaking (SSU) are pivotal. Indeed, we cannot accept an SSU unless we are satisfied the interim arrangements for equivalence and transparency are appropriate and effective – and will remain so over time.

The various access seekers, such as Optus, iinet and AAPT, will continue to rely on Telstra's copper network to supply their voice and broadband services in competition with Telstra's retail units. During the transition to the NBN it is crucial that there is a level playing field so that the competitive landscape is not distorted as the NBN is rolled out.

The ACCC and industry have openly pointed to a number of significant shortcomings with Telstra's proposed SSU.

As we address these shortcomings we will be using a process that gives all parties – Telstra and the access seekers - a voice in settling the equivalence and transparency arrangements. Only this way can we be sure that the arrangements we put in place will deliver effective equivalence of outcomes.

The same approach will be taken to regulating the NBN itself.

The NBN will be a national, wholesale-only network. The extensive fibre-to-premises infrastructure will be a fixed-line monology for the supply of input services to telecommunications companies, who in turn provide voice and broadband services to consumers.

We have raised concerns with NBN Co about access to its services. A particular issue is that NBN's Wholesale Broadband Agreement potentially allows for only limited ACCC oversight of the terms and conditions of access (including prices) to its services.

It is absolutely necessary that there is a robust regulatory regime in place to address the potential for excessive prices and to ensure fair access to the network.

We have therefore said that we expect that NBN Co will structure its access arrangements, and in particular its Wholesale Broadband Agreement and Special Access Undertaking, to allow for regulated outcomes should they prove necessary.

We intend to engage constructively with NBN, its access seekers and consumers as we settle the regulatory arrangements for the NBN.

This will allow a robust regulatory framework to be established which can lead to continuing reductions in prices, improvements to service quality, and the continued development of competition in communications.

On another front, as many of you will know the regulation of airports is the subject of a Productivity Commission (PC) review. There is considerable concern that the major airports operate as monopolists in their markets.

The PC's draft report into Economic Regulation of the Airport Services has found that the five airports – Melbourne, Sydney, Brisbane, Adelaide and Perth – have "sufficient market power to be of policy concern."

The ACCC agrees. It is Australian consumers who ultimately pay for any monopoly rents. The exercise of market power by airports can result in inefficiency and losses in related markets such as aviation and tourism.

The ACCC does have a monitoring regime in place for airports, but that does not constrain the ability of the airports to exercise their market power.

Unfortunately, we also consider it unlikely that the monitoring and inquiry regime proposed in the PC's draft report is the answer either.

It is important that an effective solution is put in place. Such a result could be achieved by addressing the imbalance of bargaining power of the parties.

To do this, the ACCC has proposed an approach to encourage true commercial negotiations between airports and their users, free of the use of market power.

We recommend the airports be deemed declared under Part 3A of the Act so when airport users are negotiating with the airports, they can have access to an outcome arbitrated by the ACCC if required.

We believe this will so strengthen the arm of users that arbitration will rarely be required.

In another sector, wheat exporting facilities, we take a similar approach.

Wheat is among Australia's larger agricultural exports. The arrangements for exporters' access to facilities makes a difference to our international trade.

Last month, the ACCC approved arrangements for access to wheat port terminals on the east coast, and also in South Australia and in WA.

The ACCC approved stronger regulation in SA and WA than that which applies on the east coast, because we recognise that there is less competition in the south and the west relative to the east.

Recently, the Government has accepted a Productivity Commission recommendation that - from 2014 - vertically integrated bulk handlers will no longer need to submit undertakings that govern third-party access to their port facilities. This is conditional upon port operators developing a voluntary industry code of conduct.

The ACCC strongly supports liberalisation of wheat markets. However we are concerned that in regard to export ports there is not sufficient competition to constrain the market power arising from ownership of this bottleneck infrastructure.

We need to be careful that we don't move away from current arrangements before we are confident that there are sufficient checks in place in the supply chains.

So, there is a question: will competitive constraints develop in the south and west by 2014, when third-party access could become a much tougher prospect?

A possible solution here – as in the case of the major airports - is the declaration/arbitration option available under the Act.

Hopefully, before we get to the point of arbitration, the wheat industry parties would reach a commercial agreement – preferring that to an arbitrated deal – so that the customers of the wheat-handlers have a long-term role.

The above are all examples where users and consumers need to be involved in settling regulatory arrangements.

The ACCC will do its best to ensure users and consumers are involved in settling the regulatory arrangements in communications.

In the case of airports and wheat port facilities I hope the users can also find their voice.

4. In closing

So, to wrap up, I've reviewed the strategy under which the ACCC will perform its role as the promoter of competition, as an enforcer, and as a litigator.

I've also set out the importance of bringing competition to new areas of the economy.

And, finally, I have explained the important role of access seekers and consumers in settling regulatory arrangements.

Thank you for your attention this afternoon.

I am happy to take questions.