Australia's competition and consumer law: ensuring compliance and enforcing the law

Speech, with slides inserted, to the Trade Practices & Competition Law Conference sponsored by Key Media

Sydney, 16 February 2004

Louise Sylvan
ACCC Deputy Chair

Introduction

First, let me congratulate Key Media for organising this conference on Trade Practices and Competition Law.

I have been Deputy Chair of the ACCC for about 3 ½ months now, and am fully (although not always joyously) immersed in the many challenging issues facing the Commission.

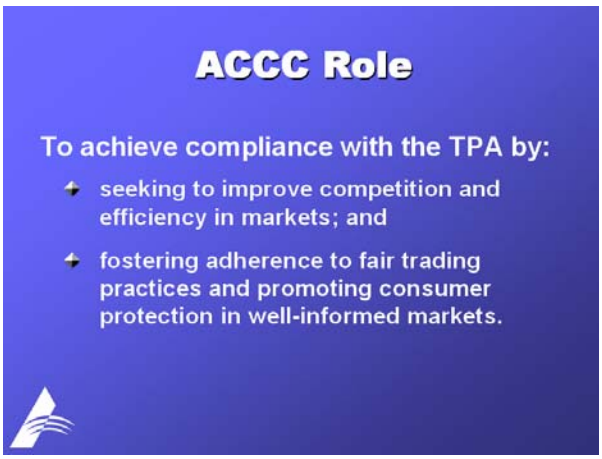
I'm going to take this opportunity to share with you my early thoughts about the role of the Commission, its approaches to compliance and enforcement, and the more significant recent issues and challenges it faces.

The Commission's role

The role of the Commission is clear. We are here to seek compliance of the *Trade Practices Act* in order to enhance public welfare through the promotion of competition, fair trading and consumer protection.

You may have heard it more than once before, but I'm going to say it again: as an independent statutory body, the Commission administers the TPA without fear or favour.

The Commission encourages competitive market structures, efficiency in markets, and well-informed behaviour by market participants.



I will not stray too long on why competition is important to the Australian economy and to the Australian public in particular. We all know the benefits that flow from competition. All governments in Australia, regardless of political persuasion, recognise that competition enhances the national economic interest by improving Australia's international competitiveness as well as enhancing the interests of Australian consumers. Consumers will benefit from lower prices, greater choice and better business management.

But the *Trade Practices Act* is more than a competition law. Equally, it aims to promote fair trading and consumer protection.

The Commission therefore has a dual role: one as a competition regulator and the other as a fair trading agency. Those of you who already know me will also know the view that I have previously expressed that competition law and consumer protection law are really the two sides of one coin. One is concerned with what I might generally call supply side issues; the other with how the demand side of the market is operating.

Because of that feature of our work, it may perhaps be of little surprise to people that all Commissioners are actively involved in every aspect of the Commission's work – be it an anti-competitive issue or a consumer protection matter or a regulatory question. While I obviously take a very high interest in consumer protection, I also take a very keen interest in Part IV, regulatory and other key issues. Clearly, as you will have seen from some of the early decisions of this "new" Commission, we see ourselves as here to promote – as our Act requires – the welfare of Australian consumers broadly and not to protect any sectional interest in the community.

Compliance and enforcement

Let me now turn to the Commission's approach on compliance and enforcement.

Our compliance and enforcement methods are designed to complement one another and work interdependently to promote conformity with the law. No part stands alone and no part can be effective in isolation.

The Commission operates generally on a model that many of you will be familiar with - the Compliance Pyramid, which was described by John Braithwaite in his 1985 book *To Punish or Persuade;* this was, I believe, the first time that the argument was made that compliance is most likely when an agency displays an explicit enforcement pyramid. In passing, I might just add for those of you who work internationally as well as nationally, you'll encounter this compliance pyramid, or enforcement pyramid as it is sometimes called, everywhere in the world now – a rather large tribute to its author and his academic influence and distinction. The "pyramid" theory of responsive regulation presumes that cooperative compliance will work most of the time with most firms, deterrence will be the strategy that is most likely to

work when cooperative compliance fails, and incapacitation is the strategy most likely to work when deterrence fails.

For most people, this is a nice theoretical model. For us, it actually describes, pretty accurately, the emphasis in the work. Occupying the base of the pyramid is the Commission's campaign to educate, advise and use persuasion to encourage compliance of the TPA.

The Commission works hard to inform markets and market participants of their rights and obligations under the TPA and to safeguard businesses from inadvertently breaching the Act. Prevention, after all, is always better than cure. The Commission has the function, as provided for under section 28 of the Act, of informing those engaged in trade and commerce and consumers of their the responsibilities and their rights. Around 800,000 publications go out each year from the Commission, many of them targeted at businesses, telling them about the Act and what it means in relation to their obligations and giving general guidance. In addition to the paper is the website of course, a set of electronic newsletters, and the public work of the Commission carried out through the media and at these types of events. Complementing these information sources flowing out from the Commission are a set of structures designed to bring information in – and I'll return to these in a minute.

Continuing with the Compliance Pyramid, at the next level, we have voluntary compliance initiatives, which we strongly support business and industry to undertake. It is vital for companies, through their CEOs, and with the full support of their Boards of Directors for larger entities, to establish their own corporate compliance programs and to educate their staff on compliance with the law. Compliance should be part of the culture and fabric of every company doing business in Australia - and it starts with the leaders of organisations.

I can only reiterate what the Chairman has said many times recently to corporate executives, that they, i.e., the business leaders themselves, should view compliance and a strong collaborative working relationship with the Commission as an essential part of normal business practice.

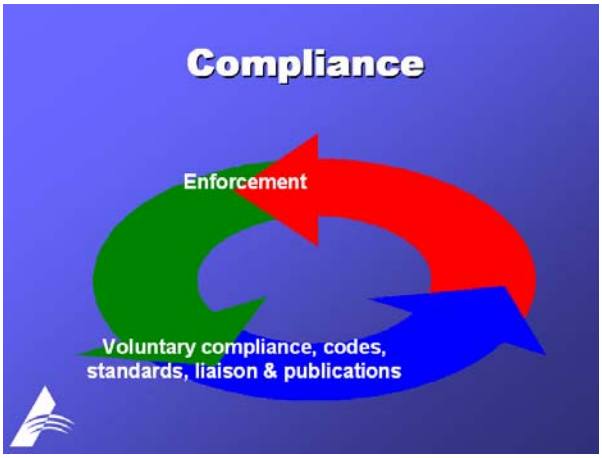
Moving up the pyramid, we get rather a lot more interventionist. Here the ACCC resolves cases through accepting enforceable undertakings from the company and/or individual. In these undertakings, which are on the public record, companies agree to:

- remedy the mischief;
- accept responsibility for their actions; and
- establish, or review and improve, their compliance programs and culture.

The main object of the Commission's compliance and enforcement role is to stop a trader's breach of the law and to seek redress on behalf of the consumer who suffers loss and damage as a result of the breach. If the Commission can stop the contravention through a negotiated settlement which is fair and effective, that's a good result.

However, the Commission is not so naïve as to believe that compliance is regarded by all business as an altruistic nicety to be pursued in the public interest. For the reality is that regulation exists to deal with misconduct. Its strength flows directly from the effectiveness of the Commission's enforcement regime.

So, if a trader fails to negotiate an effective settlement, the Commission will certainly take enforcement action through the judicial processes. By taking enforcement action, the Commission reiterates its determination to seek compliance with the Act. If individuals and companies believe that the Commission will take a court action for a breach, they are more likely to be more circumspect in the manner they conduct their business and ensure compliance with the law.



Enforcement action by the Commission is, and will be, focused and effective. It is the 'sharp point' of the Commission's compliance approach. Where the Commission believes that the Act has been breached in a serious way, we will not hesitate to take enforcement action.

Our enforcement action will be directed towards breaches of the Act where there is:

- widespread consumer detriment;
- deliberate breaches of the law;
- emerging trends of misbehaviour in particular industries; or
- recidivist behaviour.

Our approach is aimed at stopping the unlawful conduct and sending a strong message to those who would consider similar breaches, that the Commission will be swift and firm in its reaction. Decisive action against one company can be a strong message to others.

The priorities will be to: stop the misbehaviour and damage to the consumer as soon as possible; ensure, where legally possible, that where consumers have suffered loss or damage, there is restitution; and finally, to prevent the misconduct reoccurring in the future.

Litigation is an essential weapon in ACCC's armoury and will be pursued where it meets our objective of a timely and effective response to misconduct. The process of litigation - from the institution of proceedings through to the completion of all possible appeal processes - can be time consuming and costly, however... It is one effective strategy to bring about the desired outcomes in protecting consumers from the harm that can be wrought by business misconduct; but, where appropriate, we will continue to utilise other strategies to bring about desired outcomes.

Just before turning to recent policy developments, let me give you the current details of the consultative structures in place at the Commission.

There is a Small Business Advisory Group, which I try to get to, time allowing; a Consumer Consultative Committee - which launched a campaign last in June 2003, which you may have noticed, focussed on better protecting vulnerable and disadvantaged consumers; a Consultative Committee of stakeholders which includes industry groups and others; and a newly established franchising consultative panel which provides a mechanism for stakeholders to identify and comment on emerging issues and raise any concerns regarding the Franchising Code of Conduct and the ACCC's administration of that code. These consultative structures are in addition to the 50,000+ letters, calls and emails to our Information Centre which also gives us invaluable feedback about what is happening in the market.

You might think at this point that I've been giving you the ABCs of the ACCC. But let me say to you, as legal advisors to companies and their decision-makers, that some companies clearly do not have a culture of compliance from my observation of dealing with them. I think you have a responsibility to assist your clients to establish a culture of compliance rather than, obviously, the reverse.

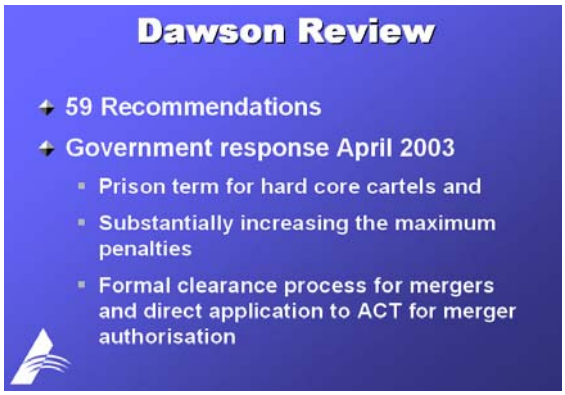
Recent developments - policy

Turning now to recent developments in policy, it's been a busy time!

I note from the program that you're looking at aspects of Dawson later today and there have been a couple of sessions on s.46 matters and Small Business issues. Although only briefly, I'd like to touch upon the Dawson Review, the shortly-to-be-released Senates Economics References Committee report into the effectiveness of the TPA in protecting small business, our leniency policy, and AGL/Loy Yang.

***Dawson*.**
The review, chaired by the Honourable Sir Daryl Dawson, was a general review of the competition provisions of the TPA. The Dawson Committee's report was released in January 2003 and the Government's response came in April the same year. The Government is currently preparing amendments to the TPA in order to implement those recommendations.

As the Dawson Committee generally reviewed the competition provisions of the TPA, the nature of the inquiry meant that many activities of the Commission came under intense scrutiny.



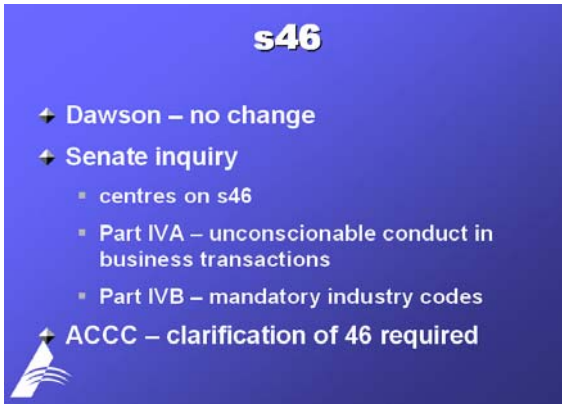
You'll recall that the Dawson Committee made some 59 recommendations, two initial recommendations were to give the courts the option of imposing a prison term on those involved in hard core cartels, and substantially increasing the maximum pecuniary penalties for anti-competitive behaviour. The government has accepted these recommendations in principle and has set up a working party to further examine the criminality issue.

The government also agreed with the Dawson Committee that, for assessing mergers, the section 50 test, that is, the 'substantial lessening of competition' test, and the public benefit test, which is used in the authorisation process, need not be changed. Pursuant to the Dawson report, the government indicated that it intends to introduce an additional formal clearance process for mergers and will allow companies to directly apply to the Australian Competition Tribunal for authorisation. The TPA will be amended to include a time limit of six months for the consideration of non-merger applications for authorisation.

I don't need to reiterate the views that the ACCC has already made about its worries in relation to the impact on the informal merger process that a more formal merger process might have. At this point, there is little further information that I can provide you about timing of possible amendments.

On the vexed issue of section 46, the Dawson Committee did not accept the ACCC's proposals to amend the section which brings us to the current Senate Inquiry.

Senate inquiry into the effectiveness of the TPA in protecting small business



Two sessions this morning examined aspects of s. 46 which is the focus of the Senate Economics References Committee *Inquiry into the effectiveness of the TPA in protecting small business.*

The Senate Committee was supposed to table its report on 11 February. As you know, this did not happen. The Senate inquiry was triggered by a grave concern by the small business sector that the High Court decision in *Boral Besser Masonry Limited v ACCC* narrowed the interpretation and application of section 46 of the TPA. The Dawson inquiry's rejection of calls from small business for greater protection against the predatory policies of big businesses further fuelled this vibrant debate.

The Senate Committee, however, broadened the inquiry's terms of reference to encompass a broad examination of the TPA to inquire into whether the Act adequately protects small businesses from anti-competitive or unfair conduct. Although much of the discussion at the public hearings conducted by the Committee centred on section 46, as you are aware from Gaire Blunt's presentation, there were also discussions on:

- the effectiveness of Part IVA in preventing unconscionable conduct in business transactions;
- the effectiveness of Part IVB in promoting better standards of business conduct through mandatory industry codes of conduct; and
- other measures that may assist small business in effectively dealing with anti-competitive and unfair conduct.

During discussions at the Senate Inquiry, there was consensus that indeed there is a need to distinguish between vigorous competitive conduct and anti-competitive behaviour that breaches the law. The Commission certainly agrees that vigorous competitive conduct benefits consumers while anti-competitive behaviour harms competition and in the short to long-term will bring harm to the public. This brings us to the difficult question: when does vigorous competition end and anti-competitive behaviour begin?

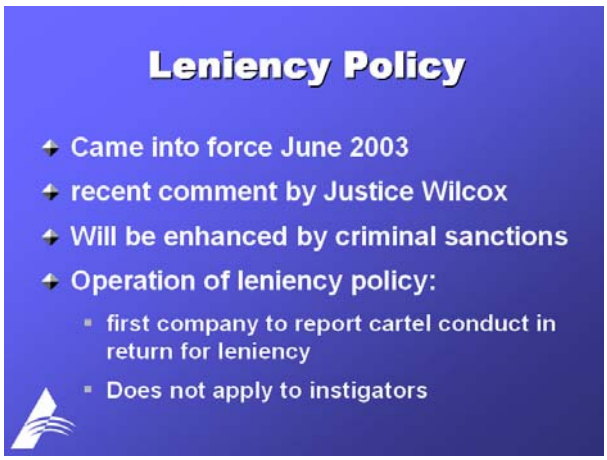
Section 46 is an essential pillar of the Trade Practices Act. It is about protecting the process of normal competition and dealing with situations where a business with substantial market power uses that power to harm a competitor and thereby competition. Following the *Rural Press* and *Boral* High Court decisions and recent decisions of the Full Federal Court, the Commission believes there is an urgent need for clarification of s 46 to give guidance to the courts and certainty to the business community.

Principally, section 46 should be amended to clarify that the threshold of 'a substantial degree of market power' is lower than the former threshold of substantial control, that 'substantial market power' does not mean that a business is absolutely free from constraint and that evidence of a company's behaviour is relevant to determining substantial market power. The Commission believes that the concept of taking advantage in regard to market power should be clarified as it is proving difficult to understand and has created uncertainty. The law should make it clear that section 46 applies to any use of substantial market power with a proscribed purpose, irrespective of whether the conduct takes place in the same market where the power exists. In predatory pricing cases, a finding that losses were recoupable should not be required to establish a breach of the Act.

The Commission awaits the Senate Economics References Committee's report.

Leniency policy

Let me now talk about recent developments with the leniency policy.



In December 2003, a penalty judgment was handed down by the Federal Court in a case instituted by the Commission. $3.5 million in penalties were imposed by the Court against a New South Wales fire protection company for industry price fixing, market sharing and misleading or deceptive conduct in making various 'cover price' arrangements with competitors on fire protection tenders. These arrangements contravened section 45 of the TPA.

The investigation of this case began as a result of one of the companies involved in the arrangement discovering through its trade practices compliance and training program that the conduct occurred. The company then approached the Commission with this information. By doing this, the company was able to take advantage of the ACCC's leniency policy which encourages disclosure of collusive cartel conduct on a 'first in best dressed' basis. The Leniency Policy, in the event that you have not had an opportunity to look at it, is on the ACCC's website at www.accc.gov.au; the policy came into force in June 2003.

Justice Wilcox, in his Reasons for Judgement in the fire protection case that I noted to you above, had this to say about the Commission's policy of leniency (though I would note that the leniency, in that matter, began under the co-operation policy).

> *"Through its solicitors, Tyco alerted ACCC to the fact of the contravening conduct. Tyco, and its relevant executives, agreed to provide evidence to ACCC in return for a leniency agreement under which ACCC agreed not to seek the imposition of a penalty upon any of them.*
>
> *No doubt it was appropriate for ACCC to offer leniency; without such an offer, ACCC may not have been able to prove the collusive conduct. It is another matter whether ACCC should have gone so far as totally to abjure any penalty application. However, that is not for me to determine. It is sufficient to say that, because of the existence of the leniency agreement, there can be no valid argument for parity in outcome as between Tyco and FFE. If this approach leads to a perception amongst colluders that it may be wise to engage in a race to ACCC's confessional, that may not be a bad thing."*
>
> *(par 29. 30)*

The operation of the leniency policy will be further enhanced once criminal sanctions for hard core cartel conduct, as recommended by the Dawson report, are implemented. I couldn't agree more with the Dawson report when it said that hard core cartel conduct is sufficiently reprehensible as to warrant the imposition of a jail sentence. Information from other jurisdictions suggests that criminal sanctions are an effective deterrent to serious cartel behaviour. Cartels harm consumers and the economy by distorting the ordinary economic processes of competition, innovation and product development.

Under the Commission's leniency policy, the offer is this: report cartel conduct such as price fixing, bid rigging and market sharing to the Commission in return for a clear, transparent and certain offer of leniency. The policy, however, applies only to the first company or executive to come forward and cooperate with the Commission. Such leniency, however, will not apply, as it should not, to people who were instigators – those who coerced others to participate in a cartel or were clearly the cartel leader. And this leniency policy applies only to civil contraventions of the TPA.

To complement the *ACCC leniency policy for cartel conduct*, the ACCC continues to have the *ACCC cooperation policy for enforcement matters*. As a general principle, persons who wish to cooperate with the Commission will be given priority in the order that they come forward. The first cooperative person will receive the most lenient treatment, the second applicant the second-most lenient treatment, and so on.

A current example of the use of the Cooperation Policy is a case instituted in May 2002 against a number of companies and individuals alleging that they entered into and gave effect to arrangements to fix the retial price of petrol in the Ballarat region. During the hearings, the ACCC submitted that the Court should take into account the Cooperation Policy in determining the appropriate penalty and made submissions to the court regarding the level of cooperation provided. We are currently awaiting judgment in respect of all the admitting respondents.

Reasons for Refusal, AGL and Loy Yang case

Let me now move to a couple of mergers matters – the publishing of reasons for refusal, and the Loy Yang case, which is also a topic on the agenda this afternoon.

The Commission is now publishing its reasons when a merger is refused. The first major instances of this were the proposed acquisition of Austrim Nylex's Pryda Reid Group by MiTek Australia Limited and the proposed acquisition of Berri Limited by Coca-Cola Amatil Limited. Our feedback is that members of the legal profession, companies and their advisors, journalists, economists and others find our decision to publish reasons very useful. It contributes to transparency in relation to the ACCC's decision making, and serves to both inform and educate the community more broadly on the key considerations on which a decision is based. I think this was a good move – and at this point, I haven't heard a single negative comment.

Turning to Loy Yang, the Federal Court has recently granted AGL Limited a declaration which would allow it to proceed to buy a minority interest in Loy Yang power station as I am sure all of you are aware. This is the first such declaration sought in court in relation to a merger. I will be forthright in saying that certainly the Commission is disappointed by the Federal Court decision.

The Commission is fully committed to ensuring a fully effective, competitive market that delivers benefits to electricity consumers. And the Commission believes, based on expert advice, that the AGL acquisition of Loy Yang would result in a real possibility of substantial lessening of competition under section 50 of the TPA.

Justice French of the Federal Court, however, found that there was a single market for electricity and electricity derivatives; that the geographic dimension of that market was national; and that Loy Yang Power did not have market power, in part based on the potential for increased government regulation of the National Electricity Market (NEM) to act as a countervailing measure against the exercise of market power.

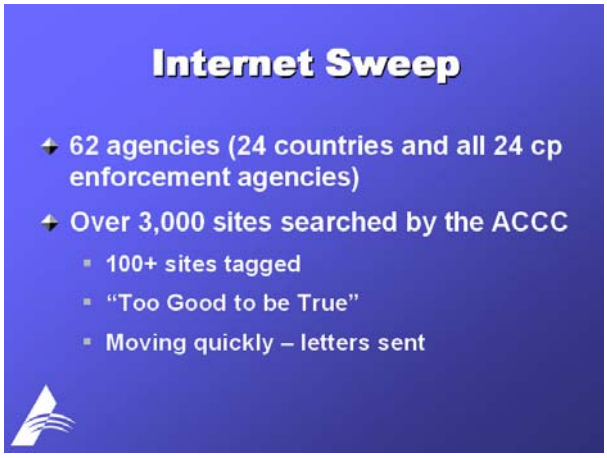
In its submission to the court, the Commission argued that electricity and electricity derivatives constituted separate product markets, that such markets were regional in scope, that Loy Yang Power possessed substantial market power and that the acquisition would increase the ability and incentives to exercise that market power.

87B undertakings

As you are aware, pursuant to section 87B of the TPA, the ACCC may accept formal administrative undertakings rather than institute court action. Over the last financial year, some 30 undertakings were accepted in enforcement matters with a priority in the Part V or consumer protection area. Of the undertakings accepted, some included implementing or reviewing Trade Practices Compliance Programs, some required corrective advertisements and others required refunds to affected customers. In the Loy Yang matter, in addition to the court-imposed undertaking, AGL and GEAC have offered an 87B undertaking to provide the ACCC with information so as to help ensure compliance with the court undertaking.

Internet scams

Finally, let me close on a complex enforcement issue in consumer protection - an old scam in new clothing – shonky internet traders. For 2004, the Commission's two major campaigns will be on internet scams and the break-up of cartel collusions which I earlier discussed in relation to the leniency policy and criminal sanctions.



Last week, the Commission took the leading role in co-ordinating the International Internet Sweep which is a joint exercise conducted by agencies who participate in the *International Consumer Protection and Enforcement Network (ICPEN)*. Given the level of media coverage, you would have had to be on a remote island to have missed it. A total of 62 international agencies in 24 countries participated and visited over 3,000 websites in Australia alone and over 100 of those have been tagged. At this point, we don't have the results from the other countries yet, but I'm sure there was not lack of sites to keep them busy as well.

For this year, the Sweep theme was “too good to be true”. The object was to examine websites making grossly exaggerated or other types of misleading claims, and target those who make misleading claims or claims that are highly unlikely, suspicious or simply not possible. Because the electronic world moves so fast, the Commission is also moving very fast and we hope to have some enforcement actions or outcomes to announce very shortly. The importance of this activity being done, essentially on a global level, cannot be underestimated. It is a clear acknowledgement by the consumer enforcement agencies around the world that when consumers are shopping on the Web, they can be anywhere in the world and that, as a result, we need to have better co-ordination in both our investigatory and enforcement activity. The Memoranda of Understanding with countries like the United States, United Kingdom, New Zealand and others – to co-operate on both consumer protection and anti-trust activities is an indication of where some of our work is heading.

Concluding remarks

By way of closing, let me reinforce that in my 15 weeks of being at the Commission, I’ve formed the view that this is a very strong organisation, with an outstanding staff, dedicated to bringing benefits to the Australian public by promoting efficient markets and fair trading practices.

We have a new Chairman who has made his views very clear that a compliance culture in a company starts at the top. We are all committed to fostering a competitive culture where individuals and their businesses, large and small, are accorded the opportunity to trade efficiently and fairly. And we shall continue to administer the law without fear or favour.

Thank you for the opportunity to address your forum today.

Louise Sylvan
ACCC Deputy Chair