Australian Competition & Consumer Commission	**National Consumer Congress** **Graeme Samuel,** **Chairman** **7 June 2011, Sydney**

Introduction

Good morning.

As you would be aware, this is my final address to the National Consumer Congress as Chairman of the ACCC and I would like to begin by saying that I believe that this annual event is an extremely important opportunity for regulators, academics, consumer advocates and the like to come together and discuss key consumer issues.

The Consumer Congress is an event the ACCC values and supports and this year there are at least 5 of my colleagues making a presentation or facilitating a workshop and I'd encourage you all to get along to one of those.

Despite this being my last address to the Congress, I won't be taking too much of a trip down memory lane today. Rather, I'll be focussing on a few key areas, these being:

- The ACCC's record on the first twelve months of the Australian Consumer Law
- The ACCC's approach to enforcement
- Consumer protection in telecommunications
- And finally some observations about the ACCC – the scope of its activity and level of international engagement.

The ACL – twelve months under the new regime

Consumer protection is at the heart of the ACCC. The objective of the Competition and Consumer Act is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".

We are guided by this in everything we do and with the new powers and penalties at our disposal under the Australian Consumer Law the ACCC has more firepower to protect consumers than ever before.

Among those powers are substantiation, infringement and public warning notices which avoid the necessity to take court action. This greater diversity in our toolkit means that we have greater capacity to respond swiftly and decisively to breaches of fair trading and consumer protection laws.

They are backed by penalties that better reflect the nature of the activity and we fully expect that as greater use is made of these powers they will become a deterrent to others thereby increasing compliance with the law.

If court action is required for more serious cases there are now penalties that are commensurate. For such cases the court can now order penalties of up to $1.1m for corporations and $220,000 for individuals.

The ACL has provided the ACCC – and state based consumer regulators – with powerful and effective tools that we have been quick to make use of. To date the ACCC has secured total penalties of over $3.6 million under the ACL in just over 12 months.

These changes have gone a long way to address the frustrations the ACCC has experienced for some years where our ability to deal with a great deal of dishonest conduct amounted to not much more than a slap on the wrist. Now the punishments can better match the crime, and we can respond in a more timely way.

In the past, the ACCC had no alternative other than to institute costly court proceedings, and then the most we could hope for was for the unlawful activity to be stopped – an important outcome but an inadequate response.

Consequently, there was in many instances little incentive for anyone to comply with the law and the message to business was that ripping off consumers was merely a minor indiscretion.

While it is still early days, the courts have shown a willingness to order the penalties available under the new laws.

In matters regarding product safety, warranties for computer equipment, and mobile phone services the ACCC has already secured significant financial penalties. Let me run through a few of these for you:

In the first civil penalty handed down for a breach of a product safety standard the Federal Court imposed penalties of $400,000 against Dimmeys Stores for supplying children's dressing gowns which failed to comply with the mandatory consumer product safety standard for children's nightwear.

In another product safety matter, Fantastic Furniture was fined $300,000 for selling bean bags that failed to display a warning about the severe danger presented to children if the filling is swallowed or inhaled.

For an issue of such high consumer concern as product safety, particularly regarding children, these sanctions along with other reforms to the product safety regime help to penalise unsafe practices and to act as a deterrent.

A small business scam was brought to brook with Yellow Page Marketing BV and Yellow Publishing Limited penalised $2.7 million for sending thousands of Australian business consumers misleading faxes and invoices in an attempt to obtain subscriptions to their online business directories.

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

Mid last month, the ACCC issues six infringement notices to Ellicom Pty Ltd and five other Harvey Norman franchisees in Western Australia. The ACCC decided it had reasonable grounds to believe that the six franchisees had contravened the Act by advertising a video camera in a catalogue and then not having stock of that camera for supply to customers during the advertised promotion period.

The six franchisees have paid the infringement notice penalties.

Just last week, as a result of ACCC action, the Federal Court ordered two companies and two individuals to pay a total of $185,000 for making false claims and misleading consumers about their ability to test for and treat allergies.

The ACCC had been particularly concerned about the respondents' claims that they could teach parents to identify and cure their children's allergies.

In a first for the ACCC, the court ordered that the respondents place digital corrective notices on the channels of various popular video-streaming websites such as YouTube.

This outcome shows that companies using social media and other popular websites to make misleading and deceptive claims can be expected to use those same channels to correct the misapprehensions they have caused.

On warranties, the ACCC has also had some success with penalties.

MSY Technology supplied computers, computer parts, electronic goods and software to retail stores and claimed that it only provided statutory warranties to consumers in a restricted range of circumstances and required consumers to pay a fee to obtain a warranty beyond that provided by the manufacturer.

In ordering penalties of $203,500, Justice Perram said: “misrepresenting to consumers what their warranty rights are is an unacceptable form of commercial conduct and illegal.”

“It is appropriate, therefore, to encourage retailers not to give consumers the impression either that their statutory rights are curtailed or non-existent or that warranties can only be obtained through payment.”

The penalties awarded in this case are significant and all the more remarkable when you consider that previously the amount a company could be penalised was zero, nada, nothing, zip.

At the less serious end of breaches of the Act the ACCC has made widespread use of infringement notices since they became available in April last year.

I know I am speaking to an informed audience of consumer affairs professionals but it’s worth recalling that before the ACL only Victoria, New South Wales and Western Australia had the power to issue infringement notices and then only for minor breaches with a maximum penalty of $2500.[1]

[1] ACCC submission to PC report
http://www.pc.gov.au/__data/assets/pdf_file/0019/89002/sub080.pdf page 115

Now, under the ACL, a regulator may issue an infringement notice of $66,000 for publicly listed companies, $6600 for corporations and $1320 for individuals.

The ACCC has issued more than 50 infringement notices since they became available from April last year and has received payment of fines totalling more than $300,000.[2]

These have been used where consumers were at risk of being misled in relation to the price of goods and services and in relation to refund and warranty provisions.

The availability of infringement notices also allowed the ACCC to act quickly in relation to the sale of a banned product – namely chewing tobacco – and also where a company had falsely claimed it was a member of an industry association.

The type of businesses which have received infringement notices include cafés and restaurants, fashion retailers, car dealers, garage door sellers, petrol stations and most notably against a telecommunications company.

[2] 54 and more than $300,000 according to Ros Walker's notes 2 Jun - JR

SingTel Optus Pty Ltd paid 27 infringement notices totalling $178,200 issued by the ACCC in relation to Optus' advertisements for its 'Max Cap' plans. The ACCC decided it had reasonable grounds to believe Optus made false or misleading representations about the price of its services and engaged in conduct that was likely to mislead consumers about the nature and characteristics of its services.

So, at both the lower and higher ends of the penalty regime the ACCC has made extensive use of the new powers and sanctions under the ACL in the short time these have been available to us. It is just over a year since this part of the ACL came into force and we are pleased to have obtained some early and significant outcomes for consumers and will continue to build on that record.

Three pronged approach to enforcement

It is important to note that despite the new laws the ACCC's general approach to enforcing the Act hasn't changed and that we are still guided by our three pronged approach of:

- education and awareness raising to achieve compliance;

- obtaining out of court settlements wherever possible;
- and pursuing litigation and penalties if necessary.

We will use the full range of regulatory tools at our disposal but we would rather start at the bottom of the Braithwaite Pyramid with education and compliance before getting out the big guns.

I should add that we work under the Legal Services Directions and so we're required to wherever possible pursue an out of court undertaking or agreement. This is to ensure best use of public funds in getting fast and effective outcomes for Australian consumers.

The advent of the ACL means that the pyramid is now better graduated with greater capacity for effective and timely outcomes in the interests of all Australians.

I speak often to the business community and on most occasions I tell them that the ACCC is not a litigation zealot and that rather our aim is to enhance the welfare of consumers - and if that is most effectively achieved without litigation we will pursue those avenues.

There is of course merit in the view that compliance is achieved by a vigilant regulator that obtains high and harsh penalties and indeed the ACCC has campaigned for criminal sanctions in relation to some types of behavior – namely cartels.

Equally there is a lot to be said for creating a culture within the business community that compliance is not just something that company executives have to do but something they should do.

Recent experience has demonstrated there is a willingness among some corporate leaders to develop a corporate culture of compliance and work with regulators.

In the telecommunications sector in particular the ACCC has dealt with the major players at CEO level, seeking their co-operation in addressing unacceptable business practices.

In September 2009 – 20 months ago – the ACCC struck undertakings with Telstra, Vodafone Hutchison (operating under the Vodafone, 3 and Crazy John's brands), and Optus (also on behalf of Virgin Mobile) to review and improve their advertising practices so that consumers better understand the telecommunications products and services they offer.

This was in a climate of hot competition between the providers and widespread and understandable confusion amongst consumers about what terms really meant and what deals really amounted to.

For the most part we have been able to achieve a voluntary cessation of conduct that might otherwise have only been achieved through years of litigation. There is considerably more work to do in this sector and I'll come to that next but the companies should be recognized for their willingness to engage with the ACCC outside the walls of the Federal Court.

This approach is effective in dealing with systemic, sector specific problems that need to be tackled not on a case-by-case basis but rather by engaging the industry at large to achieve meaningful change.

Another example of this is the work the ACCC did with large grocery stores to voluntarily phase out restrictive provisions in supermarket leases which prevent shopping centres from renting space to competitors.

Coles and Woolworths Limited agreed to phase out restrictive lease provisions in 2009, with ALDI, Franklins Pty Ltd, SPAR, Foodworks and Metcash Limited agreeing in February 2010. Last month, the final supermarket chain came on board - Canberra based Supabarn Supermarkets.

The benefit to consumers from removing this restrictive practice is that they may have more choice of grocery stores when going to a shopping centre. Increasing the options available to consumers can assist in achieving competition in the marketplace which can benefit the consumer through cheaper prices.

Let me give you now something of a case study in using a range of our resources to achieve a good result.

Mobile premium services – a case study

I did say at the start of this speech that I wasn't going to take a trip down memory lane today – and I'm not – but when I look back to the beginning of my term eight years ago, the telecommunications sector was among the most complained about – and it still is.

In some ways this is to be expected. No other sector has experienced the extent of technological change over the last decade as fixed line and mobile telecommunications. It's not an overstatement to say it has changed the way we live, shop, work and play.

The growth and diversity of products has been staggering, only to be matched by the range of plans and contracts available to connect these devices. As consumers have faced new challenges in navigating this marketplace so too have regulators.

At this point I would add a fourth prong to our enforcement approach – that is, working closely with other regulators in the relevant industry sector.

The ACCC exists in a regulatory framework alongside industry specific regulators at federal and state levels and would not achieve outcomes without the willingness of these agencies to work with us and us with them.

Again, that is why annual events such as the national Consumer Congress are vital to foster collaboration.

A good example of this has been in mobile premium services – or MPS - a term which covers ringtones, games, competitions, screen savers and the like delivered via text message and charged at a higher than standard rate.

MPS are often aimed at the teenage market and can be downloaded to mobile phones, including those on pre paid plans.

Complaints about this industry were highlighted in the Telecommunications Industry Ombudsman 2008 report. Not unexpectedly the ACCC was also receiving a high level of complaints.

The main issue identified in the TIO report was that consumers who thought they had made a one off purchase of a ringtone or screensaver had in fact been signed up to ongoing costly subscriptions.

The results were unexpectedly high phone bills. This soon formed part of the list of telco issues that spawned the term ‘bill-shock’ which describes perfectly what many teenagers and parents experienced when the cost of these subscriptions was revealed.

I am sure some recipients may have used other choice words to describe the quantum of charges as well.

The TIO, together with the Australian Communications and Media Authority and the ACCC worked together to develop the Mobile Premium Services Code which came into effect from July 1 2009.

The code includes safeguards and protections for consumers using mobile premium services including the prevention of unauthorized or inadvertent purchases by creating a ‘double opt-in’ procedure for ongoing premium SMS services – this means mobile phone users , must make two independent confirmations of their decision to purchase a service.

It also contains additional protections for minors including a ban on advertisements for premium SMS services targeted at children under 15 and requiring advertising which may encourage minors to use the service to carry a warning for people under 18 years to ask the account holder before using the service.

The MPS Code is currently being reviewed and draft of the revised code is expected to be released by the Communications Alliance for public comment in the coming months.

While the ACCC believes recent changes to the Code have helped improve consumer outcomes, there are still some concerns in relation to the provision of MPS that warrant strengthening of various aspects of the MPS Code in particular, certain advertising and complaints handling provisions.

The ACCC continues to actively participate in this and other reviews afoot in the sector.

A recent case highlights that advertising practices still require further reform.

The ACCC has taken a string of cases against MPS providers with considerable success, but I am realistic enough to recognise that it is one of those sectors where fly by night operators can get in make good quick money and get out.

The ACCC will be watching this space with interest and lobbying for tighter conditions including that all phones are sold with a bar on mobile premium services and the phone owner has to effectively 'unlock' the phone to access these products.

Since the Code came into force we have seen a significant drop in complaints. In the year from the September quarter 2009 to the same period in 201 there has been a fall in complaints from 117 to 72 – a drop of nearly 40 per cent.[3]

While there is still a need for further improvement in the mobile premium services industry and we will continue to work towards even better compliance we also have our eye fixed on potential issues that may come out of the newer offerings for smart phones and other wireless devices.

[3] Telecommunications Information Ombudsman stats

I have been very vocal in my condemnation of bad MPS advertising – they often demonstrate some of the poorest and most exploitative practices, pitched directly at inexperienced consumers and resulting in real financial distress for them or their families.

A recent case highlights the need for further reform.

In October last year the ACCC instituted proceedings against Global One and 6G – providers of mobile premium services – for false, misleading and deceptive conduct in relation to television advertisements for the purchase of games, quizzes and ring tones – notably for the downloading of a song by the popular young Canadian singer Justin Bieber.

Using the Bieber ring tone as an example of the services advertised, to download the song cost a joining fee of $13.20 and an ongoing subscription cost of $6.60 per 6 days – that’s over a dollar a day.

In April this year Justice Bennett found the advertisement made a representation to the consumer that they were making a one-off purchase rather than requesting access to a subscription service charged at premium rates and was therefore misleading.

Also at issue was whether the companies had targeted under 15 year-olds by using Justin Bieber who is popular among young teenage girls. The court found that it was inconceivable that the company did not know that this age group would be watching television at the time the advertisement was screened or that Justin Bieber appealed to them.

In relation to the requirement for a ‘double opt-in’ the court found the second warning did not contain the information that a person under 15 had to get the bill payer’s permission to request the service.

Justice Bennett said: ‘The Justin Bieber advertisement is, in my view, the most egregious of the advertisements. Clearly it was of appeal to under 18 year olds, including under 15 year olds.’

In her judgment, Justice Bennett expressed a view that a penalty of $375,000 be imposed. The matter remains before the courts for further orders.

This matter was a significant win for the ACCC and we are pleased with the outcome but it highlights a lack of compliance in the industry with the code and the need for further action.

And finally some observations about the ACCC

As outgoing Chairman I'll end today with some observations and comments about the ACCC.

I mentioned before that the ACCC is – in the minds of some consumers, activists, journalists and even politicians – the agency that should be taking action on anything that is sold in Australia.

We do have jurisdiction over an extraordinary breath of issues – and I'll come to those – but we cannot be everything to everyone with a concern about the price of goods and services.

For example petrol prices are not something we can do a great deal about unless there is price fixing in the industry in which case we will – and we have – take it straight to court.

Likewise airport parking. We can make noise about the outrageous cost to park a car for 15 minutes but we cannot change those prices – that's a matter for policy makers to address.

On the issues on which we can be fairly judged, where we can take action, the ACCC's enforcement record is a healthy one in both consumer and competition matters.

We have achieved headline grabbing court outcomes – highest ever penalty awarded for cartel activity in Australia's history in the Visy Amcor matter – and we have achieved smaller but still significant outcomes that may not make a big splash, but still make a real difference to the quality of life in this country.

Another measure of success can be viewed in how much the ACCC has grown by taking on more and more responsibilities as requested by the government of the day.

The Australian Energy Regulator is now an independent but part of the ACCC, covering network and distribution of electricity and gas, and moving soon into retail regulation.

As you know we will play an important role in regulation of the national broadband Network, and we also have responsibility for enforcing water rules in the Murray Darling Basin, having recently put out our first ever Water Report. This is a huge expansion of the role of the ACCC and we have to take from that that we are doing something right.

I can tell you that Commission meetings are certainly never dull as the agenda goes from mobile phones, to franchising issues, to cartel activity, to claims made about free range eggs, to online dating scams, to mergers and telecommunications issues.

Finally it is important for all of us to look overseas to see how we compare with other agencies, to share our experiences and to learn from each other.

When I attend international conferences I often find myself sharing the stage with representatives from countries that have economies far bigger than ours be it the United Kingdom, United States, the European Union or Japan.

They want to know what Australia is doing and about our history of reform – especially in competition where Australia has a track record of economic reform and innovation under successive governments.

I think this a strong indicator – along with the OECD reports that find our regulatory framework in banking and finance helped us escape the worst of the fallout of the Global Financial Crisis – that Australia and the ACCC has performed well.

In the Consumer field we actively participate in global activities such as the International Consumer Protection and Enforcement Network to try and stop the scourge of online scams in a coordinated way.

On a domestic level the new law requires that all states and territories work closely together – as, I am sure you have heard the phase – single law, multi regulators, which will I have no doubt result over time in more robust enforcement of consumer rights for Australians.

Thank you and enjoy the rest of Consumers 2011