Introduction

Australia’s antitrust legislation, the *Trade Practices Act 1974* (the Act), has been a key driver in our consistent economic development and prosperity for more than a decade. It is constantly evolving, responding to the changing economic environment and court jurisprudence in antitrust and consumer protection cases.

Today I will go into some detail about the Australian Competition and Consumer Commission’s (the ACCC’s) cartel detection and prosecution activities and in particular the operation of its Immunity Policy and the introduction of criminal sanctions for hard core cartel activity. But first I want to talk to you about the ACCC’s new merger processes.

Guidelines for Informal Merger Review

The ACCC has an almost unique process for informally assessing whether proposed mergers are likely to substantially lessen competition in a market and thus contravene section 50 of the Act.

In October 2004, the ACCC issued the *Guidelines for Informal Merger Review*, (the Informal Review Guidelines) a public guideline for business, advisers and the public more generally outlining the process undertaken when informally reviewing mergers, acquisitions and joint ventures on an informal basis.

These Informal Review Guidelines were initially developed to provide greater transparency and accountability to the merger reviews, consistent with the International Competition Network’s (ICN’s) guiding principles, while preserving the benefits of Australia’s informal system that have evolved over the years.

Broadly speaking, the 2004 guidelines brought about the following changes to the way the ACCC reviews mergers on an informal basis:

- the establishment of a new register on the ACCC’s internet site where information concerning merger proposals is posted. This is subject to appropriate protection of confidentiality.
• the provision of indicative timelines for the more complex merger assessments, including 'clock stoppers' where appropriate.

• the publication of a Statement of Issues on the ACCC website which outlines the basis and facts on which the ACCC has come to a preliminary view that a proposed merger raises competition concerns that require further investigation before making a final decision. It also provides the merger parties and other interested parties with the basis for making further submissions should they consider it necessary.

• the publication of a Public Competition Assessment on the ACCC’s website which outlines the ACCC’s conclusions and reasoning on particular decisions. A Public Competition Assessment is issued for all transaction proposals where the merger is rejected; the merger is subject to enforceable undertakings; the merger parties seek such disclosure; or the merger is approved but raises important issues that the ACCC considers should be made public.

The guidelines also provide additional guidance as to the level and frequency of communication merger parties and their advisers can anticipate with the ACCC during a review. This ensures that business’ concerns will be addressed at the appropriate level and that they can access appropriate decision makers if necessary.

In addition, the guidelines identified in some depth the types of information necessary for the ACCC to conduct a merger review to reduce potential confusion for merger parties as to what should be submitted to the regulator for assessment.

**One year on**
The Informal Review Guidelines has been extremely well-received in terms of explaining how our merger review process works for merger parties who request 'informal clearance' from the ACCC.

As foreshadowed when the guidelines were released in 2004, it has always been the intention that it would not remain static and would undergo further refinement over time as we learn from experience and international best practice. As a consequence, the ACCC conducted a review of the guidelines at the conclusion of its first year of implementation – this review identified a number of areas where fine-tuning was required to remove ambiguities regarding the extent of application of the guidelines and the need for more detailed guidance on the ACCC’s informal processes. The review process undertaken has included the release for public consultation of a draft version of the revised guidelines and consultation with the business community and its advisers.

Some of the key changes that are proposed for the revised guidelines include:
• Expanded coverage of the merger processes to include in the guideline a discussion on confidential mergers and details about how the ACCC will treat different types of informal mergers reviews, including those which are not brought to our attention by merger parties.

• Clearer and shorter indicative timelines for public merger reviews. Matters will be dealt with as expeditiously as possible by the ACCC and, in a number of cases, reviews can be completed before the decision date indicated in the timeline. Each indicative timeline will be included in the public register on the ACCC website.

Where the ACCC decides that limited or no market inquiries are necessary, the indicative timelines will be based on these reviews being assessed and decided upon within two to three weeks.

Merger reviews which require more extensive market inquiries to evaluate the proposal will necessitate longer indicative timelines.

Where subsequent rounds of market inquiries are required to be conducted during a review, for example, to consult on a Statement of Issues or when undertakings (or multiple versions of undertakings) are proffered by the merger parties (after the completion of the first round of market inquiries), the indicative timeline will need to be extended and a secondary timeline established for finalisation of the matter.

Of all the mergers considered in the first year of the Process Guidelines, approximately:

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<td>Less than 2 weeks</td>
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**Statements of Issues**

A Statement of Issues published by the ACCC is not a final decision on a proposed acquisition and may perform a spectrum of functions including indicating the ACCC’s unresolved concerns, the type of further information it would like, and in some cases may go so far as to provide the ACCC’s preliminary view as to whether a merger is likely to substantially lessen competition. This provides merger parties an opportunity to explore avenues (for example by giving s. 87B undertakings) to resolve the ACCC’s concerns before the ACCC makes a final decision.
Since October 2004, the ACCC has released 9 Statements of Issues.

| 1.  | Pacific Brands Ltd’s proposed acquisition of Joyce Corp Ltd’s foam business assets - 22 March 2005 |
| 2.  | China Light & Power’s proposed acquisition of the non-regulated Australian assets of Singapore Power - 14 April 2005 |
| 3.  | Readymix Holdings Ltd’s proposed acquisition of Elvin Businesses - 30 April 2005 |
| 4.  | Patrick Corporation Ltd’s proposed acquisition of FCL Interstate Transport Services Pty Ltd - 09 June 2005 |
| 5.  | Ramsay Health Care’s proposed acquisition of Affinity Health - 1 July 2005 |
| 6.  | Woolworths Ltd’s proposed acquisition of 22 Foodland Associated Ltd supermarkets - 31 August 2005 |
| 7.  | Toll Holdings Ltd’s proposed acquisition of Patrick Corporation Ltd – 10 November 2005 |
| 8.  | Lion Nathan Australia Pty Ltd’s proposed acquisition of Coopers Brewery Ltd - 16 November 2005 |
| 9.  | Barloworld Ltd’s proposed acquisition of Wattyl Ltd – 23 March 2006 |

The range of concerns covered in the Statement of issues can generally be broken up into three broad categories:

- **Green-light issues** – those issues that, based on the current information, appear unlikely to lead to a substantial lessening of competition.

- **Amber-light issues** – those areas where the ACCC identifies potential concerns and seeks to explore these further in order to either verify or dismiss the concern.

- **Red-light issues** – those matters that, based on current information available, could represent a significant threat to competition and as such are likely to breach s.50 of the Trade Practices Act.

In essence, the Statement of Issues is designed to focus stakeholder and market attention on the ACCC’s deliberations at the point of time that the statement is issued. Its purpose is to elicit more information in relation to those issues to assist the Commission in coming to an informed position on a proposed merger.

The reality can be that once further market information is assessed, the colour of those regulatory lights can change dramatically, or may in fact become reinforced. Once relevant stakeholders have had a chance to comment on a proposed merger or acquisition, it is quite possible for those green or amber lights to turn red, or visa versa. In addition to inviting the merger parties to respond to the Statement of Issues, the ACCC will engage in on-going
consultation with the merger parties prior to making a final decision on a merger.

**Misleading the market**
The ACCC has encountered problems from businesses who by explicit statements or background briefings, provide an indication that as a result of their dealings with the ACCC, it is likely that the merger will be given the go ahead, when privately they know the ACCC has some significant unresolved competition concerns.

Making bold predictions to journalists that a merger or acquisition is likely to get the tick of approval from the ACCC can lead to media speculation that misleads investors to buy or sell shares with only limited, or worse still, misleading information.

Where this happens, the ACCC will notify the merger parties of its concerns and provide a short period for them to clarify/correct the information. Where the ACCC’s concerns are not resolved by clarifying statements, the ACCC reserves the right to advise the relevant regulatory authorities like the Australian Securities and Investment Commission, the Australian Stock Exchange, Takeovers Panel of its concerns and/or make its own public statements.

**Confidentiality**
The ACCC regards confidentiality during its clearance processes as highly important and will respect it in its negotiations, but it will not sit back and let other parties paint half the picture. Where companies choose to go public with information relating to the ACCC’s views on a merger which was requested on a confidential basis, the ACCC reserves the right to confirm or clarify those views publicly.

**Relationship between the ACCC Process Guidelines and Merger (Analytical) Guidelines**

The Process Guidelines go a long way to achieving greater certainty, timeliness, efficiency, predictability, flexibility and transparency in the ACCC’s assessment of merger matters. They form part of the ACCC’s ongoing commitment to matching and hopefully influencing world best practice in merger evaluation. It is expected that the revised Merger Review Process Guidelines will be published and come into effect early in the new financial year.

The next stage in the ACCC’s merger work program will be a comprehensive revision of the 1999 Merger Guidelines which deal with the analytical and evaluative framework applied to mergers by the ACCC.
Section 87B undertakings

A key issue for these analytical guidelines will be the way in which the ACCC deals with undertakings. Section 87B undertakings provide a powerful, court enforceable, remedy to overcome the potential anti-competitive effects of a merger. It is no secret that the ACCC has increasingly sought to utilise them in its enforcement of section 50 of the Act.

The ACCC is currently reviewing its guidelines on merger undertakings in line with international best practice, as evidenced by the International Competition Network project on merger remedies, to which we contributed.

There are two issues regarding undertakings that I would like to raise today. The first concerns the practice by some merger parties of submitting iterative versions of undertakings to the ACCC and the second relates to the acceptability of behavioural undertakings.

Iterative undertakings

Merger parties are free to propose s. 87B undertakings to the ACCC for consideration at any time throughout the review process. In the case of an undertaking proposed by the merger parties under s. 87B, the ACCC will, unless it is clearly incapable of resolving its concerns, seek comment from market participants.

In cases where parties seek to address what they perceive as obvious competition concerns from the outset by giving undertakings at the commencement of an informal review, these will be publicly consulted upon in the first round of market inquiries. Alternatively, where undertakings are given sometime after completion of the first round of market inquiries, whether as a result of a Statement of Issues being published or not, a new timeline will need to be established to allow the ACCC to conduct additional market inquiries on the undertakings and assess their effectiveness in dealing with its concerns. While merger parties are encouraged to begin discussions regarding possible undertakings with the ACCC as early in the process as is possible, it is important that any undertakings submitted are comprehensive and clearly address all competition issues raised rather than proposing progressive piecemeal changes which are unlikely to resolve concerns. Merger parties need to be aware that the practice of tendering iterative versions of undertakings to the ACCC will result in an additional round of public consultation on each submitted version of the undertakings before a decision can be made by the ACCC, therefore delaying the process unduly.

If an undertaking is offered but the ACCC concludes at the end of its inquiries and assessment that it is in fact unnecessary to accept an undertaking or part of it, it may accept a lesser commitment than the undertaking offers, or clear the merger without needing to accept the undertaking at all. Indeed, in a major merger last year where the acquirer offered a significant undertaking to the ACCC, the ACCC found, after a considered assessment, that there were
unlikely to be competition concerns and cleared the merger free of the undertaking.

If merger parties consider there are competition concerns that they can resolve with an undertaking, they should offer their best resolution straight up, and know the ACCC will clear the merger without it or accepting only part of the undertaking, if it finds ultimately there are no or few competition concerns to resolve.

**Behavioural undertakings**
Our primary focus, in accepting undertakings to address competition concerns flowing from a proposed merger, is to seek to have those concerns resolved through structural undertakings that have a long lasting effect on market structures to preserve or reinstate competition.

Our traditional position has been that we do not favour behavioural undertakings primarily because of the need for monitoring by the ACCC and their potential to interfere with the ongoing competitive process through their inflexibility and unresponsiveness to market changes – thereby proving them to be unsatisfactory as a primary means of satisfying our competition concerns.

However, as our recent experience with undertakings has demonstrated it may be that well formulated behavioural undertakings can provide additional and potentially valuable safe guards to deal with competition concerns that have been primarily dealt with by means of structural undertakings.

For example, as an adjunct to the substantial structural undertakings obtained in the recent merger assessment involving Toll Holdings Ltd proposed acquisition of Patrick Corporation Limited\(^1\), the ACCC also obtained the following behavioural undertakings:

- Commitments from Toll regarding its ongoing involvement in Pacific National\(^2\), including that:
  - all dealings between Toll and Pacific National are to be on an arms length basis

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\(^1\) Toll is one of Australia’s largest providers of transport and logistics services, operating a network of over 400 sites throughout Australia and the Asian region. Its activities include freight forwarding and line-haul services by road, rail, sea and air as well as integrated logistics and distribution services including specialised warehousing and refrigerated freight services. Patrick Corporation Limited is also a large Australian transport and logistics provider. Its activities include freight forwarding and line-haul services by road, rail, sea and air as well as integrated logistics and distribution services including specialised warehousing and significant port stevedoring operations.

\(^2\) Pacific National, a 50:50 joint venture between Toll and Patrick, is one of Australia’s largest rail companies and is the largest provider of interstate rail container line-haul services. It has a very strong position on all major inter-capital routes, with the exception of freight moving between South Australia and Darwin.
- Toll will not have access to confidential customer information provided to Pacific National
- Toll will not involve itself in the commercial operations of Pacific National
- The shareholders of Pacific National will ensure that Pacific National does not discriminate in favour of Toll’s own downstream freight forwarding interests. Auditing provisions are included to measure compliance.

These measures were adopted to ensure that the continued operation of Pacific National is not unfairly influenced by Toll’s ownership of Patrick and the services of Pacific National are competitively available to other industry players.

To further deal with the potential anti-competitive conduct flowing from the merged entities ownership of one of the two major stevedores in Australia (Patrick’s stevedoring operation), Toll committed that it would not discriminate in favour of Toll or Patrick’s freight forwarding or logistics operations in terms of price or service quality in relation to Patrick’s port operations.

While behavioural undertakings have their difficulties, their potential value lies in the way in which they provide certain obligations that provide further protection against anti-competitive outcomes arising from a merger. The role of behavioural undertakings is overwhelmingly as an adjunct or a supplement to structural undertakings. In essence they are designed to restore and maintain the pre-merger level of competition. Of course, the merger parties are also still required to abide by the statutory obligations under Part IV of the Act.

While behavioural undertakings can impose ongoing regulatory costs, the ACCC can rely on merger parties’ competitors, customers and suppliers who can play a key role in monitoring post merger behaviour and compliance with the terms of s.87B undertakings, which are made public. If an undertaking is not being complied with, these parties have a strong incentive to lodge a complaint with the ACCC.

In the case of non compliance the ACCC can either take action specifically in relation to a breach of the s87B undertaking or more broadly if the ACCC forms the view that there has been an alleged breach of Part IV of the Act.

It is interesting to note that the remedies available under section 87B and in particular sub section (4) are separate and in fact seem wider than those otherwise available for breaches of Part IV of the Act. If an undertaking is not being complied with, the ACCC can apply to the Federal Court for an order under s.87B (4). The Court, if it is satisfied that the party to the undertaking has breached a term of the undertaking, may make all or any of the following orders:

- an order directing the person to comply with that term of the undertaking;
• an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;

• any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach; and

• any other order that the Court considers appropriate.

Informed observers have noted that these behavioural undertakings, which at first glance operate as an adjunct to the fundamentally important structural undertakings, can be a valuable tool for the ACCC in acting on complaints from competitors and customers to prevent anti-competitive behaviour by the merged entities in their day-to-day business operations.

I want now to turn to the ACCC’s focus on restrictive trade practices matters and in particular the detection and prosecution of cartel conduct in Australia.

**Restrictive trade practices**

The ACCC’s focus in Part IV matters remains, as always, on areas of high economic and consumer detriment. That conduct includes:

- resale price maintenance
- clear or blatant misuse of market power involving large powerful corporations
- horizontal or vertical arrangements where there is significant impact on the competitive process
- secondary boycotts involving conduct with clear detriment
- and of course, cartels – price fixing, bid rigging, market sharing and output restriction.

It is well known that over the past two years the ACCC has made deliberate moves to raise the public profile of its cartel investigation activity. That publicity has been very clearly calculated to raise the public’s awareness of cartels — what they mean and the impact they have on the community at large, on the Australian economy, on consumers and, frankly, on businesses.

I make no apology for describing cartels as a form of theft, and a silent extortion of the economy that are bad for business, consumers and the economy.

Some critics have suggested this is too simplistic and have pointed to what they describe as ‘authorised cartels’ that is anti-competitive behaviour authorised by the ACCC.
This misses the point that unlike cartels, which are secretive, and have no public benefit, these sorts of agreements are only authorised after first being subject to a rigorous and independent test to ensure that they have public benefits which outweigh the anti-competitive detriments. The Australian authorisation process is in itself transparent and invites submissions from all affected parties.

Cartels contain no such benefits and no such public exposure. They are created purely for the benefit of the cartel participants and to the detriment of consumers.

Each of you here today understands that the major reason why cartels continue to flourish is that they are potentially highly profitable. They artificially create market power, and so create monopoly rents for cartel participants.

By way of example, in Australia it has been estimated that the participants in the express freight cartel, which operated for approximately 20 years through the 1970s and 1980s in a market worth between $1 billion and $2 billion dollars annually, ripped-off Australian consumers in the order of $3 billion - $4 billion.3

Fighting cartels is a high priority for antitrust agencies around the globe.

In Australia, the Government and the ACCC both regard the impact of cartels seriously. Indeed, the Government has introduced legislation into Parliament to significantly increase the penalties for those found to have participated in a cartel and has announced its intention to introduce criminal penalties.

The ACCC has had some success prosecuting cartel offences:

- In 2004 the Federal Court ordered $23.3 million in penalties against eight companies and eight individuals for petrol price fixing in the Ballarat region in Victoria. These arrangements maintained higher petrol prices for consumers in the Ballarat region4. Although one company, Apco and its director was subsequently found by the Full Federal Court to have not demonstrated the necessary commitment to the price fix and were

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3 This estimate is based upon OECD calculations included in the 2002 OECD Report on the Nature and Effect of Cartels that suggest the average price rise may be in the order of 15 to 20 percent. There is however debate about the exact extent of price rises caused by price fixing. In 2001 W. Wils [Does the Effective Enforcement of Articles and 81 and 82 EC Require Not Only Fines on Undertakings But Also Individual Penalties, in Particular Imprisonment? 2001 EU Competition Law and Policy workshop/proceedings] stated that:
- the risk of detection is estimated at between 13% and 17%. That is, only one in 6 or 7 cartels is detected
- that the average length of a cartel is six years
- that prices of affected commodities increase by 10%

Using these estimates, Wils calculated that a penalty would not deter price fixing unless it was at least 150 percent of the annual turnover in the products concerned in the violation. The research does support the conclusion that cartels are so profitable and difficult to detect that it may be impossible to set a pecuniary penalty at a level adequate to deter collusion without threatening the very existence of offending firms.

absolved\textsuperscript{5}, the ACCC has sought special leave to appeal the Full Court’s decision to the High Court.

- In 2004, George Weston Foods was fined $1.5 million because a former divisional chief executive telephoned a competitor seeking to fix the wholesale price of flour even though the competitor did not agree to the scheme.\textsuperscript{6} The intent alone was enough.

- Also in 2004 the Federal Court imposed record penalties totalling $35 million in relation to an electricity transformer cartel – in which, for several years, companies fixed the tender price of power transformers through secret meetings that took place in hotel rooms, airport lounges and private homes across Australia.\textsuperscript{7}

The ACCC has also commenced proceedings recently in a number of other cases including:

- ACCC v Abalone Aust P/L & Ors (Victoria)
- ACCC v Admiral & Ors – airconditioning installation (Western Australia)
- ACCC v Barton Mines Corp & Ors – industrial garnet production (national)
- ACCC v Auspine Ltd & Ors – Timber costs estimating (South Australia)
- ACCC v Leahy Petroleum Ltd & Ors - petrol retailing (Victoria).
- ACCC v Visy Industries Holdings Pty Ltd & Ors (national)

Participation in a cartel is still seen as an acceptable risk by some in the pursuit of corporate profits or an easy life – rather than the corporate fraud that it is. Proposed amendments to the Trade Practices Act will substantially raise the penalties for offenders and the proposed introduction of criminal sanctions for cartel conduct following the Dawson Committee review of the Trade Practices Act, may change this calculation. The proposed amendments demonstrate the consensus that exists about the importance of tackling cartels and the need for effective deterrence.

The ACCC has advocated strongly for, and supports, these legislative developments.

The very fact that the maximum penalty will be raised to be the greater of $10 million or three times the gain from the contravention or, where the gain cannot be readily ascertained, 10 percent of turnover of the body corporate and

\textsuperscript{5} Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission [2005] FCAFC 161 (17 August 2005)
\textsuperscript{7} Australian Competition & Consumer Commission v ABB Power Transmission Pty Ltd [2004] FCA 819 (7 April 2004)
all its interrelated companies, is likely to give rise to higher penalty orders being made by courts.

Finally, in relation to penalties, it has been recommended that Australia adopt a provision similar to that existing in s80A of the New Zealand Commerce Act 1986 prohibiting a corporation from indemnifying a director, servant or agent against liability for payment of a pecuniary penalty.

It was recommended that this prohibition extend to "indirect as well as direct indemnification". This would cover incidental pay rises or bonuses whose ultimate purpose is to assist an employee meet a penalty liability. It has been suggested that such an amendment, which has been included in Schedule 9 of the Trade Practices Amendment Bill (No. 1) 2005, is unnecessary because of the operation of sections 199A and 199B of the Corporations Act 2001. Clearly the Dawson Committee would disagree. The amendment to the Trade Practices Act will make the position absolutely clear, as necessary.

The proposed amendments will give the courts the power to make orders excluding individuals found to have been implicated in a contravention of Pt IV of the Act from being a director or manager of a corporation.

International co-operation

There is an increasing culture of cooperation between international regulators to meet the challenge of cracking cartels that operate internationally. The ACCC is in the forefront of this effort and is working increasingly closely with other international agencies. I particularly welcome this relationship established with our counterparts in the European Union, Canada and the United States to crack cartels.

The ACCC is an active participant in the International Competition Network’s working group on cartels. The ACCC:

- co-chairs the enforcement techniques sub group and
- we liaise regularly with our counterpart agencies on a range of issues including where appropriate live investigations.

Ongoing international co-operation is crucial to ensure that major international cartels are swiftly exposed and prosecuted.

Cartel detection in Australia

Cartels usually involve secrecy and deception. Collusion is difficult to detect—there may be little documentary evidence and parties often go to great lengths to keep their involvement secret. In these circumstances, discovering and proving the existence of cartels can be more difficult than other forms of corporate misconduct.
The ACCC has undertaken a number of initiatives to heighten cartel detection and prosecution. The ACCC has:

- created a new national unit within the Enforcement and Compliance Division. The Criminal Enforcement and Cartel Unit has been established to apply our extensive skills and experience in cartel matters in a more structured and focussed manner. The ACCC is also ensuring that it is geared-up to handle criminal investigations and prosecutions from the commencement of the anticipated criminal penalties regime for cartel offences. We are well advanced in re-designing evidence gathering and management systems to satisfy criminal standards. The ACCC is in consultation with numerous other regulators in particular the Commonwealth Department of Public Prosecutions (the CDPP).

- developed and disseminated an interactive CD package aimed at raising cartel awareness among government procurement officials – as well as one targeted at the private sector.

- developed a suite of publications aimed at different sectors of the Australian economy including small business and consumers.

- developed an advanced training program to enhance the skills of our investigators for dealing with the criminal regime.

The ACCC will continue to sell its cartel message to all those potentially exposed to cartel exploitation.

The Immunity Policy
But perhaps the most important initiative in the detection of cartels is the ACCC’s Immunity Policy.

The Immunity Policy, released on 5 September 2005, makes it more likely that cartel participants will break ranks and report illegal conduct to the ACCC, and more likely that perpetrators will be caught and punished. This dramatically changes the risk-weighted cost-benefit analysis massively against involvement in a cartel.

No matter how secretive the cartel, and how carefully it is disguised, there is now the ever present risk of a co-conspirator rushing to our confessional to claim the advantage from the immunity policy.

So there’s a much greater chance of being exposed, and when the cartel is exposed, the new fines will mean the cost for any company will outweigh the gain.

It is precisely because cartels are difficult to detect that we have an Immunity Policy. International experience is that such policies help break open the secrecy that is the foundation stone of cartel activity. Encouraging businesses and individuals to blow the whistle on cartels assists the regulator to detect
otherwise covert arrangements, to stop the harm they cause and prosecute participants.

The ACCC’s 2003 Leniency Policy offered full or partial immunity to cartel participants who blew the whistle on their co-conspirators. The Leniency Policy was introduced to enhance the incentives then existing under the ACCC’s 2002 Cooperation Policy for cartel participants to blow the whistle.8

The Leniency Policy proved to be a most effective weapon in our fight against cartels.

A substantial proportion of the ACCC’s current in-depth cartel investigations are as a direct result of businesses taking advantage of either the ACCC’s Leniency or our current Immunity Policy.

The introduction of the new Immunity Policy follows a review of the operation of the 2003 policy and takes account of experiences here and overseas. The changes seek to maximise incentives for cartel participants to report cartel conduct.

The ACCC published interpretation guidelines that accompany the Immunity Policy and explain how the policy will be interpreted and applied by the ACCC.

It should be remembered that the Immunity Policy, as its title suggests, grants immunity from prosecution to a person who has confessed to the ACCC their involvement in a cartel.

In the absence of immunity they would be prosecuted and liable to substantial financial penalties and in the near future jail sentences. Under the Immunity Policy they will get off scot-free. The Immunity Policy recognises that there is a benefit in busting secret cartels if participants are given an incentive to confess and co-operate with ACCC efforts to investigate and prosecute.

A strong Immunity Policy is recognised by anti-trust authorities around the world as a valuable cartel busting tool.

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8 In 2002 the ACCC published its cooperation policy for enforcement matters (cooperation policy). The cooperation policy (which replaced an earlier 1998 version) is expressed in general terms and applies to all potential contraventions of the Trade Practices Act 1974. The cooperation policy essentially acknowledged what had been happening in practice, where leniency was given to those parties that disclosed illegal conduct or assisted the ACCC in its investigation and any subsequent litigation. The nature and extent of leniency under the cooperation policy was assessed on a case-by-case basis having regard to the factors it set out.

The cooperation policy provides more discretion than the leniency policy. It allows the ACCC to give parties the full range of benefits for cooperation, from immunity from prosecution and or penalty, to penalty discounts. These benefits are available to persons who do not qualify for leniency. The benefit of the Leniency Policy is that it increases certainty for corporations and individuals in the way they will be treated by the ACCC if they are the first to self-report involvement in cartel conduct. In contrast, the cooperation policy affords additional discretion to the ACCC and therefore less certainty to industry.
The Immunity Policy delivers benefits to all Australians. It also provides a powerful disincentive to the formation of cartels because businesses perceive a greater risk of ACCC detection and court proceedings.

Some companies that are penalised may regard this as unfair. They see their competitors who may have been equally culpable in the cartel getting more favourable treatment. However, Australian courts accept the principle that those who are the first to expose a cartel and assist the ACCC investigations deserve more lenient treatment.

In the December 2003 Tyco case⁹, Justice Wilcox noted:

“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 the ACCC’s confessional, that may not be a bad thing.”

Last year we saw the first real race to the ACCC’s confessional from companies in one alleged cartel that was under investigation. As the solicitor acting for one of a number of (too late) leniency applicants wryly observed: “What you’re telling me is that the leniency carrot has already been eaten.” Since then, the ACCC has, on a number of occasions turned leniency and immunity applicants who had delayed reporting the conduct away¹⁰.

The ACCC policy is clear: a person who has engaged in cartel conduct and applies for immunity will get off even if they are a major player in the cartel.

Immunity is not some secret deal completely at the ACCC’s discretion. The Immunity Policy describes what is required of the immunity applicant and explains the public policy reasons behind the policy. It recognises that cartels are inherently secret and difficult to detect and that there is a public benefit in providing an incentive for cartel participants to break ranks. In some, but not all instances, the immunity application will lead to an investigation that culminates in successful proceedings to punish the other cartel participants. Even if no proceedings result, the consequence of an application will be to put an end to the cartel. This, in itself, is an important outcome.

**How does the Immunity Policy work?**
The ACCC’s Immunity Policy can be easily explained using a simple example.

Assume you are a company director and the CEO reports to the board that a senior manager of the company has been colluding with competitors to set prices.

Your company has a choice. It could sit on its hands and hope not to be

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¹⁰ Under the Immunity Policy, the ACCC can queue subsequent immunity applications.
caught. Alternatively, it could report the conduct and cooperate with ACCC investigations. Sitting on its hands would not be a good option. The chances are higher than they have ever been that if your company does not report the cartel, a co-conspirator will.

The policy makes it easy to apply for immunity.

Under the previous policy it would have been necessary for the company to apply for leniency in writing and describe the conduct in some detail. Under the Immunity Policy a cartel participant has the choice of providing a detailed application in writing or by telephone. Alternatively, if the potential applicant is unable to provide details of the alleged cartel conduct at that time it can gain protection by placing a marker (providing it has a genuine intention to cooperate).

It is even possible to ring the ACCC on a hypothetical basis and ask whether immunity would be available for cartel conduct in a certain industry. If immunity is available, it is then possible to place a marker.

If your company places a marker, the ACCC will give you a reasonable period to conduct an internal investigation. At the end of this period, the company will be required to report fully on the conduct. If it does not report by the end of the marker period and no extension of the period has been granted by the ACCC, the marker will lapse. At this point you, and the company, are vulnerable again; it is open to another cartel participant to approach the ACCC. But as long as the company holds the marker, no other person involved in the same cartel will be allowed to take your place in the immunity queue.

I anticipate that most applicants will take advantage of the marker process.

However, it’s important to stress here that markers are not cross jurisdictional – if a company has applied for a marker in another country, but not in Australia, it is not covered, and leaves the way open for its co-conspirators to grab the Immunity carrot. So companies involved in international cartels which are contemplating co-operating with overseas authorities, need to make sure they inform us at the same time, or this risk missing out on the benefits of the Immunity Policy.

If your company places a marker and conducts an internal investigation into the conduct, it must then provide the ACCC with sufficient information for the ACCC to determine whether it satisfies the conditions for immunity.

The requirements that must be satisfied for conditional immunity are set out in the policy as follows:

(i) the corporation is or was a party to a cartel
(ii) the corporation admits that its conduct in respect of the cartel may constitute a contravention or contraventions of the TPA
(iii) the corporation is the first to apply for immunity in respect of the cartel
(iv) the corporation has not coerced others to participate in the cartel and was not the clear leader in the cartel
(v) the corporation has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel
(vi) the corporation’s admissions are a truly corporate act (as opposed to isolated confessions of individual representatives)

If these requirements are satisfied, the company will be entitled to automatic conditional immunity.

**Full cooperation**

Full, frank, expeditious and continuous cooperation is essential. The ACCC has high expectations. This obligation should not be underestimated.

No company can be under any illusion - receiving conditional immunity is not a free pass. Full cooperation is likely to be costly, onerous and time-consuming. It is only with full cooperation that the ACCC can hope to obtain evidence that would be useful in prosecuting a cartel.

An immunity applicant must provide all evidence and information in their possession, or available to them where ever it is located, and at their own expense. Examples of how the obligation to cooperate has played out in recent investigations include:

- requiring a company to engage forensic IT experts to analyse electronic records – this process allows the ACCC to review all electronic documents, including documents that may have been deleted.
- requiring the applicant to review telephone records
- requiring the applicant to deliver up for analysis mobile telephones and original diaries
- requiring that an executive based overseas travel to Australia to make a statement

As part of an immunity applicant’s obligations to cooperate with the ACCC, the immunity applicant must not disclose that it has applied for immunity without first informing the ACCC. On a number of occasions immunity applicants have announced to the Australian Stock Exchange or another foreign regulator that they have applied to the ACCC for immunity in relation to cartel conduct. The ACCC understands that under the ASX listing rules and the Corporations Act corporations are obliged to continuously disclose information that may have a material affect on their share price in order to maintain an orderly and informed share market.
However, immunity applicants need to be mindful that disclosure may jeopardise ACCC investigations, particularly covert investigations. It should be possible to manage the timing of disclosure so as not to put an investigation at risk.

In some circumstances, making public statements could be completely inconsistent with the obligation to cooperate and may in fact jeopardise the protection otherwise afforded the corporation under the Immunity Policy.

The ACCC is not seeking to encourage any company to evade its lawful duty of disclosure to the stock exchange.

However, it is important to remember that Australian Stock Exchange rules state that continuous disclosure is only required of, and I quote “any information concerning it that a reasonable person would expect to have a material effect on the price or value of an entities’ securities”.

The ASX rules also contain explicit waivers from the application of the continuous disclosure rule although strict conditions apply to the application of the waivers.

It is very easy for company secretaries or legal counsel to advise a board to make disclosure anyway, regardless of whether or not it is legally required, just to be on the safe side.

However, this will no longer be the safe option, as immunity applicants who unnecessarily disclose information about ACCC investigations may now lose their immunity. In short – inappropriate disclosure could cost you immunity, and its consequent protection from big fines and possible criminal prosecution.

**What if the ACCC has already commenced an investigation into the conduct?**

Another important development that will increase certainty for those contemplating self-reporting cartel conduct is that conditional immunity will be available even if the ACCC has commenced an investigation into the alleged cartel – provided that the ACCC has not received advice that it has sufficient evidence to commence proceedings. Immunity may even be available to a company that has been issued with a notice under section 155 or whose premises have been searched pursuant to a search warrant. This is a major initiative. Under the 2003 policy, only partial protection (from penalty) was available if the ACCC was “aware” of the alleged conduct. It can no longer be argued that an applicant does not know how it will be treated when it approaches the ACCC.

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11 Australian Stock Exchange Market Listing Rules; January 2003, Chapter 3.1, page 302
**Second applicant**
A further reform to the Immunity Policy is that if the first to apply for immunity is unable or unwilling to meet all the requirements for immunity, a subsequent applicant may still qualify for immunity. This maximises the incentive for applicants to cooperate fully with the ACCC. The first applicant knows that if it fails to satisfy the requirements for conditional immunity, its place will be taken by a co-conspirator. The first applicant will then be vulnerable to prosecution.

**What if it becomes apparent during an investigation that the leniency applicant was a ring leader?**
It remains important to determine whether an immunity applicant was a ring leader.

A corporation will not be eligible for corporate conditional immunity if it has coerced any corporation to participate in the cartel or is the clear leader in the cartel. Similarly, an individual will not be eligible for conditional individual immunity if his/her employer has coerced another corporation to participate in the cartel and he/she has played a role in coercing the other corporate participants.

But the ACCC recognises that in many cartels there is no coercion or clear leader. There will need to be strong evidence of coercive behaviour. In particular, there must be clear evidence that the coercer pressured unwilling participants to be involved in the cartel conduct.

**The investigation process – gathering evidence**
Beyond immunity applicants, the ACCC learns of allegations of cartel conduct from a number of sources including anonymous whistleblowers, suspicious customers, disgruntled employees and counterpart agencies in other jurisdictions.

Investigations into cartels are some of the most complex and difficult investigations that the ACCC undertakes. Proving a criminal cartel offence will take that difficulty to a new level. The inherently secretive nature of cartels and the measures taken to avoid detection often necessitate time consuming and resource intensive investigations.

The ACCC gathers information from a wide range of sources. In a typical investigation, the ACCC will usually gather information about communications between competitors (for example by analysing telephone records and emails). An example from one recent case that illustrates how resource intensive a cartel investigation may be is that the ACCC analysed more than 20 archive boxes of telephone call records. This revealed more than 1600 calls between competitors.

In another case, the ACCC is reviewing over 1.1 million electronic documents copied from the computers of an alleged cartel participant.
Another important task for ACCC investigators will usually be to fully review pricing information with a view to establishing any correlation between pricing movements and communications between competitors.

The ACCC is also likely to interview a wide range of people including customers, suppliers and industry bodies. Some interviews will be less formal, but others will involve the use of the ACCC’s coercive powers under section 155. Interviews with represented individuals can give rise to particular challenges, including apparent conflicts of interest of lawyers representing several potential respondents.

One misconception is that information from an immunity application will ‘stitch-up’ the other cartel participants and deliver the ACCC a successful case. The immunity applicant’s information is usually very useful, but it is only the beginning of an investigation to find sufficient evidence to litigate successfully.

Unlike in some jurisdictions, the success or otherwise of an immunity application is not dependent upon the quality or value of the evidence provided by the applicant. That said, the Immunity Policy is a great tool to break open cartels. It certainly helps the ACCC obtain evidence, but it is only one component of a cartel investigation.

While it is not unheard of for an immunity applicant to supply a ‘smoking gun document’, it is more usual that the ACCC receives a ‘road map’ of the cartel. It will always be necessary for the ACCC to investigate the admissions from other sources to validate the information provided and prove our case. Exactly what investigative steps are required will vary from case to case.

**What must we prove?**
To prove a breach of the Act, the ACCC must demonstrate that there was an agreement between competitors and/or that that agreement was put into effect. Because of the nature of penalty cases under the Trade Practices Act the ACCC must prove these matters to a standard that is higher than the usual civil burden of ‘balance of probabilities’.

The ACCC must prove its case to a *quasi-criminal* standard, where the existence of the material facts must be proved ‘clearly’, ‘unequivocally’, ‘strictly’ or ‘with certainty’.\(^\text{13}\)

When criminal sanctions are introduced, and it is necessary to prove matters ‘beyond reasonable doubt’, the evidentiary hurdles will be even higher.

Cartel cases come in a variety of shapes and sizes. Some, a very few, have written agreements. These are the easiest to prove. More common, there is no express agreement and the ACCC must rely on a mixture of direct and circumstantial or inferential evidence to prove a contravention. Courts are increasingly challenging the value of inferential evidence in proving that the

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\(^{13}\) *Briginshaw v Briginshaw* (1938) 60 CLR 336.
parties made, or gave effect to, an agreement that was the result of a ‘meeting of the minds’. University of NSW associate professor of law, Frank Zumbo, commented that:

\[\textit{Circumstantial evidence may be the smoke, but there needs to be more}.^{14}\]

Some cartels are given effect infrequently in circumstances where participants are likely to remember specific instances of conduct, such as the allocation of a small number of major tenders.

In contrast, some cartels, particularly price fixing cartels, are given effect much more frequently. The collusion becomes part of the normal course of doing business. In these circumstances, it may be very difficult for participants to recall specific instances of giving effect to the cartel. Obtaining direct evidence that an agreement has been given effect can be problematic in these circumstances.

In the Ballarat petrol case\(^ {15}\) the ACCC succeeded in proving price fixing allegations against eight corporations and eight executives.

The ACCC’s case was based on evidence which included records of telephone conversations between competitors and the correlation between the calls and the timing of price rises.

Justice Merkel stated that:

\[\textit{In summary, the price-increase information and the pattern of calls … are consistent with and supportive of the inference the ACCC seeks to draw, particularly when the direct evidence about the content of the communications between the corporate respondents is considered}.^{16}\]

Two parties, Apco Service Stations Pty Ltd and its managing director successfully appealed this decision on the grounds that there was no agreement or commitment between the appellants and the other parties to increase prices.

At first instance, it was found that the Apco managing director was:

\[\textit{aware of the purpose of price-increase and follow-up calls…received and acted upon those calls… and determined whether to substantially match them}}^{17}\]

And further that the managing director was:

\(^{14}\) ACCC’s price-fixing win overturned, David Hughes, Australian Financial Review, 18 August 2005.

\(^{15}\) ACCC v Leahy Petroleum [2004] FCA 1678 (17 December 2004)

\(^{16}\) ACCC v Leahy Petroleum at 281-91.

\(^{17}\) Apco Service Stations Pty Ltd v ACCC [2005] FCAFC 161 (17 August 2005), [40]
aware that the price-increase and follow-up calls were part of a long standing and collusive process...\textsuperscript{18}

On the basis of these findings, His Honour concluded that:

- the calls to [the managing director] were a significant aspect of any pricing fixing arrangement;
- the calls increased the likelihood of APCO increasing its prices…
- the calls made it more likely that the price increase would be taken up by APCO and would therefore ‘stick’ [among the other retailers].\textsuperscript{19}

On the other hand on appeal, the Full Court said:

\textit{If [the respondents] were not committed to increase prices, the fact that sometimes they did so is consistent with them exercising their own judgment on those occasions. Unilaterally taking advantage of commercial opportunity presented is not to arrive at or give effect to an understanding in breach of the Act.}\textsuperscript{20}

The ACCC is in the process of seeking special leave to appeal this decision to the High Court.

There have also been moves in the Federal Court toward a preference for oral testimony from witnesses over affidavit evidence. While in principle this is a good idea, it also has the potential to extend enforcement proceedings and introduce more uncertainty to litigation – it is difficult to know how any witness will perform in the witness box, and what effect this might have on the case.

This will increasingly be important if the credibility of witnesses as to the existence of agreements between parties becomes central and the value of inferential or circumstantial evidence is reduced.

\textbf{Search warrants}

The burden of proof in a criminal cartel prosecution is of course higher than in civil proceedings. To assist us obtaining necessary evidence, the government has introduced legislation that will give the ACCC powers to seek a search warrant from a magistrate to search for and seize evidentiary material relating to contraventions of the Act.

These new powers will bring the Act into line with powers available to other competition enforcement agencies around the world, such as the US Department of Justice, European Commission, and the Canadian Competition Bureau and will assist us in gathering evidence.

\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid. [31]
\textsuperscript{20} Ibid. [56].
The ACCC’s view is that having search warrant powers is vital, particularly in an environment where cartel participants face significant sanctions, including jail. The capacity to search and seize the evidence is an important development in the ACCC’s ability to gather evidence using an element of surprise, rather than relying on the information and evidence provided by the company in response to a section 155 Notice, which compels recipients to produce relevant information or documents or attend an interview.

Protecting the integrity of our investigations
For some time the ACCC has been concerned that responses it receives through its formal information gathering powers have been less than thorough. The ACCC has been carefully monitoring responses to its statutory notices and discussing our concerns with the CDPP. The ACCC is concerned that less than candid responses may be becoming more common. There are penalties under the Trade Practices Act for non-compliance with such notices including imprisonment for up to 12 months.

As I have mentioned, investigations also usually involve numerous voluntary interviews, not under section 155. It is also an offence under the Criminal Code, punishable by up to 2 years in jail, to provide false or misleading information to a Commonwealth officer in such an interview.

Further, destruction of documents to prevent them from being used in legal proceedings is prohibited under the Crimes Act, as is giving false testimony, fabricating evidence, intimidating witnesses, corruption of witnesses, deceiving witnesses and preventing witnesses from attending court. Penalties for any of these acts range from 1 to 5 years imprisonment.

It is critical that the integrity of the ACCC’s information and evidence gathering processes are maintained. We regard this issue very seriously and we will not shy away from pursuing a matter with the assistance of the CDPP where there is evidence that a person has not complied with his or her obligations under a section 155 notice or has lied to, or misled, ACCC investigators.

Instituting proceedings
There has been some media comment in the context of the successful appeal I have already mentioned in the Ballarat petrol case, that the ACCC institutes legal proceedings inappropriately.

In an article in the Australian Financial Review it was suggested that:

21 1914 (Cth) section 39.
22 Section 35.
23 Section 36.
24 Section 36A.
25 Section 37.
26 Section 38.
27 Section 40.
It is time for the ACCC to … publicly provide an assurance that the [Immunity Policy] in future cartel matters shall be subject to stringent guidelines and practices to ensure that the policy is not misused or abused, or results in unnecessary damage.\textsuperscript{28}

Ironically, such comments contrast with a contrary perception sometimes promoted that the ACCC is 'gun shy' and will not institute proceedings unless it is almost certain of victory. Such comments, from either end, are misinformed and misleading.

Our investigations are undertaken in a responsible and thorough manner and are supervised by a number of committees drawing on the expertise of senior staff and commissioners. Avenues of investigation are pursued in response to information provided to the ACCC. We are required under the Commonwealth Legal Services Directions to have external legal advice that we have reasonable prospects of success before we are able to institute proceedings. In the Ballarat case it is also relevant that the Federal Court, at first instance, found our case proved.

Litigation is a complex process and there are many contingencies. It cannot be expected that the ACCC will win every case. Nor can it be expected that a respondent will never succeed in an appeal against a decision in the ACCC’s favour. But to suggest that the ACCC is careless when issuing proceedings is just wrong.

Additional complications arise where multi-national cartels are involved. For instance, there are practical issues of service of process and enforcement of court orders.

However the ACCC will continue to investigate and where appropriate, take enforcement action to prosecute international cartels because international cartels impact adversely on Australian consumers.

\textbf{Media}

It is crucial that the ACCC is transparent and accountable – the ACCC will continue to make measured, fair and accurate public comment about ACCC processes and enforcement decisions. Transparency and accountability is one of the keystones of public confidence in the administration of the Act.

Making public statements about 'real life' ACCC enforcement actions and processes educates consumers and businesses about their rights and obligations under the Act and is the most effective way of promoting compliance with the law.

\textsuperscript{28} Van Moulis, special counsel representing Apco, quoted by Duncan Hughes and Richard Kerbaj, \textit{The loneliness of the corporate whistleblower}, AFR 29 August 2005, p53.
However, the ACCC has two overarching considerations when making public comments. The publicity should not prejudice the right to a fair trial and it should not cause any unnecessary damage to reputation.

In practice, the ACCC rarely makes public comments regarding an investigation because of the potential detrimental impact on the reputation of the parties.

The ACCC will issue a news release when it decides to institute proceedings in relation to an alleged contravention that accurately describes the allegations and does not imply that the allegations are more than allegations. No further comment either on or off the record is made in relation to these proceedings while they are progressing through the court process.

Publication of ACCC policies such as the Immunity Policy also plays an important role in maintaining transparency.

**Private damages proceedings**
The ACCC's prime focus is on deterring, stopping and prosecuting cartels. But there seems to be a growing recognition by victims of cartels that they are entitled to seek redress. This coincides with an increased interest from private legal firms (and litigation funders) to pursue such private claims. Compensating victims in private damages actions has been the norm in North America for some time. My expectation is that compensation is set to become more common in Australia too, and this will surely act as a further deterrent.

The ACCC has been approached by both private legal firms and litigation funders seeking whatever assistance the ACCC can offer in the development of private damages claims. The ACCC sees private proceedings as a legitimate and valuable avenue of redress. However there are limits to what role the ACCC should play in such proceedings and what assistance it can provide.

For instance, it would not be possible for the ACCC to share information that had been obtained using the ACCC’s compulsory information gathering powers under section 155 of the Act. Similarly, the ACCC obtains information on a confidential basis. It would not be possible to share this information without the consent of those who provided the information.

It has also been suggested that the ACCC should actively seek findings of fact that will assist private damages claimants. The ACCC will not shy away from this in appropriate circumstances. However, there may be legitimate reasons in a particular matter for the ACCC to obtain findings that do not cover all instances of certain conduct, or indeed, not pressing for findings of fact at all. The ACCC would not wish to jeopardise the public interest of obtaining an agreed penalty or other outcome merely because this would not advance a private damages action, or would advantage certain private parties over others.

**Working with the Director of Public Prosecutions**
As I have already mentioned, the Government has announced its intention to criminalise cartel conduct. This acknowledges the seriousness of cartel conduct and underscores that cartels are, in truth, a fraud on consumers and
the economy and are, as has been noted by Justice Finkelstein, “morally offensive”.\(^{29}\)

Criminalisation also recognises that financial penalties alone are not the answer. A US study of almost 400 firms convicted of price fixing\(^{30}\) estimated that optimal penalties would have bankrupted at least 58 percent of those firms. And even if a company does survive, penalties will often ultimately end up being passed on to the consumer in the form of higher prices.

On the other hand, jailing an executive guilty for participating in a cartel is a penalty from which no company or shareholder can be forced to pick up the cost.

Jim Griffin, who recently resigned from the position of Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division, told ACCC staff that in his 25 years prosecuting cartels he had listened to many accused say they would gladly pay a higher fine to avoid imprisonment but he had never once heard anyone offer to spend extra days in jail in exchange for a lower penalty recommendation.

To illustrate, he spoke of a senior executive who explained that:

‘So long as you are only talking about money, the company can at the end of the day take care of me – when you talk about taking away my liberty, there is nothing that the company can do for me.’

Before long, this equation will, I hope, play on the minds of Australian company executives.

The ACCC does not underestimate the additional hurdles that will be involved in gathering evidence that will be admissible in a criminal court and that will persuade a jury of 12 men and women to jail a person whom society has placed in a position of trust; a person who may have a reputation as an upstanding member of the community and who donates time and money to charities and community groups.

Justice Finkelstein noted in the Vizard case\(^{31}\), that it is the positions of trust such people occupy in the community that may facilitate the commission of their crimes.

The ACCC already enjoys a good relationship with the CDPP, but with the introduction of criminal cartel sanctions it will be absolutely critical that the two agencies work well together. It is after all the CDPP who decides whether to lay criminal charges in a particular matter.

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\(^{29}\) Speech to ACCC Cracking Cartels Conference 24 November 2004.  
\(^{30}\) Cray Craft and Gallo *Anti trust sanctions and a firm’s ability to pay* (1997) 12 Review of Industrial Organisation 171.  
\(^{31}\) Australian Securities and Investments Commission v Vizard (with Summary) [2005] FCA 1037 (28 July 2005)
The ACCC and the CDPP have developed a Memorandum of Understanding (MOU) that will establish high standards of cooperation at both the investigation and prosecution stages. In addition, the ACCC will issue guidelines, prepared in consultation with the CDPP, outlining what factors will inform decisions about whether an investigation should be pursued with a criminal prosecution in mind.

The ACCC accepts that criminal penalties are not appropriate in all cases, and should be reserved for only the most serious cartels. That is why we are entirely supportive of the factors announced by the Treasurer that the ACCC will be required to consider before referring matters to the CDPP. These factors underscore that criminalisation is intended to apply to hard core cartel conduct. These factors are:

- whether the conduct was long standing or had, or could have, a significant impact on the market in which the conduct occurred
- whether the conduct caused, or could cause, significant detriment to the public or loss to one or more customers
- whether one of more of the participants has previously participated in cartel conduct
- whether the value of affected commerce exceeded $1 million within a 12 month period
- whether, in the case of bid rigging, the value of the successful bid or series of bids exceeded $1 million within a 12 month period

The Treasurer also announced factors the CDPP will need to consider in deciding whether to launch a prosecution – these factors are:

- the impact of the cartel on the market
- the scale of the detriment caused to consumers or the public, and
- whether any of the cartel members have previously been a party to a cartel

Cooperation between the ACCC and the CDPP will be significant from the early stages of a matter. It is anticipated that the ACCC will liaise with the CDPP as soon as it appears that a matter may warrant criminal prosecution and will take advice on what evidence will be required and how an investigation may best be managed to gather that evidence. There will also be very close cooperation where a cartel participant has sought immunity. The ACCC and the CDPP will work closely together to ensure that there is certainty in relation to immunity from both civil and criminal liability. Both agencies understand that if this certainty cannot be delivered the Immunity Policy will be compromised.

I expect there will be instances when the CDPP will not want to lay criminal charges in a matter referred to it by the ACCC. For instance, if the CDPP does not believe the evidence will satisfy the criminal (beyond reasonable doubt) burden of proof.
The ACCC and the CDPP will have dispute resolution mechanisms in the Memorandum of Understanding. However, the ACCC understands that it is ultimately the CDPP’s decision whether or not to commence criminal proceedings, and we will respect that. If the CDPP does not consider a criminal prosecution to be warranted, the Trade Practices Act will specifically provide that the ACCC may commence civil proceedings.

Conclusion

Australia is on the verge of a new era in the enforcement of antitrust law, with the pending introduction of criminal sanctions and much tougher penalties for cartel conduct. In anticipation of this, the ACCC has significantly stepped up its fight against cartels, and this has been assisted by the introduction of our new Immunity Policy.

The introduction of the Merger Process Guidelines shows the ACCC’s ongoing commitment to world best practice in merger evaluation, while preserving the benefits of Australia’s informal system.

Everything we do at the ACCC continues to be governed by five guiding principles:

- **transparency** – we are a public institution whose regulatory activities affect almost every aspect or have the potential to affect every business decision and the relationship of business to Australian consumers. Of necessity, the ACCC must be transparent in its dealings and such transparency carries with it appropriate accountability to the Australian public.

- **confidentiality** – those dealing with the ACCC must have confidence in the integrity of its processes. Confidentiality must be maintained where this is requested by parties dealing with us. This principle can only be waived with the consent, express or implied, of those parties or where transparency is overwhelmingly in the public interest.

- **timeliness** – investigative processes and decisions on all matters before the ACCC should be made as efficiently as possible to avoid costly delays, business uncertainty and reduced impact in the case of enforcement process.

- **predictability** – we don’t make ad hoc decisions and we should set clear directions as to our priorities to give business certainty about our actions.

- **fairness** – we do not discuss investigations, we do not discuss matters before the courts. My stock standard response to any question concerning such matters is that it is not my practice to comment on matters we may or may not be investigating or any speculation in relation to investigations.

We must not act capriciously, nor react with zealotry in our administration of the Act. We must above all be fair in all our dealings with the community. Transparency in our operations and the resultant accountability to the community are the fundamental disciplines that ensure that fairness is the paramount consideration in all our determinations.