Australian Competition & Consumer Commission	**Australia Israel Chamber of Commerce Western Australia Business Leaders Lunch** ***Current ACCC priorities*** **13 September 2012, Perth** **Rod Sims, Chairman**

It is always a pleasure to meet with members of The Chamber. In February this year I spoke with AICC members in Melbourne and I addressed the Sydney AICC in July. And today I am delighted to have the opportunity to talk with Western Australian members.

The Australian Competition and Consumer Commission (ACCC) plays a crucial role in providing many of the boundaries within which Australia's market economy works.

The profit motive provides tremendous focus, drive and incentives resulting in economic and social benefits for businesses and consumers. But these benefits are only possible where businesses work within the foundations for fair competition, use of market power and treatment of consumers set out in the *Competition and Consumer Act 2010* (CCA).

The ACCC's role is to make markets work for consumers now and in the future. We use a mix of education, voluntary and administrative measures and enforcement action to:

- Maintain and promote competition and fix market failure– by preventing anticompetitive mergers, stopping cartels and intervening when we identify misuse of market power.
- Protect the interests and safety of consumers and support a fair marketplace –addressing misleading behaviour, removing unsafe goods, and tackling unconscionable dealings.
- Drive efficient infrastructure – through industry specific regulation and access regimes.

Much of our role is exercised through the courts or pursuant to a legislative framework. For example, if we see wrong doing or harm in the marketplace, to a large extent our power comes from the threat of litigation based on evidence acceptable to a court, not from any power of direction based on our view or preferences.

Today I want to discuss three topics:

1. Our priorities in competition matters
2. The ACCC's approach to assessing mergers and acquisitions
3. The ACCC's approach under the Australian Consumer Law

1. COMPETITION PRIORITIES

At any one time the ACCC has between 40 and 50 cases in the Federal Court. Currently, around one quarter relate to competition issues.

We currently also have 35 separate investigations underway into misuse of market power, cartels, or cases involving a substantial lessening of competition.

While these cases are complex, and take considerable time and resources to investigate and then prosecute, the deterrent effect of our work is substantial, as evident in the following recent cases

- Cement Australia Pty Ltd, Pozzolanic Enterprises Pty and two other firms–the ACCC has alleged that these firms contracted to buy flyash they didn't need for the purpose of preventing entry and competition in the market.
- Ticketek–another one in the series of cases against misuse of market power. This saw penalties of 2.5million, making it clear that market power can't be thrown around to block new rivals. Event organisers now have more choices in promoting their shows and consumers benefit from access to discount tickets.
- ANZ and Flight Centre–in two separate proceedings before the federal Court tackling the emergence of restraints on competition involving vertical and horizontal supply issues.

As part of our portfolio of matters, the ACCC is looking to make room for more competition cases. Our strategy is to take a proactive approach to ensure that these cases focus on important theories of harm and produce the most beneficial outcomes for competition and consumers. Three areas that the ACCC has identified that fall into this category are:

- the online economy
- cartels
- misuse of market power and other anti-competitive conduct, particularly in concentrated markets

Digital and online markets

The online economy was identified as a key priority for the ACCC when it undertook a strategic review in late 2011. It poses two of the biggest regulatory challenges in a generation:

1. Ensuring consumers enjoy the same protections in the digital and online economy as they do elsewhere.
2. Ensuring fair competition in the digital and online economy between new and innovative competitors and incumbents.

We are examining whether certain current bricks and mortar leading firms are seeking to prevent online competition in ways that breach the CCA. I recently heard one such retailer claiming that bricks and mortar incumbents will dominate online

shopping in future and see off completely new solely online competitors. It would be a missed opportunity for competition if this became the inevitable outcome.

Our cases against Ticketek and Flight Centre are two prime examples of our enforcement work to ensure competition online.

A related case is our successful court action against Apple for misleading consumers about Apple 4G iPad's capacity to connect to the 4G network in Australia which also has competition implications. Other firms, Samsung for example, sell tablets which compete with the iPad and which can connect to Australia's 4G network. Those firms are entitled to compete in a market that is fair in terms of the claims that are made about what the devices can do.

Online technology is revolutionising competitive dynamics. We will do all we can to prevent incumbents misusing their market power against the many new competitors that will emerge.

Cartels

Combating the damage cartels wreak on other businesses, consumers and the economy has been a major ACCC priority for some time. For over a year now we have been taking a more proactive approach to cartel conduct, following results from the 2010 Melbourne University Law School[1] research that showed:

- 58 percent of businesses don't know that fixing prices, rigging bids, sharing markets and restricting supply is a criminal offence that can result in a 10 year jail sentence
- Of the 42 percent of businesses that understood the potential criminal nature of cartel conduct, almost one in 10 said they'd still be likely to join a cartel if the opportunity arose

Our proactive enforcement and education program aims to bed down the new laws and increase awareness of them.

- We have 10 current cartel enforcement matters before the Federal Court.
- We have a number of active cartel investigations currently underway.
- We have conducted a direct mail and email campaign to targeted and general industry sectors informing them of the criminal penalties and how immunity can free them from prosecution. This includes letters to 2,500 executives in the heavy construction and construction supply industries.
- We have made and distributed a short film called *The Marker* that shows how involvement in cartels can ruin your business and your life – I have personally sent copies to the CEOs of the 300 top ASX listed companies urging them to show it to relevant employees at all levels of the organisation
- We have gained significant media publicity around our most recent court case and the launch of *The Marker*.

[1] '*Anti-Cartel Advocacy: How Has the ACCC Fared?'*, Sydney Law Review, vol 33, no. 4, pgs 735-769.

Last month we announced Federal Court proceedings for civil prosecution of two businesses in Sydney–Supagas and Speed-e-gas–and a number of individuals associated with those businesses. We allege that they have been engaged in anti-competitive conduct including cartel conduct in selling liquefied petroleum gas to businesses in the Sydney metropolitan area.

For this audience I should add that in the Admiral case penalties of approximately $9.27 million were imposed for involvement in price fixing and bid-rigging affecting contracts for air conditioning in schools, hospitals and shopping centres in Western Australia.

In a series of cases regarding air cargo, the courts imposed penalties in excess of $50 million, and there are a number of cases continuing.

Since the introduction of the immunity policy for cartel conduct, the majority of cartels detected by the ACCC have been detected via applications for immunity under that policy. We have had nearly 100 approaches under our immunity policy since it was put in place in 2003.

Misuse of market power and concentrated markets

Australia has many concentrated markets. This is partly a function of our geography – the sheer size of the country and the distance from other markets.

Indeed, most market sectors here are dominated by two to three main players and in a few sectors there is only one dominant player. These sectors in particular are ones we need watch carefully to ensure that there are not mergers or arrangements that substantially lessen competition, or where the obvious market power is not misused to prevent or damage competition.

Although we are targeting our competition focus in these areas, with many issues under examination, at this stage they must remain confidential.

However, we have announced active examinations of three areas in response to the significant public interest in them:

- We are focusing on issues relating to the treatment of suppliers by the major supermarket chains which include competition issues as well as allegations of unconscionable conduct, business-to-business, which we are keen to pursue generally.
- We are investigating the sharing of information about prices in the fuel retailing sector, and
- We are examining the longer term competition implications of the large shopper docket discounts provided between the fuel and supermarket sectors in particular.

Another competition matter on the ACCC desk at the moment is the Qantas / Emirates deal. Last Friday, Qantas and Emirates applied for authorisation from the ACCC to integrate and co-ordinate their international networks. This will involve Qantas operating its European services via Dubai rather than via Singapore so that it can integrate into the Emirates network. But the arrangement will also have implications for trans-Tasman routes and will involve the parties code sharing

globally including in Asia. They are seeking interim authorisation from the ACCC to plan and negotiate the details of the arrangement with a view to commencing, if approved, in April 2013.

The authorisation process is a very public process in which the ACCC seeks submissions on the likely public benefits and likely anticompetitive detriments resulting from the arrangements. Submissions are due by 1 October on the application (and on 21 September on the interim). All public submissions will be available from our website. At this stage the ACCC plans to issue a draft decision in December before making a final decision in the first quarter of 2013. There is a six month statutory timeframe for the assessment of authorisation applications, and large transactions like this one typically take the full six months.

The ACCC can grant authorisation if the likely benefits to the public outweigh the likely anticompetitive detriments. When we apply this test it is important to bear in mind that the ACCC's focus is on the benefits that the arrangement delivers to the public generally and not the benefits to the parties. Of course Qantas believes it will benefit from the arrangement, that is why Qantas wants to enter into the deal, but our question is a broader question about how this will affect the public, and particularly the travelling public. For example we will look at both how the arrangement could benefit consumers by providing greater choices across the combined network, but we will also look at whether the arrangement could reduce competition and so raise prices on particular routes.

2. MERGERS AND ACQUISITIONS

The ACCC considers mergers and acquisitions are important for the efficient operation of the economy by allowing companies to become more efficient. That said, it is crucial that the ACCC prevents mergers which substantially lessen competition.

Some of the mergers and acquisitions we review clearly attract a lot of publicity. Understandably, the parties involved in a transaction have an interest in having their merger dealt with as quickly as possible and this can lead to criticism of the length of time the ACCC takes to reach a decision on a proposed merger

The length of time our reviews take, and the potential impact on the parties' commercial timeframes, is something we are acutely aware of and we are taking a number of steps to address.

However, there will be transactions that require close attention. It is important that merger parties and their advisers expect, and accept, that when a merger is likely to raise serious competition concerns, the ACCC will carry out a full and detailed review of the proposed merger, gathering all of the necessary commercially relevant facts.

One current merger which is receiving our close attention is the Seven Group's proposed acquisition of Consolidated Media Holdings. Today we have announced that we are releasing a Statement of Issues in which we express our preliminary competition concerns with the proposed acquisition, given that the transaction would see the Seven Group gaining a substantial interest in Fox Sports Australia, in addition to their existing stake in the Seven Network. Our concerns arise in the free to air television market as a result of the influence Channel Seven may be able to

exert over FOX SPORTS Australia in joint bids for, and other commercial arrangements in relation to, sports rights.

The publication of a Statement of Issues is part of the ACCC's processes that ensure transparency of our consideration of merger proposals. We will take account of the reactions from the market and the merger parties to the concerns we have outlined. At this stage we aim to make a final decision on this transaction in mid-October.

Close scrutiny from the ACCC will be particularly the case in concentrated markets. As I noted above, we want to ensure that mergers will not result in structural changes leading to a substantial lessening of competition. While there are a range of factors to take into account in assessing mergers under section 50, market concentration is a key factor.

When a merger is a "3-2" - so, when a merger reduces the number of key players in a market from three to two - the parties should not be surprised that the ACCC would want to carry out a full review. With only two principal players remaining in a market, each will learn to anticipate the actions and reactions of the other. In these circumstances, the ability of the two remaining firms to raise prices or reduce quality for consumers generally increases.

That said, even mergers in less concentrated markets can, depending on the characteristics of the market, raise substantial competition concerns and parties should not expect that they will be waved through.

As I have mentioned in other forums, the ACCC's review in merger cases is focussed on the likely effect of the transaction on competition 'based on commercially relevant facts, assessments and evidence and not speculative possibilities'. Importantly, the ACCC's focus is on getting the decision right, taking into account commercially relevant facts and making its own assessment. The ACCC review is not focussed on collecting all the evidence for a court case.

In making these assessments, it is critical that the ACCC understands the markets affected by the transaction and has access to the facts. In an informal merger regime, which is what we have here in Australia with no upfront information requirements, information requests - both voluntary and compulsory - are an important part of our process and allow the ACCC to test the merger parties' and third parties' submissions. There will always be scope to refine the nature and extent of information requests, and we will continually seek to do this, but the ACCC does not shy away from their use where appropriate.

The ACCC has since 2010 been carrying out what we refer to as 'pre-assessments', which involves a review of the merger on the papers. During 2011/12, 250 of the 340 mergers considered by the ACCC were cleared without public review on the basis that the SLC risk was considered low; as a result, 87 percent of matters (pre-assessments and reviews) were completed in 8 weeks or less.

While the ACCC is looking to improve its processes, we also believe merger parties and their advisers should be doing likewise. Delays are being caused by some merger parties failing to comply fully and in a timely way to voluntary and compulsory information requests.

3. THE ACCC'S APPROACH UNDER THE AUSTRALIAN CONSUMER LAW

Since 2010 the ACCC has new powers under the ACL, including the ability to issue infringement notices and seek pecuniary penalties from the Federal Court.

We have welcomed the new laws with enthusiasm and are using them to protect consumers. We are particularly pleased with the penalties we have achieved as these not only show consumers that their rights are being protected, but they also have a clear, profound and lasting impact on corporate behaviour.

We now have achieved almost $18 million in pecuniary penalties, and six cases in which penalties of more than $1million have been ordered by the Court–a higher benchmark than we have seen before for maximum penalties available.

While we welcome higher penalties, we particularly welcome the strong and clear messages from the Federal Court stating that penalties need to be high enough to deter poor conduct which contravenes the law.

Our outcomes for consumers do not stop at the Court room door. In fact, much more is achieved through out of court action.

We were quick to start using new infringement notice powers with many paid over the last two years. This power is there to deliver expeditious and efficient resolution of less serious matters. In the 2011-2012 financial year 34 infringement notices have been paid amounting to a total of over half a million dollars. These powers have proved to be an alternative to legal proceedings when dealing with potential contraventions of the Act.

We also continue to accept a range of court enforceable undertakings which lock traders in to fixing the problem at hand.

Our suite of enforcement tools have enabled us to send exactly the right set of messages efficiently and expeditiously to the business community and Australian's more generally about compliance with the ACL in the context of the carbon price.

Since the start of this financial year, we have obtained administrative outcomes from four traders, accepted court enforceable undertakings from one trader and Infringement notices from another. Genesis Fitness Club, Berwick paid an infringement notice of $6,600 for convincing 200 consumers to make lengthy extensions to their membership contracts using false claims of pre-carbon price savings.

CONCLUSION

Our use of litigation to ensure healthy competition and consumer rights is firmly underpinned by targeted education initiatives and, where possible, use of administrative and voluntary agreements to address market issues.

We are making strategic and deliberate use of our powers under the Competition and Consumer Act and Australian Consumer Law to draw clear boundaries in many markets, enabling fairer competition and long term protections for consumers.

We are actively working across diverse sectors to detect misuse of market power, cartel conduct, anti-competitive mergers, and abuse of consumer rights.

And we will continue to use whatever powers necessary to remove systemic and extreme detriment that non-compliant businesses impose on their businesses and on consumers.

Thank you for your time today.