
THE PUBLIC COMPETITION ENFORCEMENT REVIEW

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Chapter 2

AUSTRALIA

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I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

In Australia, the Australian Competition and Consumer Commission ('ACCC') is the independent statutory government authority responsible for monitoring compliance with, and enforcing breaches of, the Trade Practices Act 1974 (Cth) ('the Act'). The Act is the key piece of legislation that governs competition law in Australia. Its stated purpose is to enhance the welfare of Australians by promoting competition and fair trade and protecting consumers.¹

Each year, the ACCC publishes a Compliance and Enforcement Policy² ('Enforcement Policy') setting out the principles it adopts to achieve compliance with the law and to outline the ACCC's enforcement powers, functions, priorities, strategies and regime. Under the enforcement policy, the ACCC exercises its discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for consumers and businesses. To assist with this determination, the ACCC gives Enforcement Priority to matters that demonstrate, among other things:

- a* conduct of significant public interest or concern;
- b* conduct resulting in a significant consumer detriment;
- c* conduct involving national or international issues;
- d* conduct involving a significant new or emerging market issue;

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1 Trade Practices Act 1974 (Cth), Section 2.

2 ACCC, *Compliance and Enforcement Policy* (2009), www.accc.gov.au/content/index.phtml/itemId/867964 at 22 March 2010.

- e* conduct that is industry-wide or is likely to become widespread if the ACCC does not intervene; or
- f* whether ACCC action is likely to have a worthwhile educational or deterrent effect.³

ii *Enforcement agenda*

The ACCC's enforcement response is proportionate to the conduct and resulting harm, and the implementation of the enforcement policy is governed by the guiding principles of transparency, confidentiality, timeliness, consistency and fairness.⁴ In enforcing the provisions of the Act, the ACCC's primary aims are prevention, deterrence, undoing harm caused by the contravening conduct, encouraging effective use of compliance systems and punishment.⁵

The Enforcement Policy demonstrates the range of responses used by the ACCC in relation to its compliance and enforcement activities, including education, voluntary industry self-regulation, administrative resolution, enforceable undertakings and litigation. In deciding which compliance or enforcement tool to use, the ACCC's priority is to achieve the best possible outcome for the community.⁶

II CARTELS

Since Graeme Samuel's appointment as chairman of the ACCC in July 2003, the detection and prosecution of cartels has been the ACCC's top enforcement priority. Mr Samuel led the campaign to criminalise cartel conduct in Australia. The new dual criminal and civil cartel regime took effect in July 2009 and will have profound implications for the ACCC and Australian competition law generally.

Under the new regime, it is now a criminal offence if:

- a* a person or corporation intended to enter into a contract, arrangement or understanding and the person or corporation knew or believed that the contract, arrangement or understanding contained a cartel provision;⁷ or
- b* a person or corporation knew or believed that a contract, arrangement or understanding contained a cartel provision and that person or corporation intended to give effect to that cartel provision.⁸

A contract, arrangement or understanding will be a cartel provision if two criteria are satisfied. First, the contract, arrangement or understanding must either:

- a* have the purpose, effect, or likely effect, of directly or indirectly fixing, controlling or maintaining the price (or providing for the fixing, controlling or maintaining

3 *Ibid*, 3.

4 *Ibid*, 2.

5 *Ibid*, 3.

6 *Ibid*, 2, 3.

7 Trade Practices Act 1974 (Cth), Section 44ZZRF.

8 Trade Practices Act 1974 (Cth), Section 44ZZRG.

of the price) at which the parties to the arrangement supply or acquire goods or services; or

- b* have the purpose of directly or indirectly sharing or allocating customers, suppliers or areas in which goods or services are supplied or acquired, restricting production or supply, or rigging a tender process.

Second, at least two of the parties must be, or be likely to be (or but for the contract arrangement or understanding, would be or would be likely to be) in competition with each other.⁹

Criminal offences require proof of a fault element, that is, it must be shown that the defendant had knowledge or belief that the arrangement contained a cartel provision. The civil penalty provisions do not incorporate this fault element.

Significant cases

i *Visy and Amcor*

The biggest cartel case in Australia was prosecuted in 2007 against Visy Board Pty Ltd ('Visy'). Amcor Ltd ('Amcor') approached the ACCC seeking immunity from prosecution in relation to an alleged price-fixing cartel it had conducted with Visy in the sale of cardboard boxes between 2000 and 2004. The Federal Court (Heerey J) found that Visy had committed 69 contraventions of the Act and fined the Visy group of companies a record A\$36 million.

A class action was filed in April 2006 on behalf of all persons and companies who purchased and paid more than A\$100,000 for cardboard during the relevant period. Over 20,000 companies are currently involved in the class action.

ii *Pratt (criminal proceeding)*

Shortly after the civil penalty proceeding against Visy concluded in 2007, the ACCC controversially brought criminal charges against Visy's owner, Richard Pratt, for providing false or misleading evidence in the course of the ACCC's investigation of the Visy/Amcor cartel.

A central issue was the agreed statement of facts used by the ACCC to settle the Federal Court civil penalty proceedings with Visy. The ACCC sought to rely on admissions made in it by Pratt to show that he had lied in earlier testimony. The ACCC did not disclose this possibility to Pratt or his lawyers during the settlement of the civil proceeding, nor was it disclosed to Heerey J in the Federal Court. In fact, as court documents later showed, the ACCC had been contemplating criminal charges while negotiating the civil settlement with Pratt and Visy in 2007.

Just before Mr Pratt passed away in April 2009, the criminal case against him collapsed. The agreed statement of facts was ruled inadmissible by Ryan J, who said that the statements did not amount to admissions for the purposes of a criminal case.

⁹ Trade Practices Act 1974 (Cth), Section 44ZZRD.

iii *Airline cartel*

A major focus of the ACCC's recent enforcement activity has been alleged cartel conduct by international airlines concerning fuel and security surcharges on air cargo. As a result of the ACCC's continued investigation, the Federal Court has so far ordered A\$41 million in penalties against respondent airlines.¹⁰ All of the court-ordered penalties have been jointly submitted by the ACCC and the airlines.

The ACCC has also instituted proceedings in the Federal Court against Singapore Airlines Cargo Pte Ltd (23 December 2008), Cathay Pacific Airways Ltd (30 April 2009), Emirates (18 August 2009), PT Garuda Indonesia Ltd (2 September 2009), Thai Airways International Public Company Limited (28 October 2009) and Korean Air Lines Co. Ltd (5 March 2010). The ACCC continues to investigate other airlines with the assistance of cooperating parties, and further actions are expected in the next few months.

Trends, developments and strategies

Under the new dual criminal and civil regime, the ACCC is responsible for investigating suspected cartel conduct, gathering evidence, managing the immunity process in consultation with the Commonwealth Director of Public Prosecutions ('CDPP') and referring 'serious cartel conduct' to the CDPP to consider criminal prosecution.¹¹ The CDPP is responsible for prosecuting offences and determining whether immunity will be granted in relation to criminal proceedings.

In considering whether the cartel conduct is sufficiently serious to warrant criminal prosecution and referral to the CDPP, the ACCC will consider whether the conduct was longstanding or had a significant impact on the market, whether it caused detriment or loss to the public or customers, any history of cartel conduct by the participant and whether the effect on commerce would exceed A\$1 million within a 12-month period (or in the case of bid rigging, bids exceeding A\$1 million within a 12-month period).¹²

The ACCC has said that it will pursue criminal proceedings of serious cartel conduct wherever possible. Further, the ACCC will approach all investigations of cartel conduct so as to preserve the option of criminal proceedings in the event they are considered appropriate.

10 On 11 December 2008, the court ordered Qantas Airways Ltd and British Airways plc to pay penalties of A\$20 million and A\$5 million respectively. On 16 February 2009 the court ordered Société Air France, Koninklijke Luchtvaart Maatschappij NV, Martinair Holland NV and Cargolux International Airlines SA to pay penalties of A\$3 million, A\$3 million, A\$5 million and A\$5 million respectively.

11 ACCC and CDPP, Memorandum of Understanding between the CDPP and the ACCC regarding Serious Cartel Conduct (2009), www.accc.gov.au/content/item.php?itemId=882220&nodeId=ef73337d44a8c8ee9ffd593f93cb0699&fn, at 22 March 2010 [2.1] to [2.3]; ACCC, ACCC Approach to Cartel Investigations (2009), www.accc.gov.au/content/index.php/itemId/891982 at 22 March 2010 [10] to [12].

12 ACCC and CDPP, Memorandum of Understanding between the CDPP and the ACCC regarding Serious Cartel Conduct (2009), www.accc.gov.au/content/item.php?itemId=882220&nodeId=ef73337d44a8c8ee9ffd593f93cb0699&fn at 22 March 2010 [4.4].

To provide guidance, the ACCC and CDPP have published a memorandum of understanding ('MOU'). The ACCC has also published the *ACCC Approach to Cartel Investigations*, the ACCC Immunity Policy for Cartel Conduct ('Immunity Policy') and the ACCC Immunity Policy Interpretation Guidelines.¹³

Once an application for immunity is received, the ACCC will make an assessment in accordance with the Immunity Policy and provide a recommendation to the CDPP as to whether the applicant meets the criteria in that policy. The CDPP will decide whether to grant immunity from criminal prosecution based on the ACCC's recommendation and in accordance with the Prosecution Policy of the Commonwealth.¹⁴ Also relevant to the immunity and leniency process is the *ACCC Cooperation Policy on Enforcement Matters*.¹⁵

Ordinarily, when investigating a matter, whether for a contravention of the cartel offence or the cartel prohibition, the ACCC has the capacity to issue notices under Section 155 of the Act and may seek search warrants. Additional and more extensive investigatory powers are now available in the case of a possible cartel offence. The ACCC may conduct their investigation with the Australian federal police, thereby providing the ACCC with access to tools such as surveillance devices and telephone intercepts, not otherwise available in an investigation into a breach of a civil prohibition.

Outlook

i Issues with drafting of new laws

The new cartel laws define cartel conduct in a new and complex way. There has been considerable uncertainty about their scope.¹⁶ One criticism is that they have been drafted too broadly, covering provisions that are not anti-competitive in and of themselves. This is concerning, as cartel conduct is subject to severe penalties, including, for the first time, terms of imprisonment.

A second criticism is that the new laws are excessively prescriptive and inflexible – a common criticism of the Act generally.¹⁷ As Caron Beaton-Wells observes, the definition of 'cartel' runs for six pages of dense statutory text, and heavily constrains the ACCC and courts in the extent to which they may relieve uncertainty through narrow interpretation. This contrasts with the position in the United States and the European Union, where the brevity of the same laws has enabled the relevant enforcement agencies to publish detailed guidelines explaining their interpretation, and courts to 'read down' and refine them over years of case experience.¹⁸

13 Each of these documents is available from the ACCC's website, www.accc.gov.au.

14 CDPP, *Prosecution Policy of the Commonwealth* (2008), www.cdpp.gov.au/publications/prosecutionpolicy/ at 22 March 2010.

15 ACCC, *ACCC Cooperation Policy for Enforcement Matters* (2002), www.accc.gov.au/content/index.phtml/itemId/459482.

16 See the Law Council of Australia's submission in response to response to the discussion document on cartel criminalisation published by the New Zealand Ministry of Economic Development, Section 3, p2.

17 See e.g., Caron Beaton-Wells, 'Legislation, not guidelines, is real cartel issue' *AFR* 17 July 2009.

18 *Ibid.*

ii *Issues with dual criminal and civil regime*

The A\$1m threshold appears at odds with the basis upon which cartel conduct is being criminalised (e.g., cartel conduct is wrong). It could send a signal that price fixing is not serious, or really criminal, if it is only on a small scale or involving small amounts. And generally, it could mean that small businesses are not protected to the same extent as bigger businesses.

Notwithstanding the A\$1 million threshold, the ACCC has indicated that actual trade affected alone is not determinative of whether there should be a referral to the CDPP. For instance, an attempted cartel or a cartel shut down at an early stage by the ACCC may nevertheless be serious enough to warrant referral despite its effect not reaching the threshold.¹⁹ It is possible that developments in this area may shift towards analysing the relative impact on a particular market rather than an absolute threshold applicable to all markets.

Issues may also arise under the new regime where both criminal and civil proceedings may be brought. Criminal and civil penalty proceedings cannot be run concurrently and the ACCC is precluded from continuing civil penalty proceedings against a person who has already been criminally convicted for involvement in the relevant cartel. However, there are two circumstances where sequential proceedings may become an issue.

First, a criminal prosecution may be commenced against a person involved in a cartel at the conclusion of a civil proceeding against that person. The ACCC has said that this would be rare because, under the MOU, the ACCC would have either:

- a not referred the matter to the CDPP as the conduct appeared to involve relatively minor conduct; or
- b referred the matter to the CDPP, who, on the evidence available, advised that criminal proceedings should not be taken.²⁰

This appears to be at odds with the ACCC's statement that it 'considers that a range of circumstances may arise where both criminal and civil proceedings are available to be pursued in relation to the same or similar conduct'.²¹ Further, it does not acknowledge that the ACCC may be under pressure to pursue criminal proceedings where successful civil proceedings cast doubt on its original decision not to pursue the matter criminally or bring new evidence to light.

Second, civil proceedings may be brought against a person acquitted of criminal charges. In this situation, neither the MOU nor the *ACCC Approach to Cartel Investigations* address the possibility of the ACCC bringing civil proceedings against a person for the same cartel where that person has successfully defended a criminal prosecution. This situation appears to be inconsistent with the policy behind the 'double jeopardy' principle invoked by the courts to prevent an abuse of process where an individual is placed in 'jeopardy' of criminal punishment more than once for the same conduct.

19 *ACCC Approach to Cartel Investigations*, July 2009, at [15].

20 *Ibid*, at [36].

21 *Ibid*, at [33].

Double jeopardy only applies where both the prior and subsequent proceedings relate to the commission of an offence. The New South Wales Supreme Court has held that the doctrine of double jeopardy extends beyond offences which are the same, to offences which are ‘substantially the same’.²² Although civil pecuniary penalties are not ‘offences’ in the traditional sense, to describe them as ‘civil’ is misleading and the High Court has noted that they are better described as ‘penal or quasi-penal sanctions’.²³

While the material obtained through the ACCC’s new investigative powers may only be used in the criminal proceeding for which they are obtained, it does raise concerns about derivative use in civil proceedings. For example, the prosecution will not be prevented from adducing evidence gathered through enquiries generated by evidence given in the civil proceedings. Defendants in civil proceedings may therefore face a dilemma about whether to give evidence in the civil proceedings and risk exposing themselves to criminal prosecution, or refrain from giving evidence and risk having an adverse inference drawn against them under the rule in *Jones v Dunkel*.²⁴ The ACCC Approach to Cartel Investigations does not quell these concerns, noting that a dual track approach, whereby the ACCC assigns separate criminal and civil investigation teams, will be the exception rather than the norm for investigations of alleged cartel conduct.²⁵

The ACCC’s immunity process has been a key feature of the enforcement regime for the anti-cartel provisions of the Act. The introduction of criminal sanctions and the involvement of the CDPP has complicated the operation of the process and introduced uncertainty. One issue is that the outcome of an application for immunity may be significantly delayed by the timing of the ACCC’s referral of a matter to the CDPP. Whilst the ACCC must refer a matter to the CDPP as soon as reasonably possible, before it can do this it must have considered, and potentially come to a conclusion in relation to, the criteria for referral. The ACCC has acknowledged the potential for delay, saying that in many cases it may not be in a position to decide whether or not to refer the matter to the CDPP until late in the investigation. Presumably, until both agencies have considered whether criminal or civil proceedings are appropriate, proper consideration cannot be given to the immunity application and the terms of any immunity grant. Further, once a matter is referred to the CDPP for consideration, it is not until the CDPP has made its determination on immunity that the CDPP and the ACCC will release the result of the application for immunity. This delay may take months, and significantly reduces the incentive for applicants to come forward.

Another problem is that there is no review process for decisions made under the Immunity Policy concerning whether or not an applicant meets the criteria for immunity, or a decision to revoke immunity. The complexity of some of the issues potentially under determination warrant a review process. The question of whether an applicant was a ‘clear leader’, for example, is not a simple question of fact and may be difficult

22 See *State Pollution Control Commission v Tallow Products Pty Ltd* (1992) 29 NSWLR 517 at 529, Abadee J.

23 *Rich v ASIC* [2004] HCA 42, at [123].

24 (1958) 101 CLR 298.

25 *ACCC Approach to Cartel Investigations*, July 2009, at [30].

to determine in complex commercial arrangements. Such a decision should not be left to the ACCC with no procedure for review. Moreover, in certain situations there may be political or other pressure to deny immunity to particular applicants. To ensure that the immunity process is fair, and seen to be fair, decisions of the ACCC in relation to immunity ought to be reviewable by a court.

III MERGERS

From 2008 to 2009 the ACCC assessed 412 proposed mergers. Of those assessments, the ACCC opposed or expressed concern about 11 proposed transactions and cleared five mergers on the basis that certain undertakings be made.²⁶ The ACCC has recently been criticised for focusing too heavily on cartel enforcement and letting through too many mergers. It has responded by proposing legislation that seeks to reduce the threshold for assessing a merger's effect on competition and address concerns about 'creeping acquisitions'. The ACCC has also opposed some recent merger proposals that it may arguably have allowed in the past.

Significant cases

i GUD/Breville

GUD Holdings Limited ('GUD') and Breville Group Limited ('Breville') are both major wholesale suppliers of small electrical appliances. On 9 October 2009, the ACCC commenced review of GUD's proposed acquisition of Breville under its informal merger review process. It announced on 16 December 2009 that it would oppose the proposed acquisition and issued a public competition assessment outlining the basis for its decision on 22 January 2010.

In its competition analysis, the ACCC said that the level of market concentration following the merger would be very high. For instance, the merged firm's share of sales of small electrical appliances broadly would have been around 50 per cent, and in relation to many specific products would have exceeded 80 per cent. The ACCC was also concerned that not only would GUD account for a significant proportion of sales, post-acquisition, but the acquisition itself would eliminate a substantial competitor. The ACCC also considered brand name reputation to be a significant barrier to entry and expansion in the small electrical appliances market.

Ultimately, the ACCC considered that the proposed acquisition would be likely to result in a substantial lessening of competition in four of the five product categories that it identified.

ii Mobil/Caltex

On 27 May 2009, Caltex Australia Limited ('Caltex') announced that it had entered into an agreement to acquire 302 Mobil Oil Australia Pty Ltd ('Mobil') service station sites. The ACCC announced its decision to oppose the proposed acquisition on 2 December

26 Russell Miller, *Annotated Trade Practices Act 1974* (31st ed, 2010).

2009 and released a Public Competition Assessment outlining the basis for its decision on 9 February 2010.

In its competition analysis, the ACCC formed the view that barriers to entry in local retail petrol, diesel and LPG markets were high and that there would be a lack of effective competitors in local markets post-acquisition. This would enable Caltex to unilaterally increase prices to a small but significant extent. Out of the 302 sale sites to be acquired, the ACCC formed the view that 53 raised competition concerns.

The ACCC was also concerned that the proposed acquisition would result in more effective coordinated pricing behaviour in retail petrol markets, would significantly increase Caltex's ability and incentive to increase the wholesale price of petrol and diesel to non-refiner marketers, and may lead to an increase in retail petrol and diesel prices.

On this basis, the ACCC formed the view that the proposed acquisition would be likely to result in a substantial lessening of competition in the various fuel markets in contravention of Section 50 of the Act.

iii AMP/NAB/AXA

The ACCC is currently considering separate proposed acquisitions by AMP Limited and National Australia Bank Limited (NAB) of AXA Asia Pacific Holdings Limited. On 10 February 2010, the ACCC unusually issued a joint statement of issues on the proposed acquisitions, seeking further information on the competition issues identified with respect to each of the proposals arising from the ACCC's market inquiries. At the time of writing, the ACCC has not announced its final decisions on the proposed acquisitions.

The ACCC's biggest concern is NAB's ability to dominate the market for retail investment platform services. Further, the ACCC has noted that barriers to entry are high, with investment platforms requiring high capital costs, sophisticated technology, continued IT investment and minimum efficient scale to generate a reasonable return on investment.

Trends, developments and strategies

Section 50 of the Act currently prohibits mergers that would 'substantially' lessen competition. The Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) Bill 2009 ('the Richmond Bill') proposes two key changes to Australia's merger laws:

- a* to replace the word 'substantial' in s 50(1) of the Act with the word 'material'; and
- b* to insert a new provision, effectively prohibiting any horizontal mergers by companies holding a substantial market share in an Australian market.

The explanatory memorandum to the Richmond Bill explains that a 'material' lessening of competition test would lower the threshold for determining whether a merger or acquisition is anti-competitive and would allow the merger or acquisition to be tested by reference to whether it has a pronounced or noticeably adverse affect on competition, rather than on whether the merged entity would be able to exercise substantial market power post-merger, as is currently the case.

The ACCC publishes merger guidelines outlining the analytical and evaluative framework the ACCC applies when reviewing mergers under the Act. In November 2008, the ACCC published revised merger guidelines ('the 2008 Guidelines'). The 2008 Guidelines replaced the original merger guidelines published by the ACCC in 1999 ('the 1999 Guidelines') and updated in 2006. The 2008 Guidelines are more sophisticated than the 1999 Guidelines and differ in a number of important respects, outlined *infra*.

Under the 2008 Guidelines, market concentration is used in two ways. First, as a notification threshold. While there is no compulsory pre-notification requirement for mergers in Australia, the 2008 Guidelines recommend that merger parties notify the ACCC if 'the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market/s'.²⁷ The 2008 Guidelines explain that if there is uncertainty as to the relevant market, market-share calculations should be based on conservative market definitions.

Second, market concentration is used in competition analysis. The 2008 Guidelines explain, that 'market concentration can help to determine whether a merger is likely to result in unilateral and/or coordinated effects. It is the link between concentration and the strength of competition that is important for merger analysis and this ultimately requires consideration of all relevant factors before a final conclusion can be reached'.²⁸

The 2008 Guidelines note that the ACCC typically measures concentration with reference to market shares, concentration ratios and the Herfindahl-Hirschman Index ('HHI').²⁹ The HHI is calculated by adding the sum of the squares of the post-merger market share of the merged firm and each rival firm in the relevant market, thereby giving greater weight to the market shares of the larger firms. The HHI indicates the level of market concentration while the change in the HHI (or 'delta') reflects the change in market concentration as a result of the merger.³⁰ As part of its overall assessment of a merger, the ACCC will take into account the HHI only as a preliminary indicator of the likelihood that the merger will raise competition concerns requiring more extensive analysis. The HHI operates separately to the notification threshold.

The 2008 Guidelines differ from the 1999 Guidelines, which established 'safe harbours' below which the ACCC was unlikely to take any further interest in a merger.³¹ As King observes, while the ACCC always reserved the right to intervene in a merger, the 2008 Guidelines significantly reduce the emphasis placed on simple concentration measures. The new HHI thresholds provide guidance to market participants but are not some form of 'safe harbour'.³²

27 ACCC, *Merger Guidelines 2008* (2008) at [2.9]

28 *Ibid*, [7.8].

29 *Ibid*, [7.9].

30 *Ibid*, [7.13].

31 Australian Competition and Consumer Commission, *Merger Guidelines 1999* (1999) at [5.103].

32 Stephen P King, '2009 Forum: The 2008 ACCC Merger Guidelines: How and Why Have They Changed?' *UNSW Law Journal* Volume 32(1), 264 to 265.

The 2008 Guidelines use a different analytical approach to market definition to the 1999 Guidelines. Under the 2008 Guidelines, ‘a market is the product and geographic space in which rivalry and competition take place’,³³ while the 1999 Guidelines used the four market dimensions of product, geographical, functional and time.³⁴ King observes that this change reflects international best practice. The characteristics of the relevant product, including its functionality and physical location, are the key factors that drive both demand and supply-side substitution, and hence competition. Market definition is an attempt to identify products that are strong substitutes so a focus on the product and geographical dimensions makes significant sense.³⁵

As the 2008 Merger Guidelines indicate, the change in approach does not mean that the functional and time dimensions are irrelevant, but that ‘functional and temporal considerations form part of the product and geographic dimension analysis’.³⁶ The functional dimension is considered as part of vertical integration and the purchase of a bundle of products. The time dimension has been incorporated into the broader competitive analysis and focuses on the competitive harm that can arise over a one to two-year period.³⁷

Outlook

The proposal to replace ‘substantially’ with ‘materially’ has been criticised in several respects. First, it would make Section 50 inconsistent with other provisions in Part IV of the Act that prohibit anti-competitive conduct using the test of ‘substantially’ lessening competition.³⁸ Second, it would make Section 50 inconsistent with the approach taken by most OECD jurisdictions, which prohibit mergers that ‘substantially’ or ‘significantly’ impede or lessen competition. This may generate uncertainty at a time when the increasing number of transnational mergers requiring review in multiple jurisdictions means merger laws should be internationally consistent whenever possible.³⁹

The basis for the proposed changes has also been criticised. Julie Clarke observes that while the ACCC generally opposes very few mergers, it does not necessarily follow

33 ACCC, *Merger Guidelines 2008* (2008), at [4.6].

34 ACCC, *Merger Guidelines 1999* (1999), at [5.40].

35 Stephen P King, ‘2009 Forum: The 2008 ACCC Merger Guidelines: How and Why Have They Changed?’ 32(1) *UNSW Law Journal* Volume 271.

36 ACCC, *Merger Guidelines 2008* (2008), at [4.8].

37 Stephen P King, ‘2009 Forum: The 2008 ACCC Merger Guidelines: How and Why Have They Changed?’ 32(1) *UNSW Law Journal* Volume 271.

38 See e.g., Shopping Centre Council of Australia, Submission to the Senate Economics Committee on the Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) Bill 2009, p1 – available at www.scca.org.au.

39 See Julie Clarke’s submission on the proposed Richmond Amendment Senate Economics Legislation Committee Inquiry into the Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) Bill 2009 (18 December 2009), 2.

that the threshold of substantially lessening competition is too high. It simply reflects that the majority of mergers do not raise competition concerns.⁴⁰

The informal merger review process provides merger parties with the ACCC's informal view on whether a particular proposal is likely to breach the Act and whether the ACCC would challenge the merger in the Federal Court. While the informal process is quick and convenient (there are no prescribed information requirements imposed on merger parties and no application fee), the ACCC's apparently tougher stance on recent mergers suggests that it may be dangerous for an applicant to seek informal clearance (as opposed to formal) where there are risks of competition concerns. First, because a decision under the ACCC's informal process has no legal effect, it is not reviewable by the Federal Court or the Australian Competition Tribunal ('the Tribunal'). This means that 'in-line ball' cases it is easier for the ACCC to oppose a merger knowing that its decision will not be reviewed.

Second, the practical effect of the ACCC informally opposing a merger is significant. The applicant for clearance is in most cases left with the undesirable options of:

- a* proceeding with the merger and fighting the ACCC in the Federal Court;
- b* abandoning the merger completely;
- c* modifying the merger proposal, and reapplying to the ACCC for informal review of the modified proposal;
- d* applying to the ACCC anew under the formal merger clearance process. A rejection under this process enlivens the applicant's right to apply to the Tribunal for review of the ACCC's formal determination; or
- e* applying to the Tribunal for authorisation of the merger. However, the Tribunal can only grant authorisation on a direct application if it is satisfied that the merger would result, or would be likely to result, in public benefit. That is, the applicant must concede that there is a substantial lessening of competition but argue that the public benefits outweigh this.

Proceedings in the Federal Court or Tribunal are usually time-consuming and expensive, and there is no guarantee that either of these decision-making bodies will ultimately come to a view different to the ACCC.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The EU's prohibition on abuse of dominance (formerly Article 82 of the EC Treaty, now Article 102 of the Treaty on the Functioning of the EU) finds its Australian counterpart in Section 46 of the Act. There are currently two key prohibitions in Section 46:

- a* a general prohibition of 'misuse of market power' (Section 46(1)); and
- b* a specific prohibition of 'predatory pricing' (Section 46(1AA)).

40 *Ibid.*

Section 46(1) provides:

A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:

- (a) *eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;*
- (b) *preventing the entry of a person into that or any other market; or*
- (c) *detering or preventing a person from engaging in competitive conduct in that or any other market.*

The specific prohibition of predatory pricing in Section 46(1AA) provides:

A corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, for the purpose of: [the proscribed purposes are the same as (a)–(c) in section 46(1), supra].

Breach of Section 46 is unlawful but, strictly speaking, not a crime. This means the standard of proof is on the balance of probabilities, rather than the stricter standard that applies for crimes (proof beyond reasonable doubt), and cases are heard at first instance before a judge of the Federal Court of Australia, rather than a jury.

Like other provisions of Australia's competition law, breach of Section 46 is actionable at the suit of both the ACCC and private parties (such as competitors, suppliers, customers or consumers) who have suffered loss or damage as a result of the breach.

If the regulator sues, it can seek a 'pecuniary penalty' (essentially a fine for conduct that is not criminal) of up to the greatest of:

- a* A\$10 million;
- b* if the value can be determined, three times the value of the benefit obtained by the body corporate from engaging in the contravening conduct; or
- c* if that value cannot be determined, 10 per cent of annual group turnover.

Private parties can seek damages awards, injunctions and various other remedies.

i Significant cases

On 2 December 2009, the Full Court of the Federal Court of Australia ('the Full Court') handed down its decision on appeal in *Seven Network Ltd v. News Ltd*.⁴¹ The matter was aptly described by the court as 'mega-litigation': the trial ran for 120 sitting days and the trial judge's decision was over 1,000 pages long.

The case concerned 'pay-TV', which involves consumers paying to subscribe to certain television content, and the demise of 'C7', a pay-TV sports channel that was wholly owned by the Seven Network Ltd ('Seven').

Seven had exclusive rights to broadcast Australian Football League ('AFL') matches on free-to-air and pay-TV until the end of the 2001 season. AFL matches were shown on pay-TV on C7. C7 also showed National Rugby League (NRL) matches on a

41 (2009) 262 ALR 160.

non-exclusive basis. AFL and NRL were the only two ‘marquee sports’ in Australia, and a major driver for consumers to subscribe to pay-TV.

C7 was shown on two of the three retail television platforms in Australia but not on Foxtel, which was by far the dominant platform in the market. Foxtel was a partnership between a number of parties, including News Ltd. In December 2000, after a competitive bidding process, News Ltd acquired the AFL pay-TV rights for 2002 to 2006. In May 2002, after it lost the rights to AFL matches, C7 ceased operating.

Among the numerous matters in dispute, Seven alleged that Foxtel had misused its market power by, between June 1999 and December 2000, refusing to broadcast C7 on Foxtel. This meant that AFL matches were not shown on the dominant pay-TV service, which was undesirable from the AFL’s point of view.

It was uncontroversial that Foxtel had a significant degree of market power in the retail pay-TV market. The issue, however, was whether Foxtel had ‘taken advantage’ of that power. Following the High Court’s decision in *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd*,⁴² the Full Court’ upheld the trial judge’s decision that:⁴³

[T]he test to be determined is whether the corporation which is alleged to have contravened s 46, on a counter-factual that it lacked a substantial degree of power in the relevant market, could have conducted itself in the same way.

The Full Court held that Foxtel had not taken advantage of its market power because:

- a* between June 1999 and December 2000, Foxtel expected the AFL pay-TV rights to be awarded within a few months;
- b* the cost to Foxtel of refusing to take C7, pending the award of the AFL pay-TV rights, was low;
- c* if AFL matches had been shown on all retail pay-TV platforms through C7, this would have given Seven a perceived advantage in the bidding process for the AFL television rights; and
- d* even in the counterfactual situation, it would have been ‘commercially rational’ for Foxtel to deny Seven that perceived advantage in the bidding process – provided the costs to Foxtel were ‘both very modest and short term’.

The relevant events pre-dated the introduction of Section 46(6A), which was apparently designed to liberalise the ‘taking advantage’ test, so the court did not apply that provision.

Seven also alleged that Foxtel had misused its market power in 2000 by stating to the AFL that C7 would not be able to broadcast its channel on the Foxtel service. The Full Court again upheld the trial judge’s decision that, on the evidence, Foxtel had not made such an unequivocal statement. Rather, Foxtel conveyed that it would be difficult for C7 to get on the Foxtel platform even if it won the AFL rights, and that the Foxtel proposal was the only way the AFL could be certain AFL matches could be shown across all pay-TV platforms.

42 (2001) 205 CLR 1.

43 (2009) 262 ALR 160, 372 [975] (per Dowsett and Lander JJ).

ii *Trends, developments and strategies*

In recent years, Section 46 has been a lightning rod for political debate on the need to protect small businesses from being driven out of the market by aggressive big businesses – particularly in the grocery and petrol industries. This political debate has led to a number of actual and proposed legislative amendments.

The most spectacular example of this was the introduction in 2007 of the specific prohibition of predatory pricing in Section 46(1AA) (see *supra*). This section is commonly referred to as the ‘Birdsville Amendment’ as it was reportedly conceived by a politician in a public bar in the small town of Birdsville. The proposal was swiftly endorsed as government policy and passed by parliament shortly prior to the 2007 election.

The Birdsville Amendment has been widely criticised. Notably, Section 46(1AA) applies to all corporations that have a ‘substantial share of a market’, rather than just those with a ‘substantial degree of market power’. In 2008, the new government unsuccessfully attempted to have the section amended to address this. There is also no definition in Section 46(1AA) of the key concept of ‘relevant cost’.

As yet, Section 46(1AA) has not been tested by the courts, and there is mounting political pressure on the ACCC to be seen to be taking enforcement action in this area.

iii *Outlook*

As part of the continuing political debate about Section 46, parliament is currently considering a private members’ bill designed to outlaw geographical price discrimination. Entitled the ‘Trade Practices Amendment (Guaranteed Lowest Prices – Blacktown Amendment) Bill 2009’, the Bill would insert a new Section 46C into the Act, which would provide:

A corporation must, at a retail outlet operated by the corporation or a related entity, supply or offer to supply a particular product to a consumer at a price being the lowest price the product is supplied or offered for supply at the same time at any retail outlet operated by the corporation or a related entity under the same trading name within a distance of 35 kilometres.

The Bill addresses a concern that dominant retailers – particularly in the grocery and petrol industries – could charge higher prices in geographical areas where there is little competition and then use the profits to subsidise low or even predatory prices in geographical areas where there is greater competition.

The Senate Economics Committee delivered its report on 24 November 2009 and recommended against passing the Bill. The Committee was concerned the Bill did not discriminate between competitive and anti-competitive price discrimination, and might unintentionally lead to uniformly higher prices for consumers.

The Committee’s report indicates that the Bill is unlikely to be enacted, but the complaints by small business and some politicians about the dominance of big grocery and petrol retailers – and the need to protect smaller competitors – seem unlikely to go away. While those complaints continue, so will the debate about the proper role of Section 46.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

Telstra Corporation Limited ('Telstra') is a former state-owned vertically integrated monopoly that operates in the telecommunications industry. In order to promote competition, and minimise the influence of Telstra's market power, the government has heavily regulated the Australian telecommunications industry.

This year, a series of decisions (the *Chime* decisions⁴⁴) were determined by the Tribunal (the peak competition body in Australia) and the Full Court. The *Chime* decisions were initiated by Telstra in an attempt to free itself from the obligation to supply certain services to its competitors. Specifically, Telstra sought exemption from the standard access obligations ('SAO') provided for under Section 152AR of the Act in respect of two declared services: the wholesale line rental ('WLR') service and the local carriage service (LCS).

Part XIC of the Act regulates exemption from the SAO. The object of that Part is expressed to be the promotion of the 'long-term interests of end-users of carriage services or of services provided by means of carriage services'.⁴⁵ In determining whether something is in the long-term interests of end-users, the Tribunal must have regard to a number of issues, including the extent to which access is likely to result in the achievement of the objective of 'promoting competition'.⁴⁶

In the end, and subject to a range of conditions and limitations, Telstra was granted exemption from the SAO in respect of the supply of the LCS and the WLR service.

ii Trends, developments and strategies

Although the outcome of the *Chime* decisions is important, of more importance are the procedural trends and developments that come from the decision. In particular, it is important to take note of the new role expert economic witnesses are likely to play in competition matters.

In order to appreciate the significance of this development, it is necessary to say something about how previous Tribunals dealt with expert economic witnesses. Uthmeyer and Cooke put it in the following way:⁴⁷

In prior Tribunal decisions, the approach of the Tribunal to the assessment of, and reliance on, expert evidence was akin to the assessment by the Federal Court of admissible expert evidence. These Tribunal

44 *Application by Chime Communications Pty Ltd* [2008] ACompT 4 (22 December 2008); *Telstra Corporation Limited v. Australian Competition Tribunal* [2009] FCAFC 23; *Application by Chime Communications Pty Ltd* (No 2) [2009] ACompT 2 (27 May 2009); *Application by Chime Communications Pty Ltd* (No 3) [2009] ACompT 4 (24 August 2009).

45 Trade Practices Act 1974 (Cth), Section 152AB(1).

46 Trade Practices Act 1974 (Cth), Section 152AB(2).

47 Uthmeyer and Cooke, 'Economic Experts: how necessary are they?' (Paper presented at the ACCC Regulatory Conference, July 2009).

decisions disclose a careful scrutiny of the expert evidence adduced by the parties, and the contentions advanced by the other parties to the proceeding as to the shortcomings of that evidence, with the Tribunal choosing the resultant extent to which it accepted the expert evidence

...

In summary, previous Tribunal decisions disclose a weighing of the expert material before it as 'evidence'. The Tribunal did not treat the expert material as 'submission' that could be accepted by the Tribunal or rejected in preference of the Tribunal's own view.

In the *Chime* decisions, the Tribunal did not treat economic material filed by parties as evidence, which it was required to weigh up, and then accept or reject.⁴⁸ Rather, the Tribunal treated the expert material as submissions that it was permitted to reject in preference to its own view.⁴⁹

The rationale for this new trend was explained by the Tribunal in the following way. The Tribunal's members were appointed on the basis of their 'knowledge of, or experience in, industry, commerce and economics'.⁵⁰ According to the Tribunal, this qualification requirement demonstrates that the intention of Parliament was to allow Tribunal members to use 'their particular experience and knowledge when performing their functions'.⁵¹ The Tribunal went on to say that unless it was able to 'bring to bear its knowledge of economics when analysing... issues there is the very real risk that its decision would miscarry'.⁵² The Tribunal concluded in this way:⁵³

... [T]he function of a specialist tribunal is different from that of a judge. Judges must decide cases based on the facts that have been tendered in evidence. The judge is an expert in the law and will rely on that expertise in deciding a case. In addition, a judge may use extrinsic material as a source of ideas...

The Tribunal, however, is better placed than a judge. It has no need to go to external material to inform itself of, for example, principles of [economics], although those principles may go to the very heart of an issue before it. The reason the Tribunal has no need to look to extrinsic material is that some of its members were appointed because they possess knowledge of those principles.

iii Outlook

The concern with the Tribunal's new approach to the use of economic material filed by the parties is that in considering whether the exemptions sought by Telstra were in

48 This is normally how expert evidence is received in court proceedings. Note, however, the operation of O 10 Rule 1(2)(j) of the Federal Court Rules, which provides that the court may 'in proceedings in which a party seeks to rely on the opinion of a person involving a subject in which the person has specialist qualifications, direct that all or part of such opinion be received by way of submission in such manner and form as the court may think fit, whether or not the opinion would be admissible as evidence'.

49 See Uthmeyer and Cooke, 'Economic Experts: how necessary are they?' (Paper presented at the ACCC Regulatory Conference, July 2009).

50 Application by Chime Communications (No. 2) [2009] ACompT (27 May 2009) at [5].

51 Application by Chime Communications (No. 2) [2009] ACompT (27 May 2009) at [6].

52 Application by Chime Communications (No. 2) [2009] ACompT (27 May 2009) at [7].

53 Application by Chime Communications (No. 2) [2009] ACompT (27 May 2009) at [8] to [9].

the long-term interests of end-users, the Tribunal considered, and made reference to, a vast array of economic literature regarding principles of market analysis,⁵⁴ models of competition⁵⁵ and approaches for determining competitiveness.⁵⁶ Much of that literature was not filed, or considered, by the parties.

Some practitioners appear concerned with the more active role the Tribunal appears to be taking on matters of economic theory. According to Uthmeyer and Cooke:⁵⁷

[T]he 'new' approach of the Tribunal brings with it uncertainty for the parties before it, particularly as the Tribunal revisits and reshapes, over time and with the development of economic theory, its opinion on economic principles and theories for application in the matters before it. This, in turn, raises issues of procedural fairness that the Tribunal should seek to manage...

Such concerns are not without merit. It must, however, be remembered that the Tribunal is an administrative body, not a court. Parties before the Tribunal are not entitled as of right to the same privileges as parties that appear in a court. Further, the Tribunal must aim to determine applications with as little formality and technicality, and with as much expedition as possible – something that appears to be paramount in the Tribunal's thinking. Finally, it is important to remember that although the Tribunal's new approach may create some initial difficulties for practitioners, the Tribunal's willingness to clearly state its position on matters of economic theory is likely to provide certainty in the future.

V CONCLUSIONS

i Mergers

The ACCC's consideration of the proposed acquisition of AXA by AMP and NAB will be monitored closely by parties wishing to approach the ACCC for clearance in future (particularly in the financial services sector). The ACCC has not opposed a merger in this sector in the past eight years. However, the general tone of the statement of issues and the current political climate suggests that this may be about to change. The ACCC will announce its decision on the AMP proposal on 1 April 2010, and NAB's proposal on 22 April 2010.

The ACCC is also currently reviewing a proposed joint venture between BHP Billiton Ltd ('BHP') and Rio Tinto Ltd ('Rio') to produce iron ore in Western Australia. Given that the ACCC cleared BHP's proposed acquisition of Rio at the end of 2008, the

54 Application by Chime Communications (No. 2) [2009] ACompT (27 May 2009) at [20] to [29].

55 Application by Chime Communications (No. 2) [2009] ACompT (27 May 2009) at [30] to [48].

56 Application by Chime Communications (No. 2) [2009] ACompT (27 May 2009) at [49] to [54].

57 Uthmeyer and Cooke, 'Economic Experts: how necessary are they?' (Paper presented at the ACCC Regulatory Conference, July 2009)

ACCC is particularly interested in how the competitive dynamic has changed over the past year, and the impact of the global financial crisis on iron ore demand and supply patterns. The ACCC proposes to announce its findings on 28 April 2010.

ii Applications before the Tribunal

On a related matter, the Tribunal is due to shortly release its decision in four related applications that it completed hearing in early 2010. The applications concern railway lines that are owned by BHP and Rio and are located in the Pilbara region. They are used to transport iron ore. Fortescue Metal Group Ltd is seeking access to the railway lines. Specifically, the applications concern the declaration of the facilities under Part IIIA of the Act (which deals with the sharing of essential facilities in order to promote effective competition in upstream and downstream markets). In deciding the applications, the Tribunal will need to consider and deal with a significant amount of economic material filed by the parties.

iii Cartels

In addition to the airline cartel cases identified above, there are a number of cartel cases currently being considered by the Federal Court, including *ACCC v. April International Marketing Services Australia Pty Ltd*,⁵⁸ *ACCC v. Australian Karting Association (NSW) Incorporated*⁵⁹ and *ACCC v. Vanderfield Pty Ltd*.⁶⁰ These cases will not test the new cartel regime, as they concern conduct occurring prior to its enactment. However, it will be interesting to see how the issues identified above with respect to the new cartel regime will arise in the prosecution of cartels in future.

58 (No 5) [2010] FCA 17 (29 January 2010).

59 [2009] FCA 1255 (6 November 2009).

60 [2009] FCA 1535 (3 November 2009).

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