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Subject: ACCC Chair speech to Competition and Consumer Law Workshop today [SEC=OFFICIAL] [ACCC-ACCCANDAER.FID3066942]
Attachments: Final 2023 Competition and Consumer Law Workshop Speech ACCC.pdf

OFFICIAL

Good afternoon [redacted]

For visibility, attached is the speech Gina will give to this afternoon's Competition and Consumer Law Workshop. We will publish this online after delivery - probably after 2pm. There won't be a media release.

Kind regards

[redacted] *(He / Him)*
Director | Government Relations and Advocacy | ACCC Executive Office

T [redacted] M [redacted]

SPEECH

Event: **Law Council Competition and Consumer Law Workshop Address**

Gina Cass-Gottlieb, ACCC Chair

Date & Time: **1 September 2023 at 2pm**

Check against delivery

Introduction

Thank you.

I would like to begin by acknowledging the Wurundjeri People of the Kulin Nation, the Traditional Custodians of the land we are meeting on today, and to acknowledge their descendants and their continued connection to this country. I'd like to pay my respects to their elders past, present and emerging. I acknowledge their connection to the land, sea and community. I would also like to acknowledge and pay my respects to First Nations people who are attending today's event.

Good afternoon friends and colleagues, thank you for the invitation to deliver the keynote address at the Law Council Annual Competition and Consumer Law workshop. I am delighted to be attending this event for the second year as ACCC Chair.

It is both an exciting and challenging time to be leading an agency like the ACCC. It remains my view that our economy-wide, complementary remits of the promotion of competition and consumer protection position us well to respond to emerging issues as Australia and the world navigate generational shifts in our economies and societies. The move to a low-emissions future, the continued expansion of the digital economy, the advance in new technologies such as AI and an increasing demand for care and support services are creating new markets, new opportunities and new considerations for agencies like the ACCC.

Competition policy has a key role in ensuring these transitions proceed in a way that is effective, efficient and fair. With this in mind, we welcome the announcement last week that the Government is undertaking a review of competition policy settings in Australia conducted by a Competition Taskforce within Treasury..

It is important to remember, as this review commences, that strong competition and effective markets are not ends to themselves, but should aim to serve the interests of end users.

We look forward to sharing our views with the review's expert panel on where we see the need for targeted changes to our competition framework, including in relation to merger laws. As many of you will know, one of the areas to be considered early in the two-year review is the ACCC proposal for merger law reform. I will discuss this further shortly.

The ACCC's remit is broad, diverse and growing, but we retain our strong focus on our core charter of consumer protection, protection of fair trading, protection against anti-competitive conduct and merger review. We regard enforcement outcomes as essential to achieve specific and general deterrence of the conduct prohibited by competition and consumer protection law. They also add heft to the other tools that we have.

Today, I will outline our competition and enforcement work and key areas of focus for the year ahead, and provide an update on the merger reform proposals.

I will also discuss our market inquiries function and the important work we are doing to address harms in the digital economy.

Lastly, I will outline emerging areas of focus for the ACCC in the years ahead.

Compliance and enforcement

In my speech last year I foreshowed a continued strong enforcement focus for the ACCC. It is pleasing then to be able to point to significant enforcement actions and outcomes during the past year.

Yesterday, the ACCC launched action against Qantas in the Federal Court alleging the company engaged in false, misleading or deceptive conduct by advertising tickets for more than 8,000 flights that it had already cancelled but not removed from sale. It's alleged Qantas kept selling tickets on its website for an average of more than two weeks, and in some cases for up to 47 days after the cancellation of flights. It's also alleged that, for more than 10,000 flights scheduled to depart between May and July 2022, Qantas did not notify existing ticketholders that their flights had been cancelled for an average of about 18 days, and in some cases for up to 48 days.

We've also had a series of outcomes and new cases in court enforcing the cartel provisions of the Act. Just this week, the Federal Court ordered BlueScope to pay a significant $57.5m penalty for attempting to fix prices for flat steel products supplied in Australia. The Court also imposed a $575,000 penalty on BlueScope's former general manager.

Our criminal cartel program continues to develop. Guilty pleas have been entered by all defendants in the demolition waste cartel prosecution brought late last year and we await sentencing. After guilty pleas, Alkaloids of Australia was convicted and fined, while its former export manager, Christopher Joyce was sentenced to two years and eight months' imprisonment to be served as an intensive corrections order. This is the longest sentence imposed under the criminal cartel laws to date.

Delta Building Automation was found to have attempted bid-rigging in a National Gallery of Australia tender for its building management system.

We also commenced proceedings against Qteq Pty Ltd and its executive chairman, Simon Ashton, alleging multiple attempts to induce competitors to enter into cartels in the supply of services to the oil and gas industry. We also commenced proceedings against Swift Networks in relation to equipment and services for five Pilbara mining village sites.

Finally, in April the Federal Court found, by consent, that architecture firm Ashton Raggatt McDougall Pty Ltd and its former managing director had attempted to rig bids for a $250 million building project at the Charles Darwin University.

We continue to develop our proactive cartel detection program utilising data analysis and sectoral screening. The program includes industry engagement, especially with procurement professionals, and educating public organisations on how they can protect themselves from cartels.

This proactive work has generated investigations which may well lead to outcomes, and will strengthen our capability to detect cartels.

Our cartel immunity policy remains critical to our enforcement program. It brings cartels to light and raises the risks for businesses in entering into cartels in the first place. We received 16 approaches in the 2022-23 year, and 7 immunity application proffers. This continues an upward trend since the COVID-19 pandemic.

As many of you are aware, this year we are reviewing our immunity policy. We refine the policy every few years to ensure it operates effectively. I encourage you to take up opportunities to give your input into the review as they arise.

In relation to unilateral conduct we are continuing to prepare for trial in our section 46 case against Mastercard. This matter relates to Mastercard's response to the RBA's least cost routing initiative, which aimed to increase competition and lower the fees merchants pay to process debit transactions. We allege that Mastercard offered large merchants conditional discounts, which had the purpose of substantially lessening competition by deterring

businesses from using the only alternative network, Eftpos, even though Eftpos was often the cheapest, enabling Mastercard to retain business even though it was often charging a higher price.

Earlier this year we received the Full Federal Court's judgement dismissing our appeal in our case against NSW Ports. We had alleged that agreements entered into by NSW Ports at the time the State of NSW privatised the Ports of Botany and Kembla were anti-competitive. The Full Court found that NSW Ports had derivative crown immunity, and that we had not established a substantial lessening of competition. While we recognise the complexity in most SLC cases, we remain determined to keep taking action on important competition issues.

We have also secured significant outcomes in the past year through undertakings under Section 87B of the Act which show the flexibility of the undertaking as a tool to remedy competition problems and spread compliance messages.

Most recently, we accepted an undertaking to address anti-competitive restraints in agency agreements for the supply of cotton seeds, which prevented growers from choosing an insecticide from an unapproved supplier.

This past year we have observed an increasing prevalence of resale price maintenance conduct, reflected in both the complaints we receive and consequently our investigation activity. RPM is, of course, a per se breach. It is illegal because it stops retailers competing on price, thereby increasing what consumers pay. Its harm is a particular concern in a higher inflationary environment, and when many Australians face cost of living pressures.

The RPM conduct we're seeing indicates it is worryingly widespread across the economy, with a vast range in the sectors and the sizes of the businesses involved, and the nature and breadth of the RPM conduct itself. Our enforcement response is proportionate to the variance in these elements. On one end of the spectrum, we have proceedings against Techtronic Industries Australia in which we allege that it entered into agreements with independent dealers and buying groups which restricted the sale of Milwaukee products below a specified minimum price. We also allege that Techtronic enforced these agreements in various ways, including by withholding supply from two of the dealers.

And recently an 87B Undertaking was sought from a smaller business named Hornet Industries Pty Ltd, an importer and distributor of recreational bikes, that admitted that it had likely engaged in RPM through agreements it offered to independent resellers. Hornet provided an undertaking to the ACCC which included obligations to advise independent resellers they are free to set their own prices.

The number of cases we're seeing has us looking hard at what more we need to do to deter RPM conduct and achieve both specific and general deterrence for this per se breach.

The ACCC has been advocating for some time for an unfair trading practices prohibition to be introduced to the Australian Consumer Law. We have previously identified numerous examples of concerning business conduct which causes real harm to consumers and small business but is unlikely to breach the ACL.

The ACCC considers the introduction of an unfair trading prohibition would set an improved standard for business behaviour.

Earlier this week, the Government launched consultation on possible unfair trading practices regulatory reforms. We welcome this consultation and encourage all stakeholders, particularly consumer and small business groups, to provide their views.

Environmental claims and sustainability is also a compliance and enforcement priority for the ACCC. A key aim of the ACCC's work in this area is to create a competitive environment where businesses are able to differentiate themselves to their consumers based on legitimate investment in sustainable production and distribution processes and reducing carbon emissions. Competitive markets will be crucial to drive the investment and innovation needed to support the transition to a greener economy.

Following a sweep of claims that identified that 57 per cent of claims reviewed were concerning, the ACCC released draft guidance to assist businesses that are making environmental and sustainability claims. We thought that it was important to consult widely with key business, consumer and environmental stakeholders to ensure that the guidance is fit for purpose and provides the greatest level of assistance.

Initial feedback from stakeholders included a request for more information in relation to emission and offset claims. This is an area in which the ACCC was already proposing to develop more detailed guidance.

A number of businesses and consumers have also highlighted the importance of trust marks as a key tool used to determine the legitimacy of environmental and sustainability claims. There are concerns that some trust mark schemes are not robust and may result in consumers being misled.

One concerning issue that the ACCC has heard during the consultation process is that some businesses are hesitant to talk about positive changes that have been incorporated into manufacturing/production processes or businesses operations. We understand that this is due to perceived legal risks, and scepticism from the broader public.

It is our view that legitimate environmental claims are an important part of the broader response to climate change and consumers are clear that they want this information. Those businesses that have made changes to the way they operate should have confidence to talk about these changes. We are consulting on and further developing practical guidance to assist here.

Sustainability issues extend beyond greenwashing. The transformation to a greener economy is changing industries and creating demand for new infrastructure such as electric vehicle charging stations . The ACCC will be closely monitoring for anti-competitive conduct as the green transition unfolds. Assessment of mergers in transitioning industries including energy will also be critical.

Merger reform

I'd now like to turn to our mergers work.

There has been much said recently about merger authorisations. This is not surprising. In the space of approximately 8 months, the ACCC has made three merger authorisation decisions – on ANZ/Suncorp, Armaguard/Prosegur and Telstra/TPG. The Australian Competition Tribunal completed its review of our Telstra/TPG decision and an application for review of the ANZ/Suncorp decision has now been lodged with the Tribunal. There is also a further application under ACCC consideration, with a decision on Brookfield/Origin due later this month.

Each of the markets involved in these applications – banking, cash logistics, telecommunications, and energy – are of critical importance to our economy and consumers, particularly at a time when many are facing cost of living pressures. Each involve acquisitions in concentrated markets and all are complex matters.

I am not going to discuss the reasons or details regarding these merger authorisation decisions or the Tribunal's approach, but I do want to respond to some of the commentary around the merger authorisation test and the threshold that must be met for authorisation to be granted.

As many of you would be aware, under the merger authorisation test, the ACCC, or Tribunal on review, cannot grant authorisation unless it is satisfied that the merger either would not be likely to have the effect of substantially lessening competition or would be likely to result in a net public benefit.

Unlike a Court in a section 50 proceeding, the merger authorisation test does not require the ACCC or Australian Competition Tribunal to determine (on the balance of probabilities, or any other standard of proof) that a merger would, or would not, be likely to result in a substantial lessening of competition.

The requirement to be "satisfied" in the test is not new. It has been part of both the merger authorisation and conduct authorisation tests for nearly 50 years in different forms and in its current form since 2017.

Having had the experience of the three recent merger authorisation decisions and recent Tribunal decision, the ACCC is firmly of the view that the requirement that we must be "satisfied" that the test is met in order to grant authorisation is appropriate to protect competition and also justifies its inclusion in our merger reform proposals which I outlined earlier this year.

Merger analysis involves predicting the future and this inevitably involves some degree of uncertainty. This is particularly the case where markets are rapidly changing and there are complex commercial considerations. We consider that the current informal regime with an adversarial, enforcement system favours a default position for clearance of mergers, due to that uncertainty. It is the public that bears the risk of harm from anti-competitive mergers that are not prevented due to evidentiary challenges.

As previously observed by Justice Jagot, there are alternative ways in which the law can deal with proof in an uncertain future. These include the application of the precautionary principle which is applied in other legal frameworks and is triggered by the threat or serious or irreversible damage. Justice Jagot commented that, "[i]t is not difficult to conceptualise a capacity for debate about a similar principle in competition law, particularly given the rapidity of development of some markets outstripping the pace of policy and legislative responses".[1]In circumstances where there is risk of serious or irreversible competitive harm but where there is uncertainty about likely future scenarios with and without the merger, we consider that the "must be satisfied" test appropriately errs on the side of protecting the public interest from the risk of an anticompetitive merger.

The recently announced Treasury review of competition policy settings in Australia will be pivotal in deciding the future direction for merger control in Australia.

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[1] Justice Jayne M Jagot, 'Some thoughts about proof in competition cases' (Judicial Address, UniSA and ACCC Competition Law and Economics Workshop, 15 October 2021) [49].

We will advocate for a range of changes but central to our proposals is the premise that the competitiveness of Australian markets is best preserved by moving to a clearance regime where merger parties must make the case that clearance should be granted. The decision whether to grant clearance would be an administrative decision by the ACCC, or the Tribunal on review.

We acknowledge that moving to a mandatory suspensory formal clearance regime would be a significant change and the Treasury review will need to grapple with some strong views about the test to be applied and the role of the Federal Court and Tribunal in our merger control system.

We expect that some will argue that our proposals will potentially stop efficiency enhancing mergers and will lead to the ACCC opposing significantly more mergers.

We disagree. Firstly, the vast majority of mergers are not likely to be contentious, as evidenced by the fact that 93% of mergers are currently assessed without a public review. Under our proposed reforms there will continue to be a process for expeditiously clearing mergers without a public review, via a simple notification waiver process for mergers above the threshold, or via a pre-assessment process for mergers below the threshold. It is just the small handful of contentious mergers that are subject to a public review each year that would potentially be affected.

Further, research internationally has concluded that there are numerous examples where mergers have not achieved the expected benefits that supported the merger in the first place and may have led to adverse consequences.[2] The risk of blocking an efficiency-enhancing merger needs to be weighed against the risk of not blocking an anticompetitive merger; we consider that the former is the lesser of two evils and that the risk should sit with the merger parties rather than the public, including consumers and small business, as it does now.

It is important to make sure we have the right tools in our merger control system, particularly at this time where there is considerable economic and geopolitical uncertainty, and in the midst of a technological and environmental transition.

We look forward to engaging with Treasury in the review process.

Essential services

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[2] J Stiebale and F Szücs, 'Mergers and market power: evidence from rivals' responses in European markets', *RAND Journal of Economics*, 2022, 53(4):678-702; BA Blonigen and JR Pierce, 'Evidence for the Effects of Mergers on Market Power and Efficiency', *Finance and Economics Discussion Series*, Federal Reserve Board, Washington, 2016, 2016-082.

In recent years, the ACCC has increasingly been asked to monitor and report on concentrated and deregulated markets, or markets that can become a pain point for households, to ensure they are competitive and operating efficiently.

Childcare

Last year, the Treasurer directed the ACCC to examine the prices, costs and profits in the childcare sector.

In our June interim report we found that fees for centre based day care increased by 20% from 2018 to 2022 – that is faster than both the Consumer Price Index and the Wage Price Index.

We have also heard many reports of substantial price increases throughout 2023, just as the government has introduced more generous subsidies for families.

We are now analysing over 11 million data points collected from childcare providers and scrutinising internal documents obtained from childcare providers to better understand the reasons for price movements.

We will publish a report with draft findings and recommendations around September, with a final report due to the government by the end of this year.

Affordable, accessible and quality childcare is crucial for Australian families and boosting the health of the economy, including by supporting higher levels of workforce participation. We are pleased that the competition policy settings review will consider competition issues arising from the growth in the care economy and services sector.

Electricity

Through our electricity markets inquiry function we are closely examining pricing conduct by electricity retailers. While we will report on our retail competition findings in December this year, I can share some of our initial observations.

The ACCC has noticed price increases in the range of 10 to 20 per cent above the regulated safety net for existing customers, and yet we also know, from our analysis of currently advertised market offers, that much cheaper plans are available.

We are concerned that some Australian consumers may be paying too much.

This is a significant reversal in the role of the safety net price, which was designed as a maximum price to protect consumers but is becoming a cheaper option for many people.

Our initial observations raise many questions which we will seek to ventilate in our December report, such as the capacity of consumers to actively engage in the retail market and whether current policy settings for consumers are correctly calibrated. We will also consider if the pricing conduct by retailers raises any competition concerns or contributes to poor pricing outcomes for electricity consumers.

Gas

The ACCC will continue to continue to report on wholesale gas supply arrangements with particular focus on the operation of the East Coast Gas Market, through to 2030.

The Government has given the ACCC the additional responsibility of monitoring and enforcing the new Competition and Consumer (Gas Market Emergency Price) Order 2022 and responsibilities in respect of the mandatory Gas Code of Conduct.

The purpose of the mandatory Code is to ensure the domestic wholesale gas market supplies adequate gas at reasonable prices and on reasonable terms.

Last month, the ACCC released compliance and enforcement guidelines to assist the gas industry to understand its obligations.

Our primary objective is to achieve compliance with the code, but we are ready to exercise our enforcement powers in response to any alleged contraventions, particularly if we become aware of conduct that may be intended to circumvent the price cap or code.

The Digital Economy

Digital platform services are essential to the daily lives of consumers and the prosperity of many businesses.

But in the past six years when the ACCC has been examining digital platform markets through our various inquiries, we've observed a range of conduct we consider raises competition concerns, and which stifles innovation and choice, and harms consumers.

This conduct has become widespread, entrenched and systemic. Its breadth and scale presents a regulatory challenge. Mobile devices provide a good example. Third-party app developers have complained that device manufacturers like Apple can restrict their access to functions such as ultra-wideband (used for location tracking) and near-field communication chips (used for contactless payments), even while they use these functions in their own first-party apps. We have also observed that exclusive pre-installation and default arrangements for mobile apps and services provide leading digital platform firms such as Google a

significant advantage in reaching consumers and achieving scale. Such conduct has likely limited consumer choice and reduced the quality and innovation of the services they receive.

The characteristics of digital platform markets also increase the risks of harm, including that many are technically complex, lacking in transparency, involve extensive collection, analysis and privileged commercial use of consumer data and dominated by one or two large platforms. These platforms hold positions as intermediaries between consumers and businesses and are developing expanding ecosystems reaching across numerous services.

We've seen repeatedly that the best efforts of regulators, absent a full set of appropriate regulatory tools, will often fall short of achieving adequate, timely resolutions.

While we have achieved a number of importance outcomes in the courts, enforcement action under current laws alone cannot address the harms uncovered.

That's why the ACCC believes Australia can't afford to disregard the international push for regulatory reform of these markets, and that significant new measures are required.

Our fifth interim report of the Digital Platforms Services Inquiry, released last year, recommended reforms to address the competition harms occurring in these markets, in addition to stronger consumer measures.

Targeted competition measures for certain digital platforms, through legally binding service-specific codes of conduct, would address observed harms, and could improve consumer switching, information transparency and interoperability between different services, and better protect business users.

Treasury formal consultation closed earlier this year. We await the Government's response, and look forward to working with Treasury on the further design of any measures adopted.

The National Anti-Scam Centre

Australians lost $3.1 billion to scams last year.

To address this criminal behaviour, in July the Anti-Scam Centre was launched to make Australia the world's hardest target for scammers.

The National Anti-Scam Centre is a program led by government with the ACCC as the accountable co-ordinator of private sector businesses, regulators and government agencies using combined expertise and capability to impede the scam supply chain.

It will deliver better protection for Australian consumers and business by improving cooperation between government and industry.

We have established an advisory board with representatives from government, industry, consumer organisations, victim support services and law enforcement who are committed to placing consumers at the centre of scam prevention.

For the next six months, the ACCC and ASIC will lead an investment scam fusion cell, with representatives from banks, telecommunications industry, and digital platforms to disrupt investment scams and minimise losses for Australians.

This will be the first of a series of fusion cells the National Anti-Scam Centre will coordinate, with future cells targeting specific scam types.

The National Anti-Scam Centre will be greatly assisted by the establishment of whole of eco-system obligations and industry specific, enforceable codes with clear requirements for businesses to take steps against scams.

There will be an important role for the legal community to support your clients in developing commitments and compliance processes to meet the requirements of the codes once they are developed.

We understand Treasury will commence consultation on a possible codes framework and obligations later this year.

Emerging roles for the ACCC

The remit of the ACCC is broad, diverse and growing, reflecting a changing economy.

In the October budget, the Government announced funding for the ACCC to expand its role as the water market regulator in the Murray-Darling Basin.

The ACCC has also been given new powers to facilitate competitive access to clearing and settlement services in Australia's financial markets. Under (Part XICB) a proposed addition to the Competition and Consumer Act, the ACCC will have the power to arbitrate disputes relating to access to cash equity clearing and settlement services.

Recently, the ACCC was announced as the initial Digital ID regulator. The Government's Digital Identity program will seek to give Australians access to a safe, secure, voluntary and convenient way to verify themselves online.

As the initial regulator, the ACCC will undertake compliance and enforcement activities, and accredit entities participating in the Digital Identity System. Our involvement in this important reform further supports and complements our work in consumer protection, digital markets, protection from scams and the consumer data right.

Conclusion

As the national competition and consumer regulator, the ACCC is responsible for addressing issues affecting the welfare of consumers, business and the wider community. We must continually reflect on our compliance and enforcement activities and evolve our approach to be effective in a changing environment.

The ACCC is not alone in this role. We are an active member of the international community of competition, consumer and economic regulators, all facing similar issues. At the OECD Competition meetings in June this year, we discussed topics that included digital mergers, consumer welfare, the circular economy, leniency programmes, algorithmic competition and the relationship between competition and innovation. The ACCC makes contributions to discussions in these international forums as well as benefiting from learning from our counterparts around the world.

Today's workshop also provides a similar opportunity. Over the next day and a half, I look forward to discussing important areas of competition law and listening to informed debate on the various issues we intend to cover. Thank you.