

**Competition Law Conference  
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**Some Perspectives on the Role of the ACCC:  
Guidance, Ex Post Evaluation & Legislative Vaporware**

**Comments on paper presented by Mark Pearson**

**Outline**

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**1. Informing or shaping the development of competition law by means of policies, guidelines and information or discussion papers**

**1.1 Merger guidelines**

Ideally, and consistently with the ACCC's core principle of transparency, the revised Merger Guidelines would have been published before the current wave of merger activity and applications for clearances.

Stephen King's paper, "Issues in the ACCC merger guidelines" (July 2006) available at <http://www.accc.gov.au/content/index.phtml/itemId/754823>, addressed four main areas where the 1999 Guidelines are now incomplete or misleading:

- market definition and the hypothetical monopolist test;
- market concentration measures and merger analysis;
- barriers to entry; and
- countervailing power in merger analysis

Remedies are another prime area where further guidance is required, as discussed in Dave Poddar's paper and the mergers session at this conference. Consider eg:

- DOJ, *Antitrust Division Policy Guide to Merger Remedies* (October 2004);
- Bureau of Competition, *Information Bulletin on Merger Remedies in Canada* (September 2006);
- EC, Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004;
- Faull & Nikpay, *The EC Law of Competition* (2007) 5.360-5.384;
- Ezrachi "Behavioural Remedies in EC Merger Control: Scope and Limitations" (2006) 29(3) *World Competition*.

## 1.2 Joint venture guidelines

Joint ventures proliferate and often raise questions of compliance with TPA Part IV. Guidelines would assist, including guidance on the distinction between genuine and sham joint ventures.

Guidance materials published by ACCC to date have been limited (see eg *Competition Issues Associated with B2B E-Commerce: A Report on Behalf of the Australian Competition and Consumer Commission*, 20 Sept 2001).

Contrast the useful guidance available from the DOJ and the FTC, especially:

- FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000);
- DOJ/FTC, *Statements of Antitrust Enforcement Policy in Health Care* (1996), *Policy Statement 8, Statement of Department of Justice and Federal Trade Commission Enforcement on Physician Network Ventures*.

It would be helpful to have the benefit of ACCC guidelines based on the Commission's synthesis of the wide array of relevant but divergent material, including:

- *Texaco Inc v Dagher*, 547 US 1 (2006);
- FTC/DOJ, *Antitrust Guidelines for Collaborations Among Competitors* (2000);
- Werden, "Antitrust Analysis of Joint Ventures" (1998) 66 Antitrust LJ 701;
- Harpham, Robertson & Williams "The Competition Law Analysis of Collaborative Structures" (2006) 34 ABLR 399; and
- Lear, "Joint Ventures: Treatment under New Zealand, United States and European Competition Law" (2005) 11 NZBLQ 187.

## 1.3 Private actions for breaches of Part IV

Private actions for breaches of Part IV have become more common (eg the class action brought against Amcor in the wake of the ACCC's enforcement action against Visy in the Visy-Amcor corrugated fibre packaging matter). Contrast the position in 2003 as discussed in Round, "Consumer Protection: At the Mercy of the Market for Damages" (2003) 10 CCLJ 231. The obstacles in the way of such private actions have been outlined in eg Cashman, "Private enforcement of competition and consumer protection laws: The need for financial incentives to achieve corrective justice", ACCC Competition & Consumer Protection Law Enforcement Conference, Sydney 4-5 July 2002, and will be discussed in the cartel hypothetical later today.

The role of the ACCC in relation to Part IV private damages actions is outlined in Samuel, "Key Developments in Antitrust Regulation in Australia" (2006) available at <http://www.accc.gov.au/content/index.phtml/itemId/733030>. That paper highlights the constraints that apply to the ACCC (eg inability to share information acquired by reliance on s 155; it may not always be in the public interest for the ACCC to press for findings of facts that would assist private litigation). The paper states that private enforcement is

important but stops well short of indicating any interest of the ACCC in overcoming the obstacles that now impede private actions for breaches of Part IV. In stance and tone, this paper contrasts sharply with the importance attached to private enforcement in the USA and with the recent active interest and leadership taken by the EC. See eg:

- Antitrust Modernization Commission, *Report and Recommendations* (April 2007) Part III and Separate Statement of Commissioner Carlton at 398;
- ABA, *Indirect Purchaser Litigation Handbook* (2007);
- EC, Green Paper, *Damages for Breach of the EC Antitrust Rules* (2005);
- EC, *Commission Staff Working Paper: Annex to the Green Paper* (2005);
- European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI));
- Bulst, “Private Antitrust Enforcement at a Roundabout” (2006) 7 European Business Organization LR 725;
- Sweeney, “The Role of Damages in Regulating Horizontal Price Fixing: Comparing the Situation in the United States, Europe and Australia” (2006) 30 MULR 837.

## 2. Ex post evaluation to improve performance

Kovacic, “Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities” (2006) 31 *The Journal of Corporation Law* 503 gives a comprehensive and luminous account of ex post evaluations of the outcomes of actions taken by competition authorities and of the processes used. This paper discusses:

- the importance of ex post evaluations;
- past experience of ex post evaluations of competition authorities, including:
  - the FTC study in 1995 of divestiture;
  - the FTC study in the late 1970s and early 1980s of vertical restraints cases;
  - the National Audit Office review of OFT in 2005; and
  - the EC Merger Remedies Study (Oct 2005).
- why competition authorities should not rely on outside agencies or other outsiders to do most of the evaluation;
- methodology; and
- responses to predictable objections (workload, cost, undermining credibility of organization).

There have been various ex post evaluations of the work of the ACCC. One instructive example, as commented on by Mark, is the Compliance and Enforcement Project undertaken by Christine Parker and others with the assistance of the ACCC.

There is more usefully to be done. One obvious area is merger remedies. The EC Merger Remedies Study (Oct 2005) available at [http://europa.eu.int/comm/competition/mergers/others/remedies\\_study.pdf](http://europa.eu.int/comm/competition/mergers/others/remedies_study.pdf) indicates both

the usefulness of such a study and feasible methodologies. Is the ACCC planning a similar study?

### 3. Future amendments to the TPA

Mark has commented on the Government's desire to move quickly on various future reforms to the TPA including.

- section 46 – misuse of market power;
- unconscionable conduct;
- criminal sanctions for cartel activity;
- Franchising Code of Conduct.

Query the status of the cartel criminalisation legislation foreshadowed by the Government in 2003 and later trumpeted in the Treasurer's press release of 2 February 2005. The Treasury papers for the 2006 Commonwealth Budget said that the criminal cartel provisions were to be introduced to Parliament in the 2006 winter sittings (Budget Paper No 2 Part 2- Expense Measures – Treasury (2006)) but that did not occur. The Government has not released an exposure draft Bill. It is unclear whether or not an exposure draft Bill will be made available for comment by all interested parties before the legislation is introduced into Parliament. It is unclear whether the legislation will be introduced before the forthcoming federal election. This delay undermines the credibility of statements by the Government and the ACCC that price fixers will soon be going to jail. For a critique of some aspects of the Government's half-baked proposals see Fisse, "The Proposed Australian Cartel Offence: The Problematic and Unnecessary Element of Dishonesty" available at <http://www.brentfisse.com>.

Another example of legislative vaporware is the prolonged non-emergence of legislation to implement the recommendations of the Ergas Committee on Intellectual Property Legislation and the Competition Principles Agreement (September 2000). The Government's Response in August 2001 heralded legislation to substantially amend section 51(3) of the TPA. Has the Government given up on this legislation? Has it retreated from the area by reason of the criticisms of the Ergas Committee report and the Government's Response made in Eagles & Longdin, "Competition in Information and Computer Technology Markets: Intellectual Property Licensing and Section 51(3) of the Trade Practices Act" (2003) 3 QUTLJ 31? Contrast the importance attached to the relationship between intellectual property and competition law in the USA and Europe; see eg DOJ/FTC, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (April 2007); ABA, *Intellectual Property and Antitrust Handbook* (2007).