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*It's been a pretty big year - interesting merger decisions (and processes), a few quirks in the consumer protection space, the ongoing focus on price fixing, a huge High Court decision on access, and some new faces. A recurring theme in 2012 has been the increased media profile of ACCC Chairman, Rod "Hear me roar" Sims - he seems ready to slay any number of dragons (particularly those bearing the flag of either of the two main supermarket chains).*

# the state of COMPETITION

## "Even dragons have their ending"

### Looking back over 2012

2012 was the year of the dragon, predicted to be a wild year favouring boldness and adventure; a good year for launching new ideas and undertakings. So with our new venture at *The State of Competition* firmly established, it's time for look back at how 2012 unfolded for competition law in Australia.

## "Once more unto the breach, dear friends" – stiffen the sinews, summon up the blood; the merger game's afoot

The year started with the loss in the *Metcash* merger appeal weighing heavily on the ACCC. Given some of the criticisms by the Full Court concerning the manner in which the ACCC sought to prove its case, it seemed like the ACCC faced some serious obstacles in bringing future merger cases to court (something we covered in Issue 3 of TSoC):

*The market was not identified by reference to the dynamics and constraints really at work, but by reference to the need to supply a foundation for the hypothesis which the ACCC wished to offer... - Buchanan J in the Metcash Full Court decision*

The ACCC Chairman Rod Sims responded with a new year's resolution that the ACCC "will not be taking on theoretical points, we will be making proper, commercial assessments," (AFR, 16 January 2012).

But, as we discussed in Issue 6 of TSoC, the price of this has been a significant number of merger matters in 2012 that did not raise competition concerns but still took 12+ weeks to assess. The ACCC has since gone on the front foot in the face of criticisms from the business community that merger reviews are taking too long. The ACCC Chairman has challenged businesses to be more active in providing upfront information if they want speedy reviews and to accept the fact that in some situations assessing potential competition impacts will take time.

*I am still surprised at the number of companies that have a merger that results in three players going to two and think they can give us very scant information because they don't think we will be interested - Rod Sims told the Australian on 4 December 2012*

As the year progressed, it became clear that new battlelines were being drawn, and by year end there was a clear 'line in the sand' in relation to mergers in concentrated markets and in particular incremental acquisitions by the two major supermarket chains across

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*The Year of the Dragon had us fired up about plenty of issues*

their grocery, hardware, fuel and liquor operations (including greenfield store developments).

“The reality is that every time Woolies boss Grant O’Brien or Coles boss Ian McLeod scratches his backside, the ACCC will be watching,” John Durie (whose column has become essential reading for competition lawyers) wrote in *The Australian* on 8 December.

This new ‘line in the sand’ saw the ACCC officially oppose three mergers this year (with some others being withdrawn or modified): Sonic’s proposed pathology acquisition in Queensland, Seven Network’s potential bid for Foxtel and Woolworths’ deal to buy the G Gay & Co hardware stores in Ballarat.

#### Seven / Foxtel

Sports rights and TV have raised some interesting issues in the past, as discussed in Issue 7 of TSoC. In the Seven Network matter, the ACCC looked at separate free-to-air and pay TV markets and concluded that there would be a substantial lessening of competition in the market for free-to-air television services because the deal would enhance Seven’s ability to acquire the rights to premium sports.

*The ACCC is concerned that the proposed acquisition would put Seven Network in a position of advantage over other free to air networks in relation to joint bids and other commercial arrangements with FOX SPORTS for the acquisition of sports rights... Access to premium sporting content is vital to the ability of free to air networks to compete strongly. The ACCC considers that the proposed acquisition would significantly reduce the ability of Seven Network’s competitors to acquire such content.*

#### Sonic / Healthscope

The ACCC’s grounds for blocking Sonic’s proposed acquisition of Healthscope in Queensland were that it would result in the removal of a substantial competitive constraint on the two major pathology providers in that state (Sonic and Primary). Further, “If Healthscope were removed as a competitive constraint, it is not likely to be replaced in a timely and sufficient way by the new entry or expansion of other pathology providers in Queensland”.

#### Woolworths / G Gay & Co

The twist in the Ballarat matter was Woolworths’ lack of any current retail presence in hardware in the city in question. However, the ACCC concluded that, as Woolworths already had plans to open its own Masters hardware store there in 2013: “the proposed acquisition is likely to result in a substantial lessening of competition through the removal of what will be one of Woolworths’ two closest competitors in the Ballarat area” (the other remaining key competitors being the Wesfarmers-owned Bunnings).

*The ACCC’s investigation indicated that the remaining suppliers of hardware and home improvement products in the Ballarat area were either significantly smaller than the G Gay & Co stores or had a limited product offering and marketing presence, such that they would be unlikely to compete effectively against the Woolworths’ Masters store and Bunnings. The ACCC further concluded that the threat of new entry into the Ballarat area would be unlikely to replace the competitive constraint on the Masters store and Bunnings offered by the G Gay & Co stores.*



#### Where have all the PCAs gone?

As an aside on process, no Public Competition Assessments (PCAs) have been published yet for the Ballarat decision (announced 4 October) or the Seven Network and Sonic decisions (both announced 11 October). As at the time of writing, there have been only two PCAs released this year, both for matters where the ACCC did not end up opposing the transaction: Foxtel’s acquisition of Austar (announced 10 April with the PCA published 14 June) and AGL’s acquisition of the remaining interest in Loy Yang Power (announced 24 May with the PCA published 6 July).

One has to go back to 2003 for a year with so few PCAs, bearing in mind that the first ever PCA was released in October 2003 (with a total of three being published that year). Every year since, there’s been at least 10 PCAs published.

#### The supermarket wars continue

Still on process, in June, the ACCC proposed a new voluntary protocol to the two major supermarket chains that would see expedited reviews for single-site acquisitions in return for advance notification of all acquisitions planned and more detailed upfront information. That was the carrot; the stick remains the threat of lengthy processes and the possibility of the ACCC seeking injunctions or divestment orders from the court.

The ACCC announced in December that Coles had agreed to an initial six month trial of this new process for supermarket acquisitions (but not liquor or hardware) while Woolworths had declined to participate in this new process at all on the basis that any process ought to apply across the board to all industry participants (for example, Aldi and Costco).

*It doesn't matter if we know upfront or once they've done it – we'll still look at them and if we judge that there are concerns we can take steps to order a divestment through the courts. It's messy and it's slower, but we'll do it - Rod Sims in The Weekend Australian, 8-9 December 2012*

Maybe the prospect of the ACCC seeking divestment orders

not such a bad thing. In Issue 6 of TSoC we talked about the ACCC's role in mergers as being that of an enforcer rather than a regulator. We were reminded of that distinction listening to Professor Stephen Calkins at the third annual Baxt Lecture held at the Melbourne Law School in October this year. Professor Calkins talked about the "licence and discipline that comes from having courts part of the conversation" in the context of being "appropriately aggressive" on merger matters.

No doubt there'll be lots more to write about mergers in 2013.

## And now for something completely different... Consumer protection in 2012

*If it's not right, use your rights. Repair, replace, refund*

That's the slogan from this year's awareness campaign by the ACCC relating to national consumer guarantees. According to the ACCC Chairman in an interview with ABC radio in November, the ACCC has received nearly 17,000 complaints related to consumer guarantees this year.

The ACCC has undertaken a number of investigations this year into large manufacturers and retailers for alleged misrepresentations of consumer guarantee rights in breach of the Australian Consumer Law (ACL) which came into effect at the beginning of 2011.

This has led to the ACCC recently taking action against Hewlett Packard Australia for allegedly misleading consumers and retailers as to its non-excludable liability under the ACL, and against 11 Harvey Norman franchisees across the country for allegedly misrepresenting consumer rights under the ACL (for example, allegedly telling consumers that problems with a product should be taken up with the manufacturer and not the



### **Bouquets to all businesses & lawyers who have tackled Regulation 90 this year – may the force be with you**

retailer, because a manufacturer's warranty applied).

One of the complicated issues in this area is the interaction between the non-excludable statutory rights consumers enjoy against both retailers and manufacturers, and voluntary warranties against defects given by manufacturers (which are now subject to prescriptive requirements regarding disclosure on product packaging under section 102 of the ACL).

Section 102 of the ACL effectively requires any material that "evidences" a warranty against defects (including packaging and labels) to comply with the requirements of Regulation 90. Regulation 90 came into effect in January this year and requires specific information to be included about the scope of the warranty, the procedure for claiming under the warranty etc as well as a block of text about consumers' rights under the ACL that must be included verbatim (even when it's wrong).

The ACCC offered a transitional grace period until September this year for stock manufactured and packaged prior to 1 November 2011. However, some practical compliance issues remain, and the Law Council has been active in raising these with the Government for some time now.

While there is no disagreement that it is a good thing to stamp out practices such as trying to make consumers pay for warranty protections they are already entitled to under law, there

is concern that difficulties in complying with Regulation 90 may make it too hard for manufacturers to offer extra rights at no extra cost.

The Law Council's Competition and Consumer Committee provided some examples in a [submission to the Government](#) in September this year:

*White goods suppliers in Australia have recently been competing aggressively to offer ever increasing manufacturers' warranties for their products. This has resulted in standard manufacturers' warranties increasing from one or two years to, at times, up to 10 years. This is clearly beneficial for consumers. However, suppliers only compete in this way if they can advertise and promote their warranties. If s102(2)(a) were strictly enforced in its current terms, the point of sale stickers on all of these products, the product brochures, the product packaging, the manuals and the warranty cards should all include all of the Regulation 90 information. Further... if any of these documents do not comply with s102(2)(a), s102(2)(b) may operate to render any advertising or other promotion of these warranties illegal.*

*The Committee is aware of a large and reputable stationery manufacturer that has recently decided to remove its 'satisfaction guarantee' logo from products sold in Australia rather than comply with Regulation 90.*

Throughout the year the ACCC has flagged the ongoing challenge of ensuring consumers enjoy the same protections in the digital and online economy as they do elsewhere. The ACCC has drawn attention to two cases it regards as significant.

In April the ACCC won its appeal over search engine practices operated by Google. In his speech to the 2012 Competition Law Conference in May, the ACCC Chairman stated that this case has:

*considerable implications for the way people market themselves online, specifically the use of sponsored links and the way in which search results direct consumers to specific sites... From the very start of this matter the Commission has held the view that this case is important in clarifying the law about advertising practices of search engine providers in the internet age.*

The other case highlighted by the ACCC is the Apple iPad case. In June Apple was fined \$2.25m for misleading advertising in marketing its new "iPad with Wi-Fi + 4G" in Australia (on the basis that it could not actually connect to any 4G networks operating in Australia). The judge (Justice Bromberg) noted the suggestion that "global uniformity was given a greater priority than the need to ensure compliance with the ACL" and warned that "Those who design global campaigns, and those in Australia who adopt them, need to be attuned to the understandings and perceptions of Australian consumers".

And in the latest high profile consumer matter, the ACCC instituted proceedings in December against Dulux alleging false, misleading or deceptive representations regarding the performance of its InfraCOOL and Weathershield Heat Reflect paints. The ACCC alleges these representations were made in a wide variety of media, including via Facebook.

Enforcement of the ACL remains an ongoing focus for the ACCC with over \$10m in fines in this area so far this year. In Issue 4 we discussed the magnitude of ACL penalties since their recent introduction, and reflected on the resulting impact on compliance and enforcement incentives for business and the ACCC respectively.

## The ACCC starts making movies...

*Scene 33: "Martin walks through the busy office carrying Cartwall files. As he walks, he looks across the office. People glance up at him. He suspects them all. He trusts no one. A man alone."*

August saw the ACCC release its cartel video *The Marker*, telling the story of Martin the Price Fixer. The video had its genesis in research into cartel activity by Dr Caron Beaton-Wells at Melbourne Law School, which revealed a widespread lack of awareness amongst business people that cartel conduct is a criminal offence.

In Martin's case, the price fixing was pretty obvious but in Issue 8 of TSoC we covered some price fixing scenarios involving parties who would not usually be considered competitors. In particular, we looked at two ACCC price fixing cases which went to trial during this year with decisions pending.

In April the ACCC's long-standing case against ANZ in relation to the payment of rebates to mortgage brokers finally came to trial. In this case, the ACCC alleges that ANZ sought to reach an agreement with a broker (Mortgage Refunds) to



*Even by TSoC standards, this sort of enthusiasm for competition law is hardcore. But, hey, all power to the students of Yeshiva College, Balaclava (Vic)*

limit such payments to customers as a condition of ongoing relations with the bank. ANZ has argued that it does not compete with brokers who deliver clients to the bank and collect their rebate, broking services being a 'vertical channel' and not in the same market as the financial services offered by the bank.

The ACCC case against Flight Centre was heard in October and centred on alleged attempts to induce various airlines to reduce online discounting. Flight Centre has publicly contended that the ACCC has misunderstood its business model as an agent for, rather than a competitor to, the airlines.

Meanwhile the total penalties are still mounting in the ACCC's biggest ever cartel investigation, the air cargo matter. The latest airlines to settle are Cathay Pacific and Singapore Airlines, now bringing the total penalties to \$91m across the 12 airlines who have settled as of December, with the trial against Air New Zealand and Thai Airways continuing.

## Infrastructure & access

The High Court decision in the Fortescue Part IIIA matter came out in September. The High Court sent the matter back to the Tribunal (effectively telling it to go back and do it properly).

The High Court majority said:

*The conclusions reached by the Tribunal ... were reached on evidence and material far beyond the evidence and material to which it should have had regard in conducting a review of the kind required by the Act.*

Meanwhile the Productivity Commission has just started its long awaited review of Part IIIA with the release of an issues paper in November. The Productivity Commission review encompasses a review of clause 6 of the Competition Principles Agreement and the Competition Infrastructure Reform Agreement (CIRA).

The CIRA was agreed in February 2006 as part of the COAG National Reform Agenda which was intended "to reduce regulatory uncertainty and compliance costs for owners, users and investors in significant infrastructure and to support the efficient use of national infrastructure". It followed the 2005 Fisher Report established "to identify any bottlenecks of a physical or regulatory kind that may impede the full realisation of Australia's export opportunities" in response to dramatic press coverage of coal ships queued off the regulated port at Dalrymple Bay in Queensland.

Well the queues have gone, but this is largely due to reduced demand and changes in global conditions:

*Three years ago, there were queues of more than 300 ships waiting off the nation's biggest ports to load up with coal and iron ore. Yesterday, there were about 90... While the drop in queue numbers in some areas is due to greater efficiencies within the supply chain, the situation is at its most acute in Queensland, notably the port of Dalrymple Bay, where there were eight ships waiting out at sea to come into port yesterday. All of them were due to be loaded up last night and today before heading back out to sea again; three years ago, the monthly average number of ships waiting to come into port at Dalrymple Bay was just below 68, and at times the queues reached 80 - the Australian, 19 September 2012*

This highlights one of the problems for infrastructure, namely getting the 'right' level of investment to handle peaks and troughs in demand.

In Issue 5 of TSoC, we touched on the problem of getting the balance right in electricity wholesale pricing – ensuring there is just enough money for all generating plant needed to meet reliability standards (essentially an acceptable level of spare capacity to cover unexpected plant failure or demand spikes, heatwaves etc) but not necessarily any more than this.

The December COAG meeting endorsed a package of further reforms in electricity aimed at curbing rising electricity retail prices. These include reviewing reliability standards for transmission, seen as the cause of over-investment in poles and wires (or 'gold-plating'). The COAG communiqué states: "These measures will help ease electricity price pressures, while maintaining the high level of reliability of supply which Australians have come to expect."

That sounds a bit like telling consumers they can have their cake and eat it too, but let's see how it all develops.

## A changing of the guard

In 2012 there was one new appointment to the ACCC (Deputy Chair Delia Rickard, whose term began in June). In 2013 the current term of four other Commissioners is due to expire (Sarah Court in April, Deputy Chair Michael Schaper and Ed Willett in May, and Joe Dimasi in November).

The incoming Commissioners will certainly face an active work book.

*We've got about 10-15 cartel investigations, 10-15 misuse of market power investigations, about 10-15 agreements that lessen competition investigations* - Rod Sims, quoted in the *Australian*, 4 December 2012

*... the number of times the ACCC takes people to court for competition cases is about to increase quite significantly* - Rod Sims, quoted in the *AFR*, 4 December 2012

Whilst investigations are usually confidential until the ACCC decides whether or not to institute proceedings (and for good reason too), the ACCC has flagged some areas of investigation in the retailing sector. These focus on issues relating to supermarket suppliers, information sharing in fuel retailing and the impact of shopper-dockets.

We covered some of the challenging competition issues in retailing in our first two issues of TSoC.

In Issue 7, we mentioned that economic evidence might be on the nose at the moment but is nonetheless very important. We held up Justice Allsop's approach in the *Liquorland* case as an example of how to use economic evidence well. It may bode well for expert economists that Allsop will be taking up the position of Chief Justice of the Federal Court (to replace Patrick Keane who will move to the High Court in March 2013 following the retirement of Dyson Heydon).

**“Conversation should be pleasant without scurrility, witty without affectation, free without indecency, learned without conceitedness, novel without falsehood” – Shakespeare**

In April this year former Commissioner Stephen King conducted a wide ranging and very entertaining interview with former Chairman Graeme Samuel in *The Conversation*.

Graeme Samuel made the point that political debate has become highly populist and less principled, less focused on fundamental philosophy and fundamental attitudes about what's in the public interest.

In response to Stephen King's question as to whether this leaves a depressing story in which we are doomed to have silly debates that then become part of legislation (you could almost hear him coughing “Birdsville” under his breath), Graeme Samuel responded:

*you've left out an incredibly vocal group, which is those that write for The Conversation, or those that contribute to Business Spectator, or contribute to Global Mail, or contribute to the daily newspapers in the opinion pages. In other words, individuals who have credibility, have some knowledge, and are prepared to put pen to paper and to create the debate, create the information.*

That struck a chord with us and nicely sums up why we started TSoC this year. As 2012 draws to a close, we hope our readers have found some food for thought amongst the varied topics we've covered. And, to all those other commentators whose writings and websites we regularly follow, we'd like to say thanks for doing your part to lift the standard of debate. Have a happy summer holiday and we'll see you all in the new year.

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*In the meantime, Happy New Year!  
We'll see you again in February*