It is a great pleasure to join the Women Chiefs of Enterprises International and to provide an update on developments in competition and consumer protection.

I want to preface my update to you with a short commentary on the dramatic changes and the new centrality that the market has taken place in both developed and developing economies over the past 25 years.

There’s a new and important governmental emphasis: on getting the competitive settings right to enable the market to work; having the market deliver products and in particular services that in the past were very much in the domain of public provision; and on further enabling trade by reducing nation-state protectionist barriers of all kinds. All of these changes are in the interests of a more productive efficient economy – and as some of the statistics produced for the Productivity Commission Review of National Competition Policy attest, these strategies have been very important in terms of outcomes for our standards of living.

The acceleration of this manner of organising our societies was much enhanced by a combination of events; the liberalisation of trade accompanied by the global deregulation of financial markets was coupled with two key technological developments - the new instantaneous communications technologies and the phenomenal growth and availability of computing power. This left capital truly free to seek the highest global return, and that changed the world. Markets became that much more important and thus the behaviour of market participants became more significant.

And that largely explains the significant attention paid by governments to competition policy and enforcement.

Not surprisingly, a great deal has been happening in relation to the Trade Practices Act 1974, on the competition side, so I'm very pleased to be giving you this update.

The changes occurring at the moment are primarily driven by the legislative implementation of the recommendations arising from the Review of the Act by Sir Daryl Dawson, as well as a few important changes made by the ACCC itself to some of our policies and practices namely the informal merger guidelines, our cartel priority and changes to the immunity policy.
Some of these major changes I will only touch briefly upon – such as the introduction of the new collective bargaining regime and third-line forcing – but I'll spend a bit more time on the establishment of a formal merger clearance procedure, the changes to pecuniary penalties for anti-competitive conduct and the introduction of a cartel offence.

**Dawson Changes**

The change to third-line forcing recommended by Dawson - that third-line forcing be subject to a competition test rather than being a per se prohibition - will not be implemented. A third-line force is where, for example, a company says I'll sell you this if you buy this from this other company or if you buy this I'll give you a discount on this other company’s product or service. Much of this conduct is actually benign – shopper dockets being a prime example; but it will now still require notification to the ACCC because not all of this conduct has been benign, and small business and consumers were very worried about potential conduct which was not benign being directed at them.

**Collective Bargaining**

As you know, there are new provisions for collective bargaining by small business being introduced into the Act – and the businesses do have to be small, having relevant transactions with the other business of $3 million or less - per participant - per year.

Collective bargaining on terms and conditions (including price) normally raises concerns under the competition provisions of the Trade Practices Act. At the moment, businesses can seek *authorisation* for collective bargaining arrangements – which means that we conduct a full analysis of the public benefits and detriments and the benefits have to outweigh detriments for us to let the anti-competitive conduct through. A successful authorisation application provides businesses with legal protection for the proposed arrangements.

The new provisions will enable the group of businesses to obtain protection for collective bargaining with their target company on the basis of a *notification* to the Commission. This more streamlined process means that small businesses or their representatives will be able to notify such conduct which is a simpler process than seeking authorisation – but we will still be examining their notifications for the balance of benefits and detriments. In a notification, immunity starts 14 days (although we expect this to be 28 days for the first 12 months) after a valid notice is lodged. The ACCC may revoke the notification - either during this period or at any stage afterwards - where it considers that the proposed arrangements are not in the public interest.

Of course, even if such arrangements are notified, there is no requirement on the target to negotiate with the collective group. It’s voluntary. We think there are often benefits of collective bargaining arrangements that allow small businesses to have more input to their contracts and in many cases allowing savings in the time and costs of negotiations. The notification of collective
boycotts – where the collective small business group can refuse to deal with a target where negotiations break down - will raise the stakes and the ACCC will continue to examine such proposals carefully.

**Formal Mergers Clearance Procedure**

The legislation in the Parliament at the moment introduces a formal merger clearance process – up to now, Australia has only had the informal process.

I should note immediately that the informal process will remain in place and we are very committed to retaining it – I'll outline a bit of the detail of some recent changes to our informal merger process in a moment.

Not only does the new legislation introduce a formal process but it also provides for a merger application directly to the Australian Competition Tribunal – but only in relation to a merger authorisation; as noted above, an authorisation is a fully public process of analysing whether the public benefits of a proposal outweigh the public detriments according to a test provided by the *Trade Practices Act 1974*.

The key elements of the formal merger process are a 40-day timeline on the making of a decision and the ability to appeal the ACCC’s decision to the Australian Competition Tribunal. At the moment, either we approve a merger or, if the parties intend to proceed despite our rejection of a merger proposal, we proceed to an injunction in the Federal Court.

The legislation requires, as one might predict, that where the Commission is not convinced that there is not a substantial lessening of competition within the 40-day timeline, that the Commission essentially has refused; specifically, the legislation states that the Commission “cannot grant the clearance unless it is satisfied that the acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition in a market.” As is the case at the moment, under either the formal or informal process, structural undertakings can be proposed by either the Commission or one or both parties that could enable a merger which would otherwise be a substantial lessening of competition to proceed. So I think companies will be pleased that the informal process will continue to be available and they will shortly have a choice whether to proceed formally or informally. It will be interesting to see how companies choose to proceed, depending on the type of merger they are contemplating – it’s really a new ballgame for all of us.

**Pecuniary Penalties**

Probably one of the most interesting changes is to the penalties regime. Under s.76 of the Act, a business may be faced, currently, with pecuniary penalties of $10 million and $500,000 for executives.

These may seem high, but it’s not as high as it will shortly be. When the law passes, companies could face penalties of up to $10 million, 3 times the value of the benefit of the anti-competitive conduct, or where the value cannot be determined, 10 per cent of the annual turnover of the body corporate and all its related bodies – whichever is greater.
One reason for the increase in penalties is that it is now recognised that a company can potentially gain tens of millions of dollars by participating in anti-competitive conduct, and this puts in an appropriately significant element of deterrence. I should note that the penalties are not simply for cartel conduct, they apply to the whole of part IV - retail price maintenance and so on. Also, the penalties have no bearing on possible third party actions, though firms operating in the Australian jurisdiction are not facing triple damages as companies do potentially in the US.

**Criminal Cartel Offence**
The second major change, after the increase in pecuniary penalties, is the introduction of the criminal offence for cartel behaviour. This is for the executives that are found to be responsible for cartel conduct – not other conduct under the anti-competitive provisions of the Act. Executives still also face the $500,000 non-indemnifiable penalty. In addition, they can be banned from managing companies under the Dawson changes. The legislation is not yet tabled for the criminalised cartel offence, but the point is that executives will be facing a term in jail. The Treasurer’s announcement of the offence stated that:

“The proposed criminal cartel offence will prohibit a person from making or giving effect to a contract, arrangement or understanding between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the contract, arrangement or understanding is made or given effect to with the intention of dishonestly obtaining a gain from customers who fall victim to the cartel.”

Our overseas colleagues tell us that a possible stint in jail clarifies the mind marvellously well. The Deputy Assistant Attorney General of the US Department of Justice Anti-trust Division, told the Commission staff that in his 25 years prosecuting cartels he had listened to many accused say they were happy to agree to much higher fines to avoid imprisonment; but he had never once heard anyone offer to spend extra time in jail in exchange for a lower fine recommendation.

**Changes to Informal Merger Guideline**

I noted earlier the changes to mergers processes arising from the Dawson Review recommendations. We have also introduced new informal merger guidelines as many of you will be aware and over 30 complex matters have been assessed under that new guideline.

The key features of the new regime are an agreed set of timelines with an expected decision date, the possible issuing on our website of a Statement of Issues after market inquiries, and the posting on the website of a Public Competition Assessment upon the finalisation of more complex matters.
The statement of issues occurs when we identify potential competition problems with a proposed merger. By posting this statement, interested parties have an opportunity to respond to us directly on these issues – and sometimes, our concerns are resolved. Sometimes, they are not, but following this internationally-recognised best practice contributes substantially to the transparency of our mergers decisions, as does the publishing of the competition assessment. The latter are basically our reasons for decision and analysis of important mergers that have either been refused or allowed through, so that the market is much more clearly informed of what we’re doing and why.

In 2004-5, the ACCC looked at almost 200 mergers, and of these, 2 were rejected. Of the 30 or so complex merger proposals, 5 statements of issues were published and about twenty public competition assessments were released.

Not everyone is comfortable with the higher levels of public transparency, but there is little doubt these practices keep businesses and the Australian community more generally far better informed.

**Cartels and Immunity**

Our work on international cartels – that is, global cartels that have affected Australia - suggests that there is no lack of conduct of this kind in markets. That is not surprising given the potential rewards for such conduct, and of course that is one reason why the penalties are being lifted and jail sentences introduced for executives.

Apart from the changes to our immunity policy to assist in the discovery of cartels, and I’ll come to that in a moment, we are also giving very strong messages about adequate compliance programs in organisations.

I think in relation to our Act, the quality of your compliance structures and training are absolutely crucial since they affect so many people’s behaviour within the firm and, in particular, your everyday business relationships with other firms. A company’s commitment to its compliance activities is quite readily apparent when one examines its program. My view is that you can tell when commitment comes from the top and you can see how the compliance activities are made into a bottom-line enhancing aspect of the firm’s day-to-day activities.

We’re also saying to companies that if you don’t have a compliance program before we catch the conduct, you will certainly will after.

One recent important change has bee made to our compliance program oversight when we take either a court-enforceable undertaking (an 87B undertaking under our Act) or get a court order in relation to the establishment or improvement in a compliance program. We have realised that, in relation to auditing the compliance programs, the purposes of a company’s audit and
an audit for the ACCC can really be quite different although they also overlap. The company requires detailed information on where, when and how the Trade Practices Act has been or might be breached, how much risk there is of this happening, and how the trade practices compliance program processes can be improved to minimise those risks. It is our view – and this expressed in the new templates for compliance programs on the ACCC website - that in order for full information be supplied by an auditor/reviewer to the company in a candid manner, it is important that the company not be forced to self incriminate by requiring this sensitive information to be distributed outside the organisation. Therefore the Company Compliance Review Report is to remain confidential to the company and will not be required by the ACCC as part of the reporting process.

What the ACCC requires is an independent report which can provide us with information and assurances that the compliance program has been implemented as undertaken or ordered. We also need to know that that it is working to minimise the risk of future breaches of the Trade Practices Act by identifying those risk areas and recommending compliance program changes to accommodate those risks. Clearly where changes are recommended by a reviewer the next report ought to test the adjustments to the compliance program to ensure that those recommendations have been taken into account.

For many of you, who carry responsibility for your company’s compliance programs, the immunity policy of the ACCC and your compliance activities may be inextricably linked.

*Immunity Policy*
We have had a cartels leniency policy for 2 years which is now replaced with the new immunity policy. The review of the leniency policy drew on our experience and that of our overseas counterparts.

The immunity policy is only for cartel conduct – i.e. price fixing, market sharing including bid rigging, customer sharing and market allocation, agreements not to compete with each other or to limit or restrict competition between firms such as production or sales quotas. I should emphasise that the co-operation policy, which has been around for a long time, still exists as well for other than cartel conduct.

In the transformation of the leniency policy to the immunity policy, three crucial changes were made. There is no longer a Part A or Part B leniency depending on whether we have knowledge of the cartel. Now, the first applicant gets immunity (up to the point where our legal advice is that we have enough evidence to institute proceedings). The marker system is crucial to a serious ‘first-in’ policy; a marker enables a potential applicant to secure their ‘place’ in the queue. So, for example, a company would have their legal firm call us to indicate something like “we have a possible cartel in ‘X’ market and want to place a marker down”. The ACCC can grant that for a period of time while the company – still unknown to us – completes its internal investigations.
The default position in relation to a corporation qualifying for immunity is that all former and current employees are also covered. If it turns out that a company cannot comply with the immunity requirements – which includes full co-operation before and in court and that they were not an instigator of the cartel – then the next company in line qualifies for full immunity. So, again timeliness is crucial. The whole point of this policy, and its equivalents overseas, is to break the secret deal that cartel participants have – to make them wary and suspicious of each other because the benefit to the first company that cracks their cartel is substantial.

You can see why effective compliance programs are so critical given the availability of immunity of this kind. Second will still be better than being third and so on, but first makes an enormous difference. About half of the current 30 or so cartels under investigation at the moment have come to our attention through an immunity applicant. When the issue becomes whether the executive of a firm possibly goes to jail or not, being first looms rather larger and I expect we may see an even greater proportion of our investigations arising from self-reported conduct when the cartel offence is in place.

**Developments in Consumer Protection**

Turning now to consumer protection, there are some exciting developments globally. I’ll touch on only two – scams and economics for the demand side.

All of you will be quite familiar with the burgeoning of scams, particularly by email, but also by letter and increasingly by phone. The globalisation of consumer scams raises issues particularly with regard to our international obligations in cross-border fraud, and other countries’ enforcement agencies obligations to us.

You may not have been aware, but March is global fraud prevention month!

The International Consumer Protection Enforcement Network, to which I’m the Australian delegate, has declared March as the month that we really profile and hunt down scams. Part of the months includes the Global Sweep Day where some 50 – 60 enforcement and other agencies around the world get on the web, on the same day, and surf it in their respective jurisdictions looking for scams.

This list is the set of ‘leading’ scams that is currently around.

- Pyramid schemes
- Lotteries
- Amazing offer scams
- Investment scams
- Door-to-door
- Medical scams
- Internet scams – including phishing
- Self-employment scams
The Australian Communications and Media Authority, which has carriage of the spam laws, advises me that a great deal of the spamming that goes on – and most spams are also scams - is organised criminal activity. That is how lucrative this business is. And just to point to how global this activity is, here is list of top specific scams from the UK consumer protection agency – its versions of the same types of scams.

- Canadian lottery
- Spanish El Gordo lottery
- Elderly victims
- Family history scam
- Nigerian letters
- Premium rate phone numbers
- Pyramid schemes

I could do much the same comparison with Canada and European countries, and probably the US and still get the same kinds of results.

One of the scams that I’m sure you have heard about is “phishing” – where an email is sent to a consumer with a live link purporting to be from their financial institution and urging them to click through to the website. The website is, of course, a false one, and consumers are asked to provide information which enables the scamster to obtain access to their bank accounts. This type of activity is getting very sophisticated – let me read you an email I got a couple of months ago, and you may have seen similar ones as well – you’ll see why consumers are getting caught.

Dear HSBC Bank Australia customer!
Please read this important message about security. We are working very hard to protect our customers against fraud. Your account has been randomly chosen for verification. This is requested to us to verify that you are the real owner of this account. All you need to do is to click on the link below. You will see a verification page. Please complete all fields that you will se and submit the form. You will be redirected to HSBC Bank Australia home page after verification. Please note that if you don’t verify your ownership of account in 24 hours we will block it to protect your money. Thank you.

The ACCC has gathered together essentially all of the regulators in Australia and New Zealand with responsibilities for consumer protection. This is a list of them.

Australian Government
Attorney General’s Department
Australian Bureau of Statistics
Australian Communications and Media Authority
Australian Competition & Consumer Commission (Chair)
Australian Institute of Criminology
Australian Securities & Investment Commission
Australian Federal Police (represented by the Australian High Tech Crime Centre)
Department of Communications, Information Technology & the Arts

New Zealand Government
NZ Commerce Commission
Ministry of Consumer Affairs

State and Territory Governments
Australian Capital Territory – Office of Fair Trading
Consumer Affairs Victoria
New South Wales – Office of Fair Trading
Northern Territory – Department of Justice
Queensland – Department of Tourism, Fair Trading and Wine Industry Development
South Australia – Office of Consumer & Business Affairs
Tasmania – Office of Consumer Affairs & Fair Trading
Western Australia – Department of Consumer & Employment Protection

The purpose of the group is to determine if we can agree on a truly preventative strategy – a single message each year from every single one of us to consumers to improve the impact of our messages for consumers and stop them responding to these types of scams. This will be linked with some real prevention, i.e. stopping a greater proportion of the scam pitch getting to consumers or stopping their monies going to the scamsters and often out of the country.

We are not co-operating only within Australia to try and deal with the increased vigour given to scamsters by these new technologies as I’ve mentioned; we also have to co-operate between jurisdictions to try and shut them down and bring the perpetrators to court. That is one of the reasons that the global consumer protection enforcement network was created. The cross-border co-operation requirements are raising some issues for our Act – including the ability to share information (which is also an issue for our competition work especially in relation to cartels), and our ability to seek refunds for our own as well as overseas consumers.

Finally, an area that I have taken a particular interest in since joining the Commission has been the issue of the interface of competition and consumer protection law – and particularly in those markets that are newly deregulated. With our society’s reliance on the market to deliver benefits for consumers in a range of newly-competitive areas – such as telecommunications, financial services and energy - a number of questions also arise about not just consumer protection – narrowly speaking – but about consumer empowerment. While substantial benefits have been delivered from these deregulations, a lot of risk is also shifting to the consumer in terms of their decision making. For example, choosing a superannuation plan can be extremely complicated, and even comparing mobile phone services and energy plans can be quite difficult. These complications can also be exacerbated by bundling arrangements even when these also bring benefits.
Where consumers cannot choose effectively, they also cannot effectively drive competition.

Complex contractual arrangements are also evident in a range of markets including these relatively newly deregulated markets – and the characteristics of such contracts can include lock-in terms and fine print clauses that may disable the consumer’s ability to examine the real costs or value for money or to switch. In general, also, these are contracts of adhesion – they are take-it-or-leave-it contracts except in the price and other core terms which can sometimes be negotiable.

In a couple of weeks there is going to be a Roundtable at the OECD in Paris, with a star-studded line-up of academic speakers looking at the market with a ‘consumer lens’ on. As far as I’m aware, this has never happened at a global level and not much at nation state level frankly. Industrial organisation economists look at the firm – not at the consumer, and focus on the supply-side structures and firm behaviour. But consumers can actually inhibit competition as well, or be unable to activate it for a variety of reasons, and in my view that is just as serious a matter for significant research. One of the more interesting aspects of this Roundtable is that it will consider not only the standard economic analysis of markets but also approach consumer issues from a behavioural economic (BE) perspective. BE insights challenge the assumption of rationality – or more correctly that irrationality averages out in markets and so can be ignored analytically. BE says that consumers systematically behave in particular ways – such as failing to evaluate risks correctly, valuing ‘fairness’ in markets, hyperbolic discounting behaviour (eg. credit cards) – and focuses on consumers as humans! Which is rather nice I think.

In any event, I am hoping that this Roundtable will substantially start to influence how consumer agencies – both the policy and the enforcement agencies – think and act; and most importantly, that the economic underpinning of the consumer protection decision making can be made more rigorous.

Thank you.