

## OPENING REMARKS AT 2008 COMPETITION CONFERENCE

I have been asked to say a few words introducing the major themes of this year's conference.

Since our inception the competition authorities have – but for one or two years – hosted an annual conference, the principal purpose of which has been to engage with the views of other competition practitioners and academics. As everyone involved in this field will confirm, competition law and policy – both in its legal and economic aspects -- is an intellectually dynamic field. That is to say, it is a field where ideas and investigative techniques are rapidly evolving and are at the cutting edge of the disciplines that inform them – just by way of example competition enforcement is seeing the proliferating use of investigative techniques derived from the relatively new sub-discipline of behavioural economics with its rich multi-disciplinary character. And it is also, or, at least, should be an intensely fact-based field of economic policy – and facts change, often with extraordinary rapidity. Technologies change, the boundaries of markets shift in consequence of new technologies or changes in government policy, new products and changing tastes challenge established conceptions of substitutability and hence market definition and also of the implications for competition of market conduct. Competition enforcers and adjudicators have to respond to these changes and this raises a number of challenges particularly for those who place a high premium on certainty in the application of policy – and this may include anyone from investors to a judicial system rooted in the application of precedent.

The rapidly evolving environment for our work demands intellectual agility, familiarity with current thinking in the field, and ongoing research. For this reason, engagement and debate between, on the one hand, the world of practitioners and, on the other hand, the world of researchers and scholars is bound to be particularly fruitful and important and prevalent. It is an area that is massively enriched by new thinking and research. And so it has proved to be and this is why the conference has benefitted so significantly from the participation of the Mandela Institute as co-host. I imagine that we would all wish that industrial organisation and, particularly, the study of law and economics as a sub-discipline of both, was a more prevalent feature of university teaching and research. Though I imagine that the lawyers who appear before us remain frustrated at having to make themselves understood to the few economists who participate in the Tribunal panels, I have learned enough about the practice of this field to know that it is never good enough to be a brilliant lawyer or a brilliant economist – what is essential, and arguably even more valuable than nobel-prize winning brilliance in either field, is a grasp of how the two disciplines interact, of how to turn micro-economic argument and evidence into administrable law and policy and conversely how to apply the approaches and requirements of law making and interpretation to economic issues and evidence. And you will see that this is precisely the direction in which the conference programme has evolved – from one that in earlier years focused almost exclusively on the application to South Africa of ideas and legal conclusions developed elsewhere and factual matrices found elsewhere, to one that examines the interface between our economy and the application of our law. This is not to say that there are not enormously valuable lessons and ideas to be absorbed from elsewhere but the mere fact that we can hold what is, by any measure, a world class conference, one whose output will be studied for the lessons it offers practitioners and scholars everywhere, and that is focused on our economy, on our statute and legal system, on our enforcement practice and on our jurisprudence, is a

representation of the really extraordinary level of maturity and sophistication that has been attained in what is still a relatively young system.

This is just as well because the successful establishment of the South African competition regime – and by this I mean the establishment of successful enforcement and adjudicative institutions, the development of a sophisticated, albeit still too narrowly based, private bar and community of local economic consultants and experts, of a critical and intelligent media, of an academic environment, and, above all of a public competition culture – is going to be sorely tested if we are to successfully confront some of the substantial challenges that are coming down the pike.

Our challenges will come from two sources.

The first of these come from changed economic conditions both globally and domestically. We have grown up – and competition law and policy everywhere in the world has flourished – in the context of high levels of global growth. And not only was this – domestically and globally – an unprecedented period of high and sustained growth rates, there was a growing consensus certainly in the economics profession and increasingly amongst policy makers everywhere that this extraordinary period of growth was underpinned by the rapid liberalisation of domestic and international markets that has characterised the past two decades. And while this consensus did not represent a market fundamentalism to the extent that it continued to recognise the importance of government's role in the economy certainly in so far as this role maintained macro-economic stability and secured investment in critical public goods, there is no doubt that in developed and developing economies alike and, most particularly, the transition economies, the dynamic force of the market was increasingly recognised as the critical foundation of economic growth and development. It is for this reason that this period represented something of a golden age for competition law and policy, for that branch of law and policy that was accorded responsibility for securing the establishment and maintenance of effectively functioning markets.

This is changing. There is now a growing consensus that we have entered what is likely to be a long period of very low growth rates, even recession, and, most disturbing of all, stagnation that will, for a variety of reasons, be accompanied by rising levels of inflation. There will be plenty who will say that 'we told you so', that they warned that unrestrained markets were simply a euphemism for the relentless pursuit of personal private wealth, a pursuit which did nothing to improve the lot of the vast majority of people. This view may only be partially correct but it clearly represents a rapidly growing consensus that ranges from those on the street protesting rising food prices to those in the corridors of power hastily drafting new statutes and regulations to curb the destructive forces that insufficiently restrained markets are thought to have unleashed. Even economists are beginning to question the faith in markets long held by the large orthodox centre of their profession. A recent article in the Financial Times by Larry Summers former US Secretary of the Treasury and a pre-eminent economist couched his support for market forces in so many caveats, and in the construction of so many safety nets – for the US middle and working classes I should add - that a response from three other economists immediately dubbed him the 'canary in the mine', the first major intellectual casualty of the poisonous gases generated by the economic downturn.

This is going to be a very testing environment for the practice of competition law and policy. Industrial policy makers will be making demands for a leading role for the state with renewed vigour –

see the recent speech by the Minister of Public Enterprises that, despite our unhappy recent experience with SOEs, advocates a greater role for these institutions in confronting our economic difficulties. Or see the intense debate surrounding electricity pricing. And social policy makers are equally going to override the market in order to address the society's growing social problems, most particularly those of poverty – see the current efforts by the Minister of Health to regulate private healthcare. Or see the growing chorus of support for regulation of food prices. Few of us will quibble with the broad sentiments and concerns underlying these and other initiatives. And in many instances the problems may indeed stem from market failures – competition is not a religion and markets are not gods. But many of these initiatives will come at the expense of market forces and will store up the kind of long term dangers and problems that are manifest in the problems currently experienced in our telecommunications and electricity markets, failures not of the market but of institutions that were able to dominate and distort market forces despite the advent of new technologies that permitted the destruction of what have long been natural monopolies.

This new environment will impact not only on competition policy but also on the application of competition law. As the downturn begins to bite into the real economy, you will see demands for a more permissive merger regulation regime in order to prevent bankruptcies or promote competitiveness or to protect employment. You may even see demands for greater tolerance of cartels – so-called 'recession cartels' have an explicit place in some country's laws and could arguably be a basis for applications for exemption from our own competition legislation.

I don't think that these represent intractable problems – I cannot see that it is impossible for industrial, social and competition policy to complement each other even in conditions of economic downturn. Quite the contrary – a competition policy that cannot live alongside industrial and social policy will not, and arguably should not, survive. But there is in the context of a heated social environment, an active electoral cycle and, at best, a thin appreciation of the benefits of competition, a real prospect of over-reach by our industrial policy and social policy makers. And we are going to need a courageous and sophisticated advocate of competition to join in robust public debate. And we will see, as competition authorities have seen in other places and other times, that some of our fair-weather friends will desert us when the storm clouds gather.

The second danger that I foresee is, oddly enough, rooted in the Commission's recent successes. For many people the penny has finally dropped, with the dangers of price fixing in particular keenly appreciated in government as well as by a broad swathe of the public. It's fair to say that price fixing in markets like bread and pharmaceuticals has generated public outrage, appropriate outrage. Rising inflation is going to intensify the abhorrence at price fixing. This is going to give rise to expectations which are impossible for us to meet on our own – a prescient article by the Minister of Finance in a recent Business Times recognised this when he cautioned against the view that saw every increase in prices as evidence of collusion. It is also leading to demands that we be better empowered to deal with price fixing and other offences, in particular that our power to punish perpetrators be significantly increased. We are of course completely at one with the sentiments underpinning these intentions but, as we all know, the road to hell is paved with good intentions. As with everything in competition law the devil is in the detail and apparently robust measures to strengthen us may have exactly the opposite effect. There is already a brewing controversy around the question of what is referred to as 'personal liability' for directors and other individuals who have actually engaged in the

construction and maintenance of a cartel. It amounts to criminalising anti-cartel conduct. While I am happy to side with anyone who insists that no punishment is too great for a price fixer, there are strong grounds for fearing that criminalising the statute will not only fall foul of the constitution but will undermine the corporate leniency programme which has been the key instrument underpinning the Commission's recent successes in apprehending cartels.

So these are going to be interesting times and the outcomes are going to impact on economic efficiency and economic welfare. These are all serious issues that deserve serious debate. Today will I think make a major contribution to a series of debates which we want all of you – lawyers, economists, practitioners, academics, regulators – to join. I look forward to a robust day of it.