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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRALIA**

--2015--

**29-30 November 2016**

*This report is submitted by Australia to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 29-30 November 2016.*

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## EXECUTIVE SUMMARY

1. This report addresses events that have occurred in the financial reporting year (1 July 2015 to 30 June 2016) and, where appropriate, significant developments since then.
2. Australia's competition policy is implemented by a range of agencies (see Item 3 below). This report primarily covers the activities of the Australian Competition and Consumer Commission (ACCC), and the Australian Energy Regulator (AER). The role of the ACCC is to enforce the Competition and Consumer Act 2010 (CCA) and a range of additional legislation, promoting competition and fair trading, and regulating national infrastructure. The AER is Australia's national energy market regulator. Its functions are set out in national energy market legislation and rules, and mostly relate to electricity and gas markets in eastern and southern Australia. While funded through the ACCC, the AER undertakes these functions as an independent regulatory agency.
3. On 31 March 2015 the independent panel led by Professor Ian Harper released the Final Report of the Competition Policy Review, which made 56 recommendations. On 24 November 2015, the Australian Government released its response to the Report. Of the 56 recommendations in the Final Report, the Government supports 40 in full or in principle and 5 in part. The Government has noted, or remains open to the remaining 11 recommendations, subject to further review and consultation.
4. A number of significant court decisions were also handed down,
  - Visa Worldwide Pte Ltd was fined \$18 million for engaging in anti-competitive conducts which prevented competing currency conversion providers from expanding.
  - Cement Australia Pty Ltd and related companies were ordered to pay penalties totalling \$17.1 million for anti-competitive fly ash agreements. The ACCC has appealed this penalty, arguing that it is manifestly inadequate, and not of appropriate deterrent value.
  - Colgate-Palmolive Pty Ltd was ordered to pay \$18 million after it admitted to entering understandings to limit the supply and control the price of laundry detergents. As a part of the same proceedings, the Federal Court ordered Woolworths Limited to pay \$9 million in penalties following admissions. The case continues against PZ Cussons Australia Pty Ltd.
  - The Full Court of the Federal Court upheld the ACCC's appeal in the air cargo case. The Full Court found PT Garuda Indonesia's and Air New Zealand's conduct breached Australia's price fixing laws when it agreed to surcharges for carrying air cargo from overseas ports to destinations within Australia. These matters have been remitted to the Federal Court to determine the relief to be granted, including declarations, injunctions and penalties.
  - The Federal Court also found that Yazaki Corporation had engaged in collusive conduct in supplying wire harnesses to Toyota Australia.
5. In July 2016 the Commonwealth Director of Public Prosecutions (CDPP) charged Nippon Yusen Kabushiki Kaisha (NYK) with criminal cartel conduct under the CCA. NYK has pleaded guilty to this charge. This is the first criminal charge laid against a corporation under the criminal cartel provisions of the CCA.
6. The ACCC considered 319 merger matters, including conducting 31 public reviews.
7. The ACCC also conducted a formal inquiry into the competitiveness of wholesale gas prices in eastern and southern Australia. This report provided a number of recommendations that the COAG Energy Council and state and territory governments can consider to alleviate gas market issues.

## 1. Changes to competition laws and policies, proposed or adopted

### 1.1 Competition reforms

8. In 2014, the Government asked Professor Ian Harper and an expert panel to undertake an independent ‘root and branch’ Competition Policy Review (the Harper Review). On 31 March 2015, the Harper Review panel released its Final Report, which made 56 recommendations. Following a broad consultation process, the Government released its response on 24 November 2015. Of the 56 recommendations in the Final Report, the Government supports 40 in full or in principle and 5 in part. The Government has noted, or remains open to the remaining 11 recommendations, subject to further review and consultation.

9. Among its recommendations, the Harper Review found that section 46 of the CCA is not ‘fit for purpose’ and recommended reframing section 46, to strengthen the prohibition on the misuse of market power and better target anti-competitive conduct. Recognising the importance of this issue for business and consumers, the Government conducted broad consultation including the release of a Discussion Paper in December 2015. After carefully considering all submissions, the Government decided that the recommendation of the Harper Review represents the best option to strengthen the misuse of market power provision.

10. The Government has developed exposure draft legislation to implement a significant number of the competition law reforms recommended by the Harper Review. The changes are designed to simplify the law and better deal with anti-competitive conduct while supporting pro-competitive behaviour, including:

- amending section 46 in accordance with the Harper Review recommendation to prevent firms with substantial market power engaging in behaviour that harms the competitive process;
- broadening the definition of ‘competition’ to include potential imports of goods and services, to fully reflect the range of competitive pressures facing Australian firms;
- confining the cartel conduct provisions to conduct affecting competition in Australia and broadening the exceptions for joint ventures and vertical trading restrictions to apply to common, pro-competitive business arrangements;
- amending the National Access Regime declaration criteria, including to ensure that third-party access is only mandated where it is in the public interest, rather than “not contrary” to the public interest as currently required
- consolidating the various authorisation processes into a single, streamlined process; and
- simplifying the CCA by repealing separate, specific prohibitions on price signalling and exclusionary provisions, and introducing a prohibition against concerted practices.

11. This exposure draft legislation was released for public consultation on 5 September 2016. (In parallel the Government also sought views on the need for consequential amendments to Part XIB of the CCA which includes related telecommunications-specific conduct rules.) Following consultation on the exposure draft, the Government will consider the submissions received and review the legislation before introducing it to Parliament.

12. Additionally, on 1 April 2016, the Council of Australian Governments (COAG) agreed that competition and productivity reforms are important to drive Australia's economic performance and living standards.

- Treasurers are developing a new competition and productivity enhancing reform agreement, for consideration by COAG.
- As outlined in the Government's response to the Harper Review, the new arrangements will reflect the challenges that Australia faces now and into the future and will be flexible enough to allow each jurisdiction to tailor reforms to its own conditions.

## **1.2 Communications**

13. NBN Co limited (nbn) was established to roll out a high-speed national broadband network (NBN) across Australia. The network operates on an open access, wholesale-only basis. The network will provide access to high speed broadband to all 12 million homes and business across Australia. Approximately 93 per cent of homes and businesses will be served by fixed line technology, with the remainder to be served by a combination of fixed wireless and satellite.

14. Following its election in September 2013, the Coalition Government implemented a change to the NBN technology composition in its fixed network footprint, from an all fibre to the premise network, to a multi-technology mix (MTM) model incorporating fibre to the node, fibre to the basement, fibre to the curb and Hybrid fibre-coaxial (HFC) technologies. The NBN has now passed 3 million of Australia's 12 million premises and is scheduled for completion in 2020.

15. In 2013, the Government appointed a panel of experts, chaired by Dr Michael Vertigan AC to review the overall structure and regulatory framework for Australia's future broadband market and the role of nbn. In 2014, the panel released its report, the "Independent cost-benefit analysis of broadband and review of regulation Volume I – National Broadband Network Market and Regulatory Report" (the Vertigan report)<sup>1</sup>. The Government responded to the Vertigan report in December 2014.

16. The response provided a roadmap for regulatory reform for the following years and consists of statutory infrastructure provider obligations, structural or functional separation of high-speed fixed-line broadband networks, and industry contributions to the costs of nbn's non-commercial services. In October 2016, legislation to implement these changes was being finalised for consultation.

17. In March 2015, the Government introduced revised arrangements for the provision of telecommunications infrastructure in new developments. The new arrangements are set out in the Telecommunications Infrastructure in New Developments Policy. A key aspect of the policy is to require nbn to charge for infrastructure in new developments. This is designed to promote fair and effective competition in this market with a view to fostering greater efficiency and innovation.

18. On 1 September 2016 the Australian Government introduced legislation to amend Australian media law in response to the significant technological and commercial changes occurring in the sector. The proposed reforms would repeal media control and ownership rules that prevent a person from controlling: (1) commercial television licences whose combined licence area populations exceed 75 per cent of the Australian population (the reach rule); and (2) more than two of the three regulated forms of media (i.e. commercial radio, commercial television and associated newspapers) within the one commercial radio licence area. The reform package will also establish new local content obligations on regional commercial

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<sup>1</sup> Available here: <https://www.communications.gov.au/departmental-news/nbn-market-and-regulation-report>

television licences following a change in control, such as a merger, that results in them being in part of a group whose combined licence area populations exceed 75 per cent of the Australian population. The proposed reforms will take effect subject to the passage of the amending legislation.

### **1.3 Energy markets**

19. The Government released the Energy White Paper on 8 April 2015. The White Paper's focus is on increasing competition, energy productivity and investment to deliver reliable and cost competitive energy to households and business. To support this approach, the Australian Government is leading, through the COAG Energy Council, market reforms aimed at encouraging greater competition and consumer choice. The Australian Government is putting in place appropriate market settings to maintain Australia's investment attractiveness and ability to adopt new technologies.

20. A National Energy Productivity Plan has also been developed to improve Australia's energy use against a global and transitioning energy market. This will be achieved by:

- providing efficient pricing and energy-use incentives to encourage productive consumer choices
- empowering consumers by increasing their choice in energy services and improving residential building energy ratings and disclosure
- promoting more productive energy services by supporting greater innovation and commercialisation of new technologies among businesses and through energy market reform

21. The Australian Energy Market Commission (AEMC) continued to implement its Power of Choice reforms to network regulation in 2016-17. They include requirements on time variable pricing (to encourage consumers to shift their energy use away from peak times), reforms to expand competition in metering and related services, and stronger incentives for demand side participation. Under these arrangements, the AER will also develop new guidelines and apply new criteria in considering any new or amended demand management incentive scheme. AER has commenced consultations with network businesses on the introduction of time variable pricing, and businesses are preparing their tariff structures in consultation with consumers and retailers.

22. Other key reforms in energy markets included the establishment of Energy Consumers Australia (ECA) on 30 January 2015. This is an important step towards increasing consumer advocacy on national energy market matters of strategic importance and material consequence for energy consumers, in particular household and small business consumers.

### **1.4 Water reform**

23. The Commonwealth Water Act 2007 established the Murray-Darling Basin Authority (MDBA), requiring it to prepare a Basin Plan for the coordinated management of the Murray-Darling Basin (MDB) by the Commonwealth and relevant states and territories. The Plan aims to optimise economic, social and environmental outcomes and develop an efficient water trading regime across the MDB. The Water Act also provides for other rules to underpin trading and transfer of rights and charging of service in water markets. The Water Market Rules and Water Charge Rules commenced in 2009 and 2010. The Water Trading Rules commenced in 2014. In May 2014, the Australian Government announced a review of the Water Act by an independent expert panel with a focus on improving the Act and opportunities to reduce regulatory burden on the water industry, water managers and irrigators. In December 2014 the panel published its final report. Among other recommendations the panel recommended the ACCC conduct a separate review of the Water Charge Rules. This review is discussed further in section 2 below.

## **2. Enforcement of competition laws**

### **2.1 *Action against anticompetitive practices, including agreements and abuses of dominant positions***

24. The CCA prohibits a wide range of anti-competitive practices, including cartel conduct, contracts, arrangements or understandings that substantially lessen competition, exclusive dealing that substantially lessens competition, secondary boycotts, misuse of substantial market power, mergers or acquisitions that are likely to substantially lessen competition, and resale price maintenance. The CCA also contains telecommunication specific competition rules.

25. The CCA provides the ACCC with a range of enforcement remedies, including court based outcomes and court enforceable undertakings. The ACCC also resolves many matters administratively. In enforcing the provisions of the CCA, the ACCC's primary goals are to maintain and promote competition and remedy market failure, and protect the interests and safety of consumers and support fair trading in markets. The CCA allows any person to independently seek a remedy from a court, including an action for third party damages, regardless of any action by the ACCC.

26. The ACCC cannot pursue all the complaints it receives. Its priorities for each year are set out in its Compliance and Enforcement Policy, and currently include:

- competition and consumer issues in the agriculture sector
- competition and consumer issues in the health and medical sectors, including consumer protection issues arising from health claims by large businesses and the ACCC's 2015 report to the Senate on the private health insurance industry
- cartel conduct impacting on government procurement.

27. Some conduct, such as cartel conduct, anti-competitive agreements, and the misuse of market power, are so detrimental to consumer welfare and competition that the ACCC will always assess them as a priority.

### **2.2 *Anti-competitive conduct matters***

28. In the period 1 July 2015 to 30 June 2016, the ACCC was involved in 18 court proceedings relating to competition enforcement. These proceedings relate to competition matters in a range of industries including pharmaceuticals, travel, fuel retailing and financial services. Of these proceedings:

- 17 cases were carried over from the previous year
- 1 new case commenced in the year (noted below)
- 5 cases were finalised
- 13 cases remained ongoing at the end of the year.

29. In June 2016 the ACCC instituted proceedings in the Federal Court against three businesses and related individuals alleging cartel conduct in the supply of polycarbonate roof sheeting to retailers (Oakmoore Pty Ltd, Palram Inc, Ampelite Pty Ltd & Ors).

30. In July 2016 the Commonwealth Director of Public Prosecutions (CDPP) charged Nippon Yusen Kabushiki Kaisha (NYK) with criminal cartel conduct under the CCA. NYK has pleaded guilty to this charge. This is the first criminal charge laid against a corporation under the criminal cartel provisions of the CCA<sup>2</sup>.

31. Significant competition enforcement outcomes in 2015–16 included:

- proceedings involving Yazaki Corporation—findings of contraventions of the anti-cartel laws
- Informed Sources Australia and five fuel retailers—enforceable undertakings to stop sharing real time fuel prices unless they are also shared with consumers
- Visa Inc and its subsidiaries—penalties of \$18.3 million for anti-competitive conduct which prevented competing currency conversion providers from expanding
- Cement Australia—\$17.1 million penalty for anti-competitive fly ash agreements
- Colgate-Palmolive \$18 million penalty and Woolworths Ltd \$9 million penalty – cartel conduct in respect of laundry detergents.

#### **Case study - the Laundry Detergent cartel**

In April 2016 the Federal Court ordered Colgate-Palmolive Pty Ltd (Colgate) to pay total penalties of \$18 million for contraventions of the Trade Practices Act 1974 (now the Competition and Consumer Act 2010). In June 2016 the Court ordered a penalty of \$9 million against Woolworths Limited (Woolworths) for the same conduct.

Colgate is a manufacturer of household products, including some of Australia's best known brands of laundry detergent. Woolworths is a major Australian company with extensive supermarket and retail interests throughout Australia and New Zealand.

In 2011 Unilever Australia Ltd (Unilever) approached the ACCC alleging that Colgate, PZ Cussons Australia Pty Ltd (Cussons) and Unilever had been involved in cartel and anti-competitive behaviour in supplying laundry detergent, with the knowledge of Woolworths. The companies had agreed that in early 2009 they would stop supplying standard concentrate laundry detergents to major supermarkets and supply only ultra concentrates from that time on.

Unilever alleged they were selling ultra concentrates for the same price per wash as the equivalent standard concentrated products. However, the ultra-concentrate detergents were cheaper to produce, store and transport and these cost savings were not passed onto consumers.

In December 2013, the ACCC filed proceedings in the Federal Court against Colgate, Cussons, Woolworths and Mr Paul Ansell (a former sales director at Colgate).

In April 2016, during the Federal Court proceedings, Colgate admitted that it had entered into understandings that limited the supply and controlled the price of laundry detergents. Specifically, Colgate admitted that it had made and given effect to an understanding with Unilever and Cussons.

Colgate also admitted that Colgate and Unilever had shared sensitive market information—for example, information about when they would increase the price of their laundry detergents. It admitted that Mr Ansell and senior Unilever executives, including Unilever's sales director at the time, had shared this information by telephone.

<sup>2</sup> Under existing arrangements the ACCC investigates cartel conduct, manages the immunity process, takes proceedings in the Federal Court in respect of civil cartel contraventions, and refers serious cartel conduct to the CDPP for consideration for prosecution. The CDPP is responsible for prosecuting criminal cartel offences, in accordance with the Prosecution Policy of the Commonwealth.

Mr Ansell admitted to being knowingly concerned in the alleged conduct. The ACCC has resolved its proceedings against him by consent. The Court ordered that Mr Ansell be disqualified from managing corporations for seven years and pay a contribution of \$75 000 towards the ACCC's costs.

In addition, the Federal Court made other orders by consent that Colgate:

- update its trade practices compliance program and maintain that program for three years
- contribute \$450 000 towards the ACCC's costs.

In June 2016 Woolworths admitted to being knowingly concerned in the making of, and giving effect to, an understanding between Colgate, Cussons and Unilever that they would each cease supplying standard concentrate laundry detergents to Woolworths in early 2009 and supply only ultra concentrates to Woolworths from that time. The Federal Court also made orders by consent that Woolworths update its trade practices compliance program and pay a contribution of \$250 000 towards the ACCC's costs in the proceedings.

### 2.3 *Merger review*

32. Section 50 of the CCA prohibits mergers and acquisitions that would have, or are likely to have, the effect of substantially lessening competition in any market in Australia.

33. In 2015-16 the ACCC considered 319 matters under section 50 of the CCA. Of these matters, 287 were pre-assessed as not requiring a public review. The ACCC conducted a public review of 31 mergers and a confidential review of 1 merger. The ACCC unconditionally cleared 55 per cent of those mergers that underwent a public or confidential review and 95 per cent of all mergers (including pre-assessments) considered during the period.

#### **Case study - TPG's acquisition of iiNet**

On 20 August 2015, the ACCC announced its decision not to oppose TPG's proposed acquisition of iiNet. At the time of the proposed acquisition, the five major suppliers of retail fixed broadband services were Telstra, Optus, iiNet, TPG and M2.

The ACCC review focused on whether the proposed acquisition would be likely to lessen competition in the retail fixed broadband market. The ACCC held a public forum to ensure that interested consumers had the opportunity to put their views directly to the regulator. In addition a large number of submissions were received from interested parties, including consumers, regarding iiNet's competitive influence and its high standard of customer service.

It was found that both TPG and iiNet were regarded as vigorous competitors in the retail market, with offers differentiated from each other. While it was concluded that the acquisition would result in a lessening of competition, it was found that it did not reach the threshold required to establish a contravention of s. 50 of the CCA (that there would likely be a substantial lessening of competition).

It was considered that after the acquisition the combined entity would remain constrained by the other major retail fixed broadband suppliers at the time: Telstra; Optus; and M2. The ACCC was satisfied that consumers would continue to have a choice of broadband suppliers.

The ACCC also considered the vertical effects of the proposed acquisition relating to the supply of wholesale transmission services, finding that a number of purchasers and suppliers of wholesale transmission services would remain following the proposed acquisition, even if TPG/iiNet reduced its demand from non-vertically integrated transmission suppliers.

## 2.4 *Adjudication – authorisation applications and notifications*

34. The authorisation and notification provisions of the CCA allow businesses to obtain protection from legal action for certain conduct that might otherwise raise concerns under the competition provisions in the CCA, where that conduct delivers public benefits. The authorisation and notification provisions reflect a recognition that, in certain circumstances, arrangements which restrict competition can nonetheless be in the public interest, principally by addressing market failure and increasing efficiency.

35. During 2015 -16 the ACCC issued 33 final authorisation decisions, excluding minor variations, for arrangements involving a wide range of industries. Among them were aviation, finance, mining, agriculture, wagering, electricity, waste services, healthcare and retailing. Applicants sought authorisation for conduct such as collective bargaining, coordination agreements, joint tender processes and other price or fee agreements.

36. The ACCC also received and assessed 766 exclusive dealing notifications, involving 495 separate matters, and allowed five collective bargaining notifications.

### **Case study - ihail taxi booking app**

In May 2015 a number of taxi networks sought authorisation from the ACCC for the proposed development and launch of a new smartphone taxi booking app (ihail). In October 2015 the ACCC issued a draft decision proposing to deny authorisation, following the release of the draft decision the applicants made significant modifications and ultimately conditional authorisation was granted in March 2016.

The initial members of the ihail joint venture were Yellow Cabs, Silver Top Taxi Service, Black and White Cabs, Suburban Taxis and Cabcharge. As well as providing in-taxi payment terminals to most taxis in Australia, Cabcharge operates taxi networks in Sydney, Melbourne, Adelaide and Brisbane.

The ACCC was originally concerned that the public benefits of the ihail app (for example, convenience for consumers and reduced waiting times) would not outweigh the detriments to competition likely to result from ihail becoming a dominant taxi booking app and from foreclosing opportunities for payment processing providers other than Cabcharge to supply services to passengers using the ihail app. Both were likely outcomes due to ihail's ownership structure.

To address these concerns, ihail amended the app to enable passengers to pay their fare in the taxi (rather than just via the app) and to choose either their preferred taxi network, based on certain performance information during the booking process, or the nearest available taxi (regardless of network).

The ACCC granted authorisation subject to the conditions that ihail explicitly inform drivers that they remain free to use competing booking apps and that ihail and its shareholder networks not prevent drivers from using other booking apps or disadvantage drivers who do so in preference or in addition to using the ihail app.

## 2.5 *Market studies – improving the transparency of Australia's markets*

37. Under the CCA the ACCC can be directed to conduct formal market inquiries, which can include the use of compulsory information-gathering powers. The ACCC can also elect to undertake informal market studies without being given a government direction. In 2015-16 the ACCC

- was directed to undertake an inquiry into the competitiveness of Australia's East coast gas wholesale industry.
- commenced a market inquiry into competition, efficiency, transparency and trading issues in the beef and cattle supply chain. The final report on the study will be released in late 2016.

- conducted ‘micro’ market studies into petrol prices in targeted regional locations around Australia.
- pursuant to a government direction, published quarterly petrol monitoring reports, which provided analysis and commentary on topics such as movements in wholesale petrol prices, price differentials between regional and city locations, and petrol price cycles;

38. In August 2016 the ACCC announced that it would conduct a market study into the communications sector, with a report due in late 2017.

#### **Case study - East coast gas markets inquiry**

On 13 April 2015 the Minister for Small Business directed the ACCC to hold an inquiry into the competitiveness of the wholesale gas industry.

The East Coast Gas Markets inquiry, held under Part VIIA of the CCA, enabled the ACCC to use compulsory information gathering powers to gather information and hold hearings to assess the level of competition in the market. This meant the ACCC could bring together information that has previously not been available to other inquiries into or studies of the market.

In its public hearings in July and August, the inquiry heard from over 30 market participants—including large gas users, gas retailers and shippers, small and large producers and pipeline owners—and considered over 73 000 documents.

The final report was presented to the Minister in April 2016. The report makes a number of recommendations to the Council of Australian Governments Energy Council and state and territory governments for alleviating gas market issues, particularly for industrial users. For example, it recommends:

- enabling new gas supply to come to market, particularly in south-eastern Australia
- revisiting the regulatory coverage of pipelines, increasing the ability for pipelines with market power to be regulated
- addressing the consistency and transparency of the provision of information to the market.

The report has been well received across the industry. Although some in the industry do not agree with all the recommendations, the report contains significant findings that will assist in making changes in the availability and terms of gas supply, offering ways to settle matters previously in dispute, and better informing policymakers in order to improve the efficiency of the gas market.

39. Appendix A provides a high level summary of the ACCC’s competition activities during the period 2015 – 16.

## **2.6 Access to infrastructure facilities**

40. Under the National Competition Policy reforms of the mid 1990s, all Australian Governments agreed to the introduction of an economy wide access regime for essential infrastructure services. The National Access Regime, which was established in 1995 under Part IIIA of the now CCA, provides an avenue for firms to access certain essential infrastructure services on reasonable terms and conditions. Effective access to these essential services promotes competition in upstream and downstream markets that rely on that infrastructure.

41. The ACCC has roles under Part IIIA, including the assessment and administration of enforceable access undertakings that set out the terms and conditions of access to major infrastructure.

42. There are also a number of industry specific access regimes, both at the Commonwealth and state levels. Access to telecommunications services, for instance, is provided for under Part XIC of the CCA, which is administered by the ACCC, while a code of conduct has been established for wheat export arrangements.

## **2.7 Rail**

43. The ACCC has a role in assessing, and monitoring compliance with, access undertakings submitted by the Australian Rail Track Corporation (ARTC), a provider of “below rail” track access services. There are currently two access undertakings in place—one covering ARTC’s rail network in the Hunter Valley region of New South Wales, and one for its national interstate rail network.

44. In December 2015 ARTC submitted a replacement undertaking for the Hunter Valley network for the ACCC’s assessment. The network itself is predominantly used to transport coal from the region’s mines to the Port of Newcastle for export, though it is also used for domestic coal and non-coal freight. The ACCC’s consultation revealed a lack of support among stakeholders for the revised arrangements, and ARTC withdrew its proposal in June 2016, intending to submit a revised undertaking at a later date. The prior undertaking, accepted in 2011, remains in place following an extension granted by the ACCC.

## **2.8 Wheat export port terminal services**

45. On 30 September 2014 the Port Terminal Access (Bulk Wheat) Code of Conduct commenced, replacing the previous wheat port access regime under the Wheat Export Marketing Act 2008 (Cth).

46. The code is a mandatory code of conduct prescribed under the CCA. Its purpose is to regulate the conduct of port terminal service providers to ensure that exporters of bulk wheat have fair and transparent access to port terminal services. The ACCC enforces the regulations in the code and has an ongoing role in monitoring compliance.

47. The code has two tiers of regulation, meaning some port operators may be exempted from some of the code requirements. The ACCC can make an exemption determination after having regard to a series of matters, including the interests of exporters, the public interest in having competition and the legitimate business interests of the port operator. The Minister for Agriculture can also exempt a port operator in certain cases.

48. In 2015–16, the ACCC granted a number of exemptions to port operators, including:

- Newcastle Agri Terminal and Qube Holding Limited at Newcastle (30 July 2015)
- GrainCorp and Queensland Bulk Terminals Pty Ltd at their respective bulk wheat port terminals at the Port of Brisbane (24 September 2015)
- WA Chip & Pulp Company Pty Ltd at its Bunbury port terminal (24 September 2015)
- GrainCorp and Quattro Ports at their respective port terminals at Port Kembla (1 April 2016)
- Patrick Stevedoring Pty Ltd at its Port Adelaide port terminal facility (1 April 2016).

## 2.9 Telecommunications

49. The telecommunications access regime contained in the CCA supports the development of a competitive telecommunications industry by allowing services to be ‘declared’—a process that determines which services are regulated by the ACCC. Once declared, a service must be supplied, on request, to other providers. The ACCC can also set terms and conditions of access, including price, by making “access determinations” for declared services.

50. In 2015-16 the ACCC completed a number of declaration inquiries and determination assessments, including:

- On 9 October 2015 final access determinations (FADs) were issued setting price and non-price terms of access to the seven declared Telstra **fixed-line services** (associated with Telstra’s copper network). Ensuring efficient prices for wholesale services on Telstra’s networks supports competition in retail telecommunications as the industry transitions to the NBN as the wholesale infrastructure provider. The ACCC’s final decision was for a one-off uniform decrease in regulated charges of 9.4 per cent, with effect from 1 November 2015 until 30 June 2019. Telstra sought judicial review of the ACCC’s decision and the matter was heard by the Federal on 3–4 March 2016, with respondents including the ACCC and five access seekers. The judgment will be delivered in due course.
- The ACCC released a FAD for the **Domestic Transmission Capacity Service (DTCS)** on 21 April 2016. The DTCS is a high-capacity transmission service capable of carrying large volumes of voice, data and audio-visual traffic. It is often used by telecommunications companies to carry the combined traffic of separate services across long distances. The FAD set DTCS pricing at a level significantly lower than the regulated prices set in 2012, though the extent of the reduction in for a specific route depends on the geographical route type, capacity and distance of a particular service. The DTCS FAD applies from 21 April 2016 to 31 December 2019.
- The ACCC released a FAD with primary price and non-price terms for the **mobile terminating access service (MTAS)** on 24 August 2015. The MTAS is a wholesale service provided by mobile network operators (MNOs) to other network operators (such as other MNOs and fixed-line network operators) to terminate calls or SMS messages on their networks. It enables mobile subscribers to receive calls and SMS on their mobile phone. The determination, effective from 1 January 2016 to 30 June 2019, sets a price of 1.7 cents per minute for mobile voice termination, down from the current 3.6 cents per minute, and sets a price of 0.03 cents per SMS.
- After releasing a draft decision in November 2015, in July 2016 the ACCC released a final decision to declare the wholesale **superfast broadband access service (SBAS)** for five years. The SBAS declaration allows retailers to access non- NBN services with a downstream data rate normally more than 25 Mbps. The declaration will provide retailers with an opportunity to enter the superfast broadband market, which will benefit consumers in the long term through increased competition and choice. The decision will also help to simplify and clarify the existing regulations that apply to superfast broadband services.

51. The ACCC has also been considering variations to its special access undertaking proposed by nbn.

52. In August 2016 the ACCC also announced it would undertake an inquiry about whether it should declare a domestic mobile roaming service. The ACCC is expected to conclude this inquiry by mid-2017.

## **2.10 Energy infrastructure regulation and energy market monitoring/enforcement**

53. The electricity and gas rules require the network businesses to periodically (usually every five years) submit regulatory proposals (electricity) and proposed access arrangements (gas) to the AER for approval. The AER must assess the regulatory proposals of network businesses and justify network pricing decisions with regard to the legislative criteria.

54. In 2015–16, the AER completed eight electricity network revenue determinations and three gas network access arrangement review, and commenced a further six processes. The decisions applied the network regulation rules and the guidelines developed through the AER's Better Regulation program.

## **2.11 New South Wales and ACT networks**

55. In May 2015 the New South Wales (electricity and gas) and ACT (electricity) distribution networks applied to the Australian Competition Tribunal (the Tribunal) for a limited merits review of the AER's April 2015 regulatory decisions. The grounds for review focused on rate of return issues and the use of operating expenditure benchmarks. The Public Interest Advocacy Centre also applied for a Tribunal review of regulatory decision affecting the New South Wales electricity distribution networks, contending the revenues allowed by the decisions were too high.

56. In February 2016 the Tribunal handed down its decisions. While the Tribunal did not accept the revenues proposed by the businesses, it remitted to the AER the decisions on operating expenditure to reconsider using a broader range of modelling and benchmarking, and a bottom-up review of operating costs (electricity networks only) and the transition to a new method for estimating return on debt (all networks). Additionally the Tribunal substituted an alternative value of gamma (relating to tax imputation credits) for all networks. The Tribunal found no error in the AER's decisions in relation to return on equity; efficiency benefit sharing and service target performance incentive schemes; and metering issues, although a reconsideration of the decision on operating expenditure may require some aspects of those areas to be also reconsidered. The AER appealed the Tribunal decisions to the Full Federal Court. The appeals will be heard in October 2016.

## **2.12 Other appeal processes**

57. South Australian Power Networks was granted leave in May 2016 to seek merits review of the AER's November 2015 revenue decision on the network. The Tribunal will conduct the merits review in August 2016. The Victorian electricity distribution networks and ACT gas distribution network have also sought merits review of the AER's May 2016 revenue decisions.

## **2.13 Pricing matters**

### **2.13.1 Monitoring/enforcement of water charge and water market rules**

58. Under the Water Act, the ACCC has responsibility for monitoring compliance with and enforcing the following water market and water charge rules:

- Water Market Rules 2009
- Water Charge (Termination Fees) Rules 2009
- Water Charge (Planning and Management Information) Rules 2010, and
- Water Charge (Infrastructure) Rules 2010.

59. The ACCC or an accredited state regulator regulates charges for large, non-member owned water infrastructure operators in the Murray-Darling Basin under the Water Charge (Infrastructure) Rules.

#### 2.13.2 *Water Act and water charge rules review*

60. Under the Water Act, the ACCC is required to provide advice to the Minister on the making, amending or revoking of water charge rules and water market rules. As noted, in December 2014 the Minister requested that the ACCC provide advice on possible amendments to the water charge rules. The water charge rules regulate the charges imposed on rural water users in the Murray-Darling Basin. The current rules have been in place for five years.

61. In November 2015 the ACCC issued its draft advice which was developed following an extensive period of stakeholder consultation. The draft advice set out proposed amendments to the rules to:

- promote a ‘level playing field’ among infrastructure operators by removing distinctions based on size, ownership structure and the purpose for which they deliver water
- remove overly prescriptive reporting requirements on medium-sized operators to produce network service plans
- improve pricing transparency requirements to give water users confidence in how charges are determined
- expand protections against charging arrangements that unfairly advantage some customers over others
- prevent discriminatory trading charges being unreasonably imposed by infrastructure operators
- reduce regulatory cost and complexity for infrastructure operators by returning the role of regulatory determinations to the economic regulators in each Basin State where possible
- merge three sets of water charge rules into one.

62. Following further consultation the final advice was provided to the Minister for Agriculture and Water Resources in August 2016.

#### 2.13.3 *Airports*

63. Under Part VIIA of the CCA, Parts 7 and 8 of the Airports Act 1996, and related Airports Regulations 1997, the ACCC monitors and reports annually on a range of indicators—including quality of service, prices, costs, profits and investment levels—relating to aeronautical and car-parking services at Australia’s four major airports.

64. The Australian Government has directed the ACCC to monitor these airports until June 2020 because of concerns that airports could use their position to earn monopoly profits to the detriment of consumers.

65. The 2014–15 Airport monitoring report was released in March 2016. It found that, while domestic passenger growth was relatively flat with an increase of 0.7 per cent, international passenger growth was 3.7 per cent. This growth in international passenger numbers and the higher fees international

passengers attract resulted in three of the monitored airports reporting increases in aeronautical revenue of between 1.8 and 10.7 per cent in real terms.

66. As the only suppliers of car parking on the airport grounds, the four monitored airports continued to earn significant profits from car parking.

#### 2.13.4 *Australia Post*

67. The ACCC is notified of increases in the prices of some letter services over which Australia Post has a legislated monopoly.

68. In November 2015, Australia Post notified the ACCC of an increase in the basic postage rate for letters to \$1 and a timetable that allowed two extra business days for delivery. The proposal also included price increases for the delivery of large letters. Australia Post did not propose to increase the price of concession stamps or stamps for seasonal greeting cards.

69. The price increase was designed to increase Australia Post's revenue from its 'reserved' letter services to offset continuing losses as a result of declining demand for those services. The ACCC released a decision (December 2015) not to object to the notification.

70. Prices were assessed with regard to Australia Post's ability to recover enough revenue to cover the efficient cost of providing a service, including a rate of return commensurate with the risks faced by the firm, without achieving excessive or monopoly profits.

71. The ACCC found that Australia Post would not be likely to recover revenue in excess of its costs for postal services over the period to 2017–18 even with an increase of the postage rate to \$1.00.

72. The ACCC also produces an annual cross subsidy report, to determine whether Australia Post has used revenue from its reserved letter services to cross-subsidise its non-reserved services.

73. The report for 2014–15 (issued in April 2016) concluded that, as in previous years, the regulatory accounts did not show that Australia Post was cross subsidising its contestable services. Following its release, the ACCC made a decision to discontinue this report.

#### 2.13.5 *Container stevedoring monitoring*

74. Under Part VIIA of the CCA, the ACCC monitors prices, costs and profits of container stevedoring operators located in the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney.

75. The *Container stevedoring monitoring report no. 17*, focusing on 2014–15, found that average stevedoring prices for the industry fell for the second consecutive year and, in real terms, are now at the lowest level recorded by the monitoring program. The report noted that there has been significant capital investment by the stevedores over the last three years. New entrant Hutchison Ports Australia has been developing terminals in Sydney and Brisbane, while the incumbent stevedores have been investing in automation, cranes and other equipment.

### **3. The role of competition authorities in the formulation and implementation of other policies**

The principal government departments/agencies involved in the development, implementation, administration and enforcement of competition policy and laws are detailed below.

### **3.1 *The Treasury***

76. Amongst other functions, the Treasury advises the Government on competition law and policy, including advice on the economic regulation of infrastructure and broader product markets.

77. More information can be found at <http://www.treasury.gov.au/>.

### **3.2 *The Australian Competition and Consumer Commission***

78. The ACCC was formed in 1995 (with the amalgamation of the Trade Practices Commission and the Prices Surveillance Authority) and is an independent statutory authority that enforces the CCA. The CCA prohibitions of anti-competitive conduct apply to virtually all businesses in Australia.

79. The ACCC has responsibilities in industry regulation that include promoting efficient investment and access to monopoly rail infrastructure, access to wheat ports, monitoring prices and service quality for Australia's four major airports, providing information on the performance of Australia's container stevedoring industry, regulating and monitoring a range of water charges, and monitoring and enforcing compliance with water market and charge rules.

80. More information can be found at <http://www.accc.gov.au/>.

### **3.3 *The Australian Energy Regulator***

81. The AER is the economic regulator of the electricity transmission and distribution networks and is responsible for monitoring the wholesale electricity market and enforcing the National Electricity Law and National Electricity Rules in the National Electricity Market (NEM). The AER is also responsible for the economic regulation of gas transmission and distribution networks and enforcing the National Gas Law and National Gas Rules in all jurisdictions except Western Australia. The AER also regulates retail markets (other than retail pricing) in all states that have adopted the National Energy Customer Framework.

82. More information can be found at <http://www.aer.gov.au/>.

### **3.4 *The National Competition Council***

83. The National Competition Council (NCC) considers applications in relation to third party access to major infrastructure services under Part IIIA of the CCA, and makes recommendations to the relevant decision making Ministers. The NCC has a similar role under the National Gas Law, where it makes recommendations on coverage, the form of regulation (light or full regulation), classifying pipelines (as transmission or distribution) and various exemptions for greenfields gas pipelines.

84. More information can be found at <http://www.ncc.gov.au/>.

### **3.5 *The Productivity Commission***

85. The Productivity Commission (PC), an independent statutory authority, is the Australian Government's principal review and advisory body on microeconomic policy and regulation, and undertakes public inquiries and other research in response to terms of reference provided by the Australian Government. The PC also undertakes self-initiated research.

86. More information can be found at <http://www.pc.gov.au/>.

### 3.6 *The Australian Competition Tribunal*

87. The Tribunal is an independent statutory tribunal whose primary role is to review decisions of the ACCC, the AER and responsible Ministers under Part IIIA of the CCA. Decisions of the ACCC which may be referred to the Tribunal for reconsideration include decisions on whether or not to grant authorisations under the CCA, and arbitration decisions in cases involving access to essential facilities. The Tribunal may also consider applications at first instance for authorisation in relation to mergers and acquisitions under the CCA.

88. More information can be found at <http://www.competitiontribunal.gov.au/>.

#### 4. Resources of competition authorities

89. In 2015-16 the ACCC had seven full time members, one part-time member, and five associate members. The AER had three full-time members.

90. The total average number of staff employed by the ACCC at 30 June 2016 was 739.

91. It is noted that in addition to competition matters, the ACCC has consumer protection and national infrastructure services regulatory functions. ACCC staff can have diverse roles, in carrying out investigative functions they may assist with competition enforcement (including merger and authorisation review), consumer protection, the investigation of product safety concerns, as well as advocacy and outreach activities. In addition staff from the ACCC infrastructure area may assist with competition enforcement in relevant sectors.

92. The ACCC's investigative and regulatory functions are supported by specialist advisers in the Legal and Economic Division. The division comprises two groups: the Legal Group and the Economic Group.

- The Legal Group consists of general and special counsel, and four core units that provide in-house legal services to the ACCC and AER. It assists the ACCC and AER to make legally informed decisions and manage litigation, including by facilitating, as an informed purchaser, external litigation services. It also assists in managing the agency's corporate legal obligations.
- The Economic Group consists of the Chief Economist, and two core units that provide in-house strategic economic advice and related services to the ACCC and AER. It aims to facilitate the consistent use of economic principles in decision making, increase the quality of economic analysis and contribute to economics-related learning and development initiatives.

93. The ACCC's total funding for the period 1 July 2015 to 30 June 2016 was \$170.89 million, comprising the original appropriation of \$165.34 million and other revenue of \$5.54 million.

#### ACCC funding appropriations

	ACCC	
	2015-16 \$m	2014-15 \$m
<b>A</b>	165.3	167.4
<b>US</b>	122.6	122.9

(Exchange rate at 30 June 2016 – A\$1= US\$0.7419)

94. The cost of administering the ACCC's telecommunications-specific regulatory functions are recovered from telecommunications carriers through carriers' annual licence fees.

**5. Summaries of or references to new reports and studies on competition policy issues**

**5.1 Productivity Commission inquiries, reports and publications**

95. In the past financial year the PC completed a number of public inquiries and commissioned research studies. These can be accessed at [www.pc.gov.au](http://www.pc.gov.au). Completed inquiries included:

- Migrant intake into Australia;
- Workplace Relations Framework;
- Business Set-up, Transfer and Closure.

96. The PC also completed 3 commissioned research studies during the past financial year:

- Public Safety Mobile Broadband;
- Service Exports;
- Mutual Recognition Schemes.

97. In 2015-16 the PC completed 6 research papers:

- Superannuation Policy for Post-Retirement;
- Tax and Transfer Incidence in Australia;
- Housing Decisions of Older Australians;
- Developments in Anti-Dumping Arrangements;
- Indigenous Primary School Achievement;
- Digital Disruption: What do governments need to do?

98. Other completed research work includes:

- National Indigenous Reform Agreement: Performance Assessment 2013-14
- Effective Marginal Tax Rates on Savings
- Productivity in Financial and Insurance Services
- CAPITA-B: A Behavioural Microsimulation Model

99. As at 30 June 2016, the PC was undertaking inquiries or research studies into:

- Human Services
- Consumer Law Enforcement and Administration

- Telecommunications Universal Service Obligation
- Data availability and use
- Education Evidence Base
- Superannuation
- Marine Fisheries and Aquaculture
- Regulation of Agriculture
- Intellectual Property Arrangements

## **GLOSSARY**

- ACCC Australian Competition and Consumer Commission
- AEMC Australian Energy Market Commission
- AER Australian Energy Regulator
- ARTC Australian Rail Track Corporation
- CCA Competition and Consumer Act 2010
- COAG Council of Australian Governments
- ECA Energy Consumers Australia
- MDB Murray-Darling Basin
- MDBA Murray-Darling Basin Authority
- NBN National Broadband Network
- NCC National Competition Council
- NEM National Electricity Market
- PC Productivity Commission

## APPENDIX A - SUMMARY OF ACCC ACTIVITIES – COMPETITION MATTERS

### Cartel conduct proceedings finalised

#### **Colgate-Palmolive Pty Ltd & Ors**

Alleged cartel in relation to the supply of laundry detergents

Commenced 12 December 2013

Concluded 28 April 2016—Colgate-Palmolive Pty Ltd

Concluded 3 June 2016—Woolworths Ltd

Colgate-Palmolive: pecuniary penalties of \$18 million, declarations, compliance program, ACCC costs of \$450 000.

Mr Ansell: seven year disqualification order and payment of ACCC costs \$75 000.

Woolworths Ltd: pecuniary penalties totalling \$9 million, declarations, compliance program, costs \$250 000.

Matter is ongoing in respect of other parties.

#### **Australian Egg Corporation Limited & Zelko Lendich**

Alleged attempt to induce members of AECL into an arrangement, for the purpose of reducing the available egg supply

Commenced 28 May 2014

Concluded 29 April 2016

In respect of Mr Lendich pecuniary penalties of

\$120 000, declaration, compliance program, ACCC costs of \$10 000.

Matter is ongoing in respect of other parties.

#### **Yazaki Corporation & Australian Arrow Pty Ltd**

Alleged price fixing and market sharing in relation to the supply of wire harnesses to Toyota

Commenced 13 December 2012

Concluded 24 November 2015

Yazaki found to have contravened the cartel provisions of the CCA.

Penalty against Yazaki pending.

Australian Arrow found to have contravened the cartel provisions of the CCA.

### Cartel conduct proceedings commenced

#### **Oakmoore Pty Ltd, Palram Inc, Ampelite Pty Ltd & Ors**

Commenced 23 June 2016

Alleged cartel conduct in the supply of polycarbonate roof sheeting to retailers in Australia

### Cartel cases ongoing

#### **Air New Zealand Limited (appeal)**

Commenced 12 May 2010

Alleged cartel conduct concerning price fixing of surcharges on air cargo services

**Cascade Coal Pty Ltd & Ors**

Commenced 25 May 2015  
 Alleged bid rigging conduct involving mining exploration licences in the Bylong Valley, New South Wales

**Prysmian Cavi e Sistemi Energia Srl & Ors**

Commenced 23 September 2009  
 Alleged cartel in relation to the allocation of projects supplying high voltage or extra-high-voltage land or submarine cable

**OLEX Australia Pty Ltd & Ors**

Commenced 4 December 2014

**P.T.Garuda Indonesia Ltd (appeal)**

2 September 2009  
 Alleged cartel conduct concerning price fixing of surcharges on air cargo services

**Anti-competitive agreements and practices proceedings finalised****Australia and New Zealand Banking Group Ltd (appeal)**

Commenced 9 December 2013  
 Concluded 31 July 2015  
 ACCC appeal dismissed

**Informed Sources (Australia) Pty Ltd & five fuel retailers**

Commenced 19 August 2014  
 Concluded 21 December 2015  
 s. 87B undertaking for 5-year period

**Little Company of Mary Health Care Limited**

Commenced 10 December 2014  
 Concluded 26 October 2015  
 Declaration, payment of ACCC costs of \$100 000

**OmniBlend Australia Pty Ltd**

Commenced 14 August 2014  
 Concluded 17 August 2015  
 Pecuniary penalty of \$17 000, injunction, declaration, CCA training for employees, contribution of \$10 000 to ACCC costs

**Anti-competitive agreements and practices proceedings ongoing****Flight Centre Ltd (High Court appeal)**

Commenced 9 March 2012  
 Appeal on issues

**Cement Australia Pty Ltd & Ors (appeal)**

Commenced 12 September 2008  
 Appeal on penalty

**Construction Forestry Mining and Energy Union (CFMEU)**

Commenced 20 November 2014

**Misuse of market power cases finalised****Visa (Inc) & Ors**

Commenced 4 February 2013  
 Concluded 4 September 2015  
 Pecuniary penalty of \$18 million, declaration, payment of ACCC costs of \$2 million

### Misuse of market power proceedings ongoing

#### **Pfizer Australia Pty Ltd (appeal)**

Commenced

13 February 2014

Judgment reserved

### Merger review - Statement of Issues issued

- Consortium comprising **Brookfield, Qube** and others proposed acquisition of Asciano Limited
- **DYWIDAG-Systems International Group** proposed acquisition of Jenmar Australia
- **Iron Mountain Incorporated** proposed acquisition of Recall Holdings Limited
- **Halliburton Company** proposed acquisition of Baker Hughes Incorporated
- **GPC Asia Pacific Pty Ltd** proposed acquisition of Covs Parts from Automotive Holdings Group Limited
- **Brookfield** consortium proposed acquisition of Asciano Limited
- **APA Group** proposed acquisition of EnergyAustralia's Iona Gas Plant
- **Royal Dutch Shell plc** proposed acquisition of BG Group plc
- **Foxtel Management Pty Ltd** proposed acquisition arrangements with Ten Network Holdings Ltd
- **Coles Supermarkets Australia Pty Ltd** proposed acquisition of nine Supabarn supermarkets

### Public competition assessments issued

- **Iron Mountain Incorporated** proposed acquisition of Recall Holdings Limited
- **GPC Asia Pacific Pty Ltd** proposed acquisition of Covs Parts from Automotive Holdings Group Limited
- **Foxtel Management Pty Ltd** proposed acquisition arrangements with Ten Network Holdings Ltd
- **Royal Dutch Shell plc** proposed acquisition of BG Group plc
- **TPG Telecom Limited** proposed acquisition of iiNet Limited
- Federation Centres and Novion Property Group proposed merger
- **Elgas Limited** proposed acquisition of Wesfarmers Kleenheat Gas Pty Ltd's east coast LPG assets
- **Australian Amalgamated Terminals Pty Ltd** proposed acquisition of Automotive and RoRo Terminal at the Port of Fremantle
- **Victoria Quay International RoRo Terminal Pty Ltd** proposed acquisition of Automotive and RoRo Terminal at the Port of Fremantle
- **CSR Limited** and **Boral Limited** proposed clay brick joint venture