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Annual Report on Competition Policy Developments in Australia

-- 2018 --

5-7 June 2019

This report is submitted by Australia to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 5-7 June 2019.

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Table of contents

1. Executive Summary	4
2. Changes to competition laws and policies, proposed or adopted	5
2.1. Competition Law Reform & New Guidelines	5
2.1.1. Guidelines on misuse of market power	5
2.1.2. Guidelines on concerted practices	5
2.1.3. Merger Authorisation guidelines	5
2.1.4. ACCC Immunity and Cooperation Policy for Cartel Conduct	6
2.2. Other Law Reform	6
3. Enforcement of competition laws and policies	6
3.1. Action against anticompetitive practices, including agreements and abuses of dominant positions	6
3.1.1. Anti-competitive conduct matters	7
3.2. Mergers	9
3.3. Adjudication – authorisation applications and notifications	11
3.4. Market studies	12
3.5. Infrastructure Regulation	14
3.6. Access to infrastructure facilities	14
3.6.1. Rail	15
3.6.2. Ports	15
3.7. Telecommunications	15
4. The role of government departments and agencies in the formulation and implementation of competition policy	16
4.1. The Treasury	16
4.2. The Australian Competition and Consumer Commission	16
4.3. The Australian Energy Regulator	16
4.4. The National Competition Council	17
4.5. The Productivity Commission	17
4.6. The Australian Competition Tribunal	17
5. Resources of competition authorities	17
6. Summaries of, or references to, new reports and studies on competition policy issues	18
6.1. Productivity Commission inquiries, reports and publications	18
Annex A	19
7. Summary of ACCC activities – competition matters	19
7.1. Cartel conduct proceedings finalised	19
7.2. Cartel conduct proceedings commenced	20
7.3. Cartel cases ongoing	21
7.4. Anti-competitive agreements and practices proceedings finalised	21
7.5. Anti-competitive agreements and practices proceedings commenced	22
7.6. Misuse of market power proceedings finalised	22
7.7. Misuse of market power proceedings ongoing	22

7.8. Merger review - Statement of Issues issued.....	22
7.9. Public competition assessments issued.....	23

Tables

Table 1. ACCC funding appropriations.....	18
Table 2.....	19
Table 3.....	20
Table 4.....	21
Table 5.....	21
Table 6.....	22
Table 7.....	22
Table 8.....	22

Boxes

Box 1. Case Studies.....	8
Box 2. Case Study.....	10
Box 3. Case study.....	12

Australia

1. Executive Summary

1. This report addresses events that have occurred in the previous calendar year (1 January 2018 to 31 December 2018).
2. The report primarily covers the activities of the Australian Competition and Consumer Commission (ACCC). The ACCC is responsible for enforcing the *Competition and Consumer Act 2010 (CCA)*, which is the primary instrument of Australia's competition policy. A range of other agencies are responsible for developing and implementing Australia's competition policy. The roles of these agencies are outlined in Section 4 below.
3. In 2018, there were no changes to the competition provisions of the CCA. A number of guidelines were produced or updated in response to the changes in the CCA in 2017.
4. A number of significant court decisions were handed down during 2018:
 - In April 2018, the Full Federal Court ordered Flight Centre to pay penalties totalling \$12.5 million for attempting to induce three international airlines to enter into price fixing arrangements between 2005 and 2009. The \$12.5 million in penalties was an increase from the original \$11 million that the trial judge imposed in March 2014.
 - In May 2018, The Full Federal Court upheld the ACCC's appeal on penalty in the Yazaki case relating to cartel conduct, and increased the penalties imposed at first instance from \$9.5 million to \$46 million. Following the ACCC's appeal, Yazaki sought special leave from the High Court to appeal the Full Federal Court's penalty decision. In October 2018, the High Court dismissed Yazaki's application
 - In August 2018, the Federal Court declared (by consent) that Palram Australia and Ampelite Australia had engaged in exclusive dealing conduct with the purpose of substantially lessening competition, and ordered them to pay penalties of \$3.5million and \$2.1 million respectively.
 - In September 2018, another company, Oakmoore Pty Ltd and its director Mr Rodney Horwell were ordered to pay penalties totalling \$6.35 million for being knowingly concerned in the same exclusive dealing conduct.
5. In 2018, the ACCC considered 305 merger matters, including conduct 27 public reviews, and 278 were pre-assessed as not requiring a public review.
6. In 2018, the Government directed the ACCC to conduct inquiries into:
 - electricity market monitoring (August 2018)
 - foreign currency conversion services (October 2018)
 - feminine hygiene products price monitoring (November 2018).
7. In 2018, the ACCC released interim reports on:
 - Digital Platforms Inquiry (December 2018)
 - Northern Australian Insurance Inquiry (December 2018)
8. The ACCC concluded government-directed inquiries into:

- retail electricity supply prices (July 2018)
 - the Australian dairy industry (September 2018).
 - residential mortgage products price (December 2018)
9. The ACCC also initiated a market study into the Australian Wine Grape Industry (September 2018) and completed a self-initiated market study into the communications sector (April 2018).

2. Changes to competition laws and policies, proposed or adopted

2.1. Competition Law Reform & New Guidelines

10. In 2018, the Australian Government did not pass any new amendments to the competition provisions of the *Competition and Consumer Act 2010 (Cth)* (CCA). As noted in Australia's previous Annual Report to the OECD on Competition Policy Developments in Australia, the second half of 2017 saw landmark amendments to Australia's competition law with sweeping changes to the misuse of market power (dominance) provisions, the merger review processes and adding the new prohibition of anti-competitive concerted practices. The changes were in response to the recommendations of Harper's *Competition Policy Review* (Harper Review).

11. In 2018, the ACCC produced and/or updated a number of guidance documents on how the ACCC proposes to interpret the amendments to the legislation. These describe the general approach the ACCC will likely take in investigating alleged contraventions of these provisions.

12. The guidelines newly produced or updated in 2018 include:

2.1.1. Guidelines on misuse of market power

13. These guidelines explain the key concepts that the ACCC considers when investigating allegations of contravention of the new misuse of market power provisions and were produced in 2018 for the first time. The misuse of market power provisions are contained within section 46 of the CCA. The amendments to this provision introduced a substantial lessening of competition test to determine whether a business with a substantial degree of market power has engaged in anti-competitive conduct.

2.1.2. Guidelines on concerted practices

14. In 2017, the new amendments to the CCA, introduced the concept of concerted practices to section 45 of the CCA. This provision prohibits concerted practices that substantially lessen competition. These guidelines were developed in 2018 to explain the key elements and what the ACCC considers to be a likely contravention of the concerted practices provisions.

2.1.3. Merger Authorisation guidelines

15. Merger authorisations are an alternative to the informal merger review process. A person who obtains merger authorisation from the ACCC obtains statutory protection from legal action under section 50 of the Act in respect of the proposed acquisition. In October 2017, the ACCC produced interim guidelines for consultation in response to the merger

authorisation process arising out of the Harper review. In 2018, these guidelines finalised to outline the process for businesses when seeking authorisation for mergers and acquisitions under the new regime.

2.1.4. ACCC Immunity and Cooperation Policy for Cartel Conduct

16. The ACCC's Immunity and Cooperation Policy for Cartel Conduct encourages businesses and individuals to disclose cartel behaviour and this in turn assists the ACCC to stop the harm arising from this illegal conduct and to take action against participants. Given the importance of the immunity program, the ACCC constantly seeks to improve the effectiveness of the policy. The ACCC announced that the policy is being updated to reflect its experience, particularly in the criminal context. The revision will ensure that policy accurately reflects the approach the ACCC takes and its expectation of immunity applicants.

17. There are ten proposed key revisions of the policy. These extend (but are not limited to) the scope of the policy, the use of information where immunity is and isn't granted, conditional immunity agreements, derivative immunity, clarification of whether a concerted practice is included, attempted cartel conduct and a review of wording contained in the MOU between the ACCC and CDPP. It is expected that the revised policy will be released later in 2019.

2.2. Other Law Reform

18. Although there were no amendments to the competition provisions of the CCA in 2018, on 15 February 2018, the Australian Government introduced legislation to increase penalties for breaches of the Australian Consumer Law (ACL). The ACCC had strongly advocated for an increase in ACL penalties, and assisted Treasury by providing feedback on drafts of this legislation. These amendments have assisted in bringing penalties for breaches of the ACL in line with those for breaches of competition laws.

3. Enforcement of competition laws and policies

3.1. Action against anticompetitive practices, including agreements and abuses of dominant positions

19. 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.

20. The ACCC's competition priorities in 2018, set out in its Compliance and Enforcement Policy,¹ included:

- competition issues in the financial services sector
- competition and consumer issues in the provision of energy as an essential service

¹ <https://www.accc.gov.au/speech/2018-compliance-enforcement-priorities>

- competition and consumer issues concerning the use of digital platforms, algorithms and consumer data
- competition and consumer issues in the agricultural sector
- competition issues in the commercial construction sector.

21. Some forms of 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.

3.1.1. Anti-competitive conduct matters

22. The ACCC instigated directly or through the Commonwealth Director of Public Prosecutions (CDPP) eight new competition enforcement interventions in 2018 which include:

- the first criminal cartel prosecution of an Australian corporation and two individuals under the criminal cartel provisions, with the CDPP commencing proceedings against Country Care Pty Ltd
- criminal cartel charges against Citigroup Global Markets Australia Pty Ltd (Citigroup), Deutsche Bank Aktiengesellschaft (Deutsche Bank) and Australia and New Zealand Banking Group Ltd (ANZ), as well as against six senior executives and former executives of those companies
- criminal cartel charges against the Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) and its ACT Divisional Branch Secretary, Jason O'Mara, in relation to alleged cartel conduct
- civil cartel proceedings against Cryosite Limited (Cryosite) for alleged cartel conduct
- civil proceedings against Pacific National and Aurizon for allegedly entering into a contract, arrangement or understanding which has the effect of substantially lessening competition
- civil proceedings against NSW Ports Operations Hold Co Pty Ltd and its subsidiaries Port Botany Operations Pty Ltd and Port Kembla Operations Pty Ltd for making agreements with the State of New South Wales that the ACCC alleges had an anti-competitive purpose and effect.

23. All of the competition enforcement interventions were within the priority areas or demonstrated the priority factors as outlined in the Compliance and Enforcement Policy.

24. The ACCC achieved significant outcomes in competition matters in 2018, including the following penalties or fines:

- Yazaki Corporation Pty Ltd—penalties upheld of \$46 million
- Air New Zealand—penalty of \$15 million
- Oakmoore – penalty of \$6.5 million
- Palram & Ampelite – penalty of \$5.5 million
- CFMEU – penalty of \$1 million
- Flight Centre Ltd—penalty of \$12.5 million

- Prysmian – penalty upheld of \$3.5 million

25. In 2018, the ACCC completed 32 in-depth competition investigations. These include abuse of dominance, cartel conduct and exclusive dealing conduct.

26. Throughout the 2018 period, the ACCC has continued to prioritise investigations of cartel conduct, an enduring priority under the Compliance and Enforcement Policy. Resources have been dedicated to increasing the ACCC’s capability and working with the CDPP to prosecute criminal cartel conduct.

27. There were a number of longstanding and ongoing cases dealt with during the period that continued to require resourcing, including a number of important appeals to the Full Federal Court and High Court. These included Prysmian, Yazaki, PZ Cussons, PT Garuda Indonesia Ltd, Air New Zealand Ltd and the Flight Centre appeal. In some of these cases, the litigation has been ongoing and involved the continued expenditure of significant resources for many years. In the case of the air cargo proceedings involving Air New Zealand, Garuda and other airlines, it has now involved expenditure for over a decade.

28. Challenges ahead for the ACCC’s competition work include continued efforts to achieve higher penalties for breaches of competition law, to provide both specific and general deterrence, particularly in relation to the conduct of larger companies. We are continuing our criminal cartel work, and to balance competition advocacy and law reform work with investigations, and market studies and inquiries. The ACCC will also be looking for appropriate opportunities to test new legislative provisions in the CCA including the new misuse of market power with a substantial lessening of competition test and concerted practices provisions.

Box 1. Case Studies

Enforcement action to remedy damage from a cartel – Yazaki Corporation and Australian Arrow Pty Ltd

In December 2012 the ACCC instituted proceedings against Yazaki Corporation, a Japanese company, and its Australian subsidiary, Australian Arrow Pty Ltd. This matter relates to cartel conduct in connection with the supply of wire harnesses to Toyota and its related entities in Australia between 2003 and at least late 2009.

Wire harnesses are electrical systems that facilitate the distribution of power and the sending of electrical signals to various components of a motor vehicle.

The ACCC’s action follows similar enforcement action against Yazaki and other cartel participants by competition regulators in the US, Canada, and Japan. It arose from an immunity application which reported the conduct.

In November 2015, the Federal Court of Australia found that Yazaki Corporation engaged in collusive conduct with its competitor. The Court held that this conduct was in breach of the CCA and the Competition Code of Victoria (the Code). The Court found that Yazaki’s conduct was subject to the CCA and the Code, even though much of the conduct occurred in Japan. The Court imposed penalties of \$9.5 million against Yazaki.

The ACCC noted it will seek to enforce Australian cartel laws to protect Australian consumers and industry, even when the collusive arrangements are made outside of Australia.

The ACCC appealed the decision because it believed that the penalties imposed were insufficient to adequately deter Yazaki or other businesses from engaging in cartel conduct in the future. It submitted to the Court that Yazaki should be ordered to pay a penalty of between \$42 million and \$55 million to reflect both the size of Yazaki's operations and the very serious nature of its collusive conduct.

In May 2018, the Full Federal Court ordered Yazaki to pay increased penalties of \$46 million. This is the highest penalty ever imposed under the CCA.

In October 2018, the High Court dismissed Yazaki's special leave to application to appeal the Full Federal Court's penalty decision.

Criminal cartel charges laid against ANZ, Citigroup and Deutsche Bank

In June 2018, following an investigation by the ACCC, the Commonwealth Director of Public Prosecutions (CDPP)* charged Citigroup Global Markets Australia Pty Limited (Citigroup), Deutsche Bank Aktiengesellschaft (Deutsche Bank) and Australia and New Zealand Banking Group Ltd (ANZ) with criminal cartel offences.

In addition, criminal charges were laid against several senior executives for being knowingly concerned in the conduct, these include: John McLean, Itay Tuchman and Stephen Roberts of Citigroup; Michael Ormaechea and Michael Richardson formerly of Deutsche Bank; and Rick Moscati of ANZ.

The proceedings relate to the defendants' involvement in a series of cartel arrangements or understandings which are alleged to have been entered into following the sale of \$2.5 billion ANZ shares to institutional investors in August 2015. The sale was organised and underwritten by Citigroup, Deutsche Bank and JP Morgan.

This is a significant case for the ACCC as it is the first time that charges have been laid against senior executives of large banking institutions in Australia. The matter is currently before the courts.

*Under the CCA, the ACCC may take proceedings in the Federal Court of Australia in respect of civil cartel provisions, however the CDPP is responsible for prosecuting criminal cartel offences. The ACCC refers serious cartel conduct to the CDPP for consideration of prosecution.

3.2. Mergers

29. 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.

30. In Australia, there is no compulsory pre-merger notification process. However, parties are encouraged to approach the ACCC on a voluntary basis to seek the ACCC's view on those proposed mergers or acquisitions that may raise competition issues – this clearance option is commonly referred to as 'informal review process' as the decision is not underpinned by legislation.

31. An alternative clearance option is to apply for merger authorisation which enables public benefits and detriments to be assessed. Following a change to the legislation in November 2017 applications can be made to the ACCC for merger authorisation of a proposed merger which, if granted, provides immunity from legal action under the mergers

law. There were no applications received by the ACCC in 2018. Prior to November 2017, applications for merger authorisation were made to the Australian Competition Tribunal.

32. Where the ACCC has concerns that a proposed merger or acquisition may, or may be likely to, substantially lessen competition in contravention of section 50 of the *Competition and Consumer Act 2010* (CCA), it may accept a court enforceable undertaking (remedy) from the merger parties under section 87B of the CCA to remedy those concerns.

33. In 2018, the ACCC assessed 305 mergers under the informal review process, of which 27 underwent a public review, and 278 were assessed and cleared using an expedited process and did not require a full public review.

34. Of the 27 public reviews that were conducted in 2018 these included:

- 1 merger was opposed outright that underwent a public informal review
- remedies were accepted in relation to 4 mergers to address competition concerns, resulting in these mergers being cleared subject to a remedy
- 4 reviews were discontinued because either the transactions did not proceed or the parties withdrew their request for clearance. In 1 of these matters, the decision by the parties to withdraw came after we released a statement of issues² identifying issues of concern or issues that may raise concerns
- 17 other mergers that underwent a public informal review were not opposed
- 1 request to vary an existing remedy previously accepted to address competition concerns.

Box 2. Case Study

Nine Entertainment and Fairfax Media Merger

On 8 November 2018, the ACCC announced that it would not oppose the proposed merger between Nine Entertainment (Nine) and Fairfax Media (Fairfax).

Nine's main business activities involve its television business, digital publishing assets and a 50% share in Stan.

In addition to its publishing business, Fairfax has shareholdings in Domain, radio broadcaster Macquarie Media Limited, Australian Associated Press Pty Limited and a 50% share in its on-demand video services, Stan.

The ACCC examined a number of markets affected by this proposed merger. The key issue was whether the merger would substantially lessen competition in the creation and provision of Australian news content.

² The ACCC may issue a public statement (Statement of Issues) at the end of phase I outlining the basis and facts upon which the ACCC has come to a preliminary view that a proposed merger or acquisition raises competition concerns.

The ACCC concluded that while the merger will likely reduce competition to some degree, it is not likely to substantially lessen competition in any market in breach of the Competition and Consumer Act.

The ACCC found that Nine's television operations and Fairfax's main media assets generally do not compete closely with each other. Nine's news and current affairs programs target a mass market audience while Fairfax's print and online publications tend to provide more in-depth coverage, targeting the demographic of its subscription audience.

While the parties directly overlap in online news, Nine and Fairfax online sites currently do not provide much constraint on each other. In addition, with the growth in online news, many other players, albeit smaller, now provide some degree of competitive constraint. While there are important barriers to building trust and scale, significant new entry into the Australian online news market has already occurred and made a noticeable difference.

The ACCC reached the conclusion that any changes to the way Fairfax and Nine operate in future would not be, to a significant extent, caused by the merger lowering the level of competition.

The ACCC also investigated potential competition issues in the provision of regional news. In particular, concerns were raised about combining the two key newsrooms in the Hunter/Newcastle region. It determined, however, that in the Hunter region, Fairfax and Nine do not compete closely with each other.

In relation to advertising markets, content acquisition markets and non-news content markets, Nine and Fairfax do not currently compete strongly against each other, and would continue to face a range of competitive constraints after the merger.

3.3. Adjudication – authorisation applications and notifications

35. 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.

36. 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.

37. The ACCC can, upon application, grant an authorisation that imposes restrictions on competition where the likely public benefit outweighs any likely public detriment. The ACCC may now also grant authorisation for certain forms of conduct if it is satisfied that no substantial lessening of competition is likely.

38. In 2018, the ACCC issued 25 final authorisation decisions, excluding minor variations, for arrangements involving a wide range of industries. Among them were aviation, financial services, agriculture, energy, waste services, transport and retailing. Applicants sought authorisation for conduct such as collective bargaining, coordination agreements, joint tender or buying processes, industry codes and other price or fee agreements.

Box 3. Case study

Homeworker Code Committee Incorporated

On 30 August 2018 the ACCC granted authorisation to the Homeworker Code Committee, to allow the continuation, for another 10 years, of a revised Homeworkers Code of Conduct. A form of the Code has been authorised by the ACCC since 2000.

The Code assists businesses in the textile, clothing and footwear industry in Australia to ensure compliance with the legislative requirements applying to homeworkers or outworkers. It does this by providing education of, and auditing against, the legal obligations on participants in the supply chain to provide award wages and conditions. Signatories to the Code must be able to demonstrate compliance with relevant Australian Awards and workplace laws in relation to all workers directly engaged by them and in any outsourced supply chain, in order to gain accreditation under the Code. Boycotts can be imposed on businesses which do not observe their legal requirements.

Accredited businesses are able to promote their credentials to consumers by displaying the Ethical Clothing Australia license mark and trade mark.

The ACCC found that the Code has resulted, and is likely to continue to result, in public benefits in the form of increased compliance by businesses with legal obligations relating to workers, efficiencies in the management of supply chains and efficiencies in businesses' signalling their compliance with legal obligations, which provides better information to customers.

The ACCC considered that the Code did not restrict competition between suppliers or increase the costs and administrative burdens for businesses. As obtaining accreditation under the Code is voluntary, the ACCC considered the operation of the Code is likely to result in little, if any, public detriment.

39. Notification is an alternative to authorisation for certain arrangements such as exclusive dealing. Like authorisation, the notification process provides protection from legal action under the CCA if the conduct is in the public interest.

40. Notification remains in place unless we revoke it. At any time, we can review the public benefit and detriment from the notified conduct to assess whether it should continue.

41. Changes to the CCA from 6 November 2017 mean that it is now possible to obtain protection from legal action for resale price maintenance conduct by lodging a notification, but legal protection only comes into effect if the ACCC does not move to revoke the notice. Before this date, ACCC authorisation was the only way to obtain legal protection for resale price maintenance conduct.

42. In 2018, the ACCC assessed three exclusive dealing notifications, three collective bargaining notifications, and one resale price maintenance notification.

3.4. Market studies

43. Under the CCA, the ACCC can be directed to conduct formal inquiries, which can include the use of compulsory information-gathering powers. The ACCC can also initiate informal market studies without being given a government direction, as detailed below:

1. The ACCC published the final report of its communications sector market study on 5 April 2018, which includes 28 recommendations and actions on competition and consumer issues. The report has found that the markets for broadband and voice services are operating competitively under the current regulatory arrangements, despite the levels of concentration.
2. On 30 April 2018, the ACCC released the final report arising from its dairy inquiry, which includes a key recommendation that a mandatory code of conduct be implemented to improve contracting practices between dairy processors and farmers. The inquiry was initiated in response to large and retrospective reductions in milk prices imposed by two major dairy processors in April 2016. The inquiry involved extensive investigations, consultation and data analysis over a period of 18 months.
3. The ACCC concluded its inquiry into the supply of retail electricity and the competitiveness of retail electricity prices in the National Electricity Market on 11 July 2018. The inquiry, which commenced in March 2017, began by identifying the root causes of high electricity prices across the entire electricity supply chain, and has now made 56 recommendations detailing ways to fix the National Electricity Market. The ACCC estimates its recommendations, if adopted, will save the average household between 20 and 25 per cent on their electricity bill, or around \$290 to \$415 per annum.
4. On 20 August 2018, the Federal Government directed the ACCC to monitor and report on prices, profits and margins in the supply of electricity in the National Electricity Market. The first report is due by 31 March 2019. Under the direction the ACCC may make recommendations to Government on how to improve outcomes for electricity customers.
5. The ACCC released an update report on 8 June 2018 on its inquiry into the supply of home, contents and strata insurance in Northern Australia, commenced in July 2017. Early analysis shows that while northern Australia makes up only five per cent of the number of policies, it accounts for about 10 per cent of premium revenue.
6. The ACCC announced a market study into the wine grape industry on 26 September 2018. The study will examine competition, contracting practices, transparency, and risk allocation issues in the wine grape supply chain.
7. On 2 October 2018, the Treasurer, issued a notice approving the ACCC to hold an inquiry into the supply of foreign currency conversion services in Australia.
8. On 19 November 2018, the final report of the price inquiry into the residential mortgage products was provided to the Treasurer.
9. On 28 November 2018, the Treasurer directed the ACCC to monitor the prices, costs and profits relating to the supply of menstrual products in the feminine hygiene products industry in Australia.
10. On 10 December 2018, the ACCC released its preliminary report into digital platforms. This was as a result of a direction from the Treasurer, to conduct an inquiry into digital platforms on 4 December 2017. The inquiry is examining the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets. In particular, the inquiry is focusing on the impact of digital platforms on

the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers.

44. Annex A provides a high level summary of the ACCC's competition activities during the period 2018.

3.5. Infrastructure Regulation

45. The ACCC has a number of duties and functions in relation to the economic regulation of infrastructure and natural monopoly assets. Key developments in relation to these functions for 2018 are outlined below. More information can be found at acc.gov.au.

46. During 2018 the ACCC undertook a number of major regulatory activities including:

- a regulatory decision to extend the declarations of key fixed line wholesale communications services and undertook inquiries into the continued regulation of the Domestic Transmission Capacity Service (DTCS) and mobile termination access services.
- continuing to progress our public inquiry into National Broadband Network (NBN) wholesale service standards and accepting a court-enforceable undertaking from NBN Co (the network operator) to address gaps in key service commitments.
- finalising an arbitration of a dispute between Glencore Coal Assets Australia Pty Ltd (Glencore) and Port of Newcastle Operations Pty Ltd (PNO) about terms and conditions of access to the 'declared' shipping channel service at the Port of Newcastle.
- the publication of multiple monitoring reports on different infrastructure sectors, including airports, bulk wheat ports, container stevedoring and telecommunications, and fuel, which provide transparency for consumers and businesses about competition and market conditions.

47. The ACCC's other key activities during the year include:

- undertaking monitoring and releasing key reports and advice to government as part of our market studies and inquires in relation to Gas, Insurance and Electricity markets following directions by the government.
- continuing to provide advocacy on request as well as voluntarily on inquiries and reviews by other government and non-government agencies affecting competition and consumers in Australia, particularly in relation to the economic regulation of Australia's airports
- continuing to investigate and secure appropriate remedies in response to potential breaches of rules in the communications and water sectors.

3.6. Access to infrastructure facilities

48. 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.

49. The ACCC has a role under Part IIIA of the CCA to arbitrate access disputes where a service has been ‘declared’. When an access seeker and the provider cannot agree on the terms and conditions of access to the declared service, either party may request the ACCC to arbitrate the dispute.

3.6.1. Rail

50. 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.

51. On 28 September 2018, ARTC applied to the ACCC to vary its 2011 Hunter Valley Access Undertaking.

52. The variation incorporated a number of proposed amendments set out in [ARTC's December 2017 variation of the 2011 Hunter Valley Access Undertaking](#), which ARTC withdrew on 27 July 2018 following the ACCC’s draft decision on the variation on 28 June 2018.

53. On 29 November 2018, the ACCC consented to ARTC's September variation application following consultation with stakeholders. A majority of stakeholders considered that the ‘package’ of proposed amendments was preferable to the current HVAU and the ACCC was confident that stakeholders were fully aware of the implications of the variation of the operation of the HVAU.

54. On 12 December 2018, the ACCC consented to a variation to extend the term of the 2008 Interstate Access Undertaking (IAU) until 29 February 2019. This was to allow time for the ACCC to assess ARTC’s 2018 IAU application which ARTC submitted in March 2018. The ACCC subsequently made a draft decision on the proposed 2018 IAU on 20 December 2018. ARTC withdrew the proposed 2018 IAU on 25 January 2019 while it considered the issues raised in the ACCC’s draft decision.

3.6.2. Ports

55. On 8 October 2018, the ACCC finalised its arbitration of a dispute between Glencore Coal Assets Australia Pty Ltd (Glencore) and Port of Newcastle Operations Pty Ltd (PNO) about terms and conditions of access to the ‘declared’ shipping channel service at the Port of Newcastle.

56. The ACCC determined that PNO should reduce its charge for ships entering the port to carry Glencore’s coal by around 20 per cent. The decision is currently under review by the Australian Competition Tribunal.

3.7. Telecommunications

57. 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.

58. Under the NBN Co special access undertaking (SAU), the ACCC must make annual determinations specifying the amount of revenue that NBN Co is allowed to earn for each financial year. The ACCC must review regulatory information submitted by NBN Co and determine whether NBN Co has complied with the relevant requirements set out in the SAU.

59. During 2018, the ACCC finalised a review of Telstra fixed line services declaration for further five years and commenced consultation of a proposal to extend the operation of the DTCS declaration. The ACCC commenced reviewing the DTCS final access determinations (FAD) in December 2018.

4. The role of government departments and agencies in the formulation and implementation of competition policy

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

4.1. The Treasury

61. 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.

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

4.2. The Australian Competition and Consumer Commission

63. The ACCC was formed in 1995 and is an independent statutory authority that enforces the CCA. The CCA prohibitions of anti-competitive conduct apply to virtually all businesses in Australia.

64. 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.

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

4.3. The Australian Energy Regulator

66. The Australian Energy Regulator (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.

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

4.4. The National Competition Council

68. 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.

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

4.5. The Productivity Commission

70. 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.

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

4.6. The Australian Competition Tribunal

72. 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.

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

5. Resources of competition authorities

74. On 1 January 2018, the ACCC had six full time members, one part time member and four associate members. In May 2018, Deputy Chair Michael Schaper's appointment concluded and Commissioner Mick Keogh was appointed as a Deputy Chair for five years. As at 31 December 2018, the ACCC had six full time members and four associate members. The AER had three full-time members.

75. The total average number of staff employed by the ACCC over the 2018 calendar year was 920.

76. In addition to competition matters, the ACCC has consumer protection (including product safety) and national infrastructure services regulatory functions. Staff from the ACCC infrastructure area may assist with competition enforcement in relevant sectors.

77. 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: regulatory, corporate, mergers and authorisations, and competition and consumer law. 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: regulatory and competition economics. 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.

78. The ACCC's total funding for the period 1 July 2017 to 30 June 2018 was \$202.57 million, comprising the original appropriation of \$197.95 million and other revenue of \$4.62 million³. The ACCC's funding is provided on an Australian financial year, 1 July – 30 June. Therefore we are unable to provide a breakdown of funding for the 2018 calendar year.

Table 1. ACCC funding appropriations

	2017-18 \$m	2018-19 \$m
AUD	197.951	228.941
USD	139.35	161.17

Note: (Exchange rate at 31 Dec 2018 – A\$1 = US\$0.70399 = €0,61301)

6. Summaries of, or references to, new reports and studies on competition policy issues

6.1. Productivity Commission inquiries, reports and publications

79. In 2018, the Productivity Commission completed a number of public inquiries and commissioned research studies. These can be accessed at www.pc.gov.au. These include:

- Human Services
- Australian Hearing
- National Water Reform
- Horizontal Fiscal Equalisation
- Competition in the Australian Financial System

80. Competition-related inquiries and research studies underway as at 30 December 2018 include:

- Superannuation
- Economic Regulation of Airports.

³ The cost of administering the ACCC's telecommunications specific regulatory functions are recovered from telecommunications carriers through carriers' annual licence fees.

Annex A.

7. Summary of ACCC activities – competition matters

7.1. Cartel conduct proceedings finalised

Table 2.

Oakmoore Pty Ltd		Conduct
commenced	23 June 2016	The ACCC alleged that Oakmoore engaged in cartel conduct in the supply of polycarbonate roof sheeting to retailers in Australia.
concluded	28 September 2018	
jurisdiction	Federal Court Brisbane	
outcome	Penalties of \$6.5 million	
Prysmian Cavi e Sistemi Energia SRL (High Court appeal)		Conduct
Commenced	10 April 2018	The ACCC alleged that Prysmian engaged in cartel conduct in the supply of high-voltage land cables to a Snowy Mountains Hydro Electric Scheme project.
concluded	8 August 2018	
jurisdiction	High Court of Australia	
outcome	Penalties upheld (\$3.5 million)	
Yazaki Corporation and Australian Arrow Pty Ltd (High Court appeal)		Conduct
commenced	13 June 2018	The ACCC alleged that Yazaki engaged in price fixing and market sharing in relation to the supply of wire harnesses to Toyota.
concluded	19 October 2018	
jurisdiction	High Court of Australia	
outcome	Penalties upheld (\$46 million)	
Palram Australia and Ampelite Australia		Conduct
commenced	23 June 2016	The ACCC alleged that Palram and Ampelite engaged in cartel conduct in the supply of polycarbonate roof sheeting to retailers in Australia.
concluded	13 August 2018	
jurisdiction	Federal Court Sydney	
outcome	Penalties of \$5.5 million	

7.2. Cartel conduct proceedings commenced

Table 3.

Country Care Pty Ltd and others		Conduct
commenced jurisdiction	14 February 2018 Magistrate's Court of Victoria	It is alleged that Country Care and employees were engaged in cartel conduct involving assistive technology products used in rehabilitation and aged care, including beds and mattresses, wheelchairs and walking frames.
Cryosite Limited		Conduct
commenced jurisdiction	16 July 2018 Federal Court Melbourne	It is alleged that Cryosite engaged in cartel conduct in relation to its entry into an asset sale agreement with Cell Care Australia Pty Ltd. In June 2017 Cryosite signed an agreement to sell its assets in its cord blood and tissue banking business to Cell Care. On signing the agreement, Cell Care made an upfront, non-refundable payment of \$500 000 to Cryosite.
Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) & Anor		Conduct
commenced jurisdiction	16 August 2018 ACT Magistrates Court	It is alleged that the CFMMEU and an employee of the CFMMEU attempted to induce suppliers of steelfixing services and scaffolding services to reach a contracts, arrangements or understandings containing cartel provisions in relation to services provided to builders in the ACT in 2012 to 2013
Australia and New Zealand Banking Group Ltd (ANZ) and others		Conduct
commenced jurisdiction	5 June 2018 Downing Centre Local Court Sydney	It is alleged that ANZ and one of its employees were knowingly concerned in cartel arrangements involving trading in ANZ shares following an ANZ institutional share placement in August 2015.
Citigroup Global Markets Australia Pty Ltd and others		Conduct
commenced jurisdiction	5 June 2018 Downing Centre Local Court Sydney	It is alleged that Citigroup and certain current and former employees engaged in cartel conduct involving trading in ANZ shares following an ANZ institutional share placement in August 2015.
Deutsche Bank Aktiengesellschaft (Deutsche Bank) and others		Conduct
commenced jurisdiction	5 June 2018 Downing Centre Local Court Sydney	It is alleged that Deutsche Bank and certain current and former employees were involved in cartel conduct involving trading in ANZ shares following an ANZ institutional share placement in August 2015.

7.3. Cartel cases ongoing

Table 4.

Cascade Coal Pty Ltd and others		Conduct
commenced jurisdiction	25 May 2015 Federal Court Sydney	The ACCC alleges that Cascade and individuals engaged in bid rigging conduct involving mining exploration licences in the Bylong Valley, New South Wales (NSW). Note: On 6 July 2018, the Federal Court dismissed the ACCC's case with costs in a suppressed ruling. On 7 August 2018, the ACCC appealed this decision to the Full Federal Court.
Kawasaki Kisen Kaisha Ltd (K-Line)		Conduct
commenced jurisdiction	2 November 2016 Federal Court Sydney	The ACCC alleges that Kawasaki engaged in cartel conduct concerning the international shipping of cars, trucks and buses to Australia between 2009 and 2012. Note: On 5 April 2018, K-Line entered a guilty plea in the Federal Court to criminal cartel conduct.
PT Garuda Indonesia Ltd (High Court appeal)		Conduct
commenced jurisdiction status	18 April 2016 Federal Court Sydney On 14 June 2017, the High Court dismissed the appeal by PT Garuda and other airlines and the matter was remitted to the Federal Court for consideration of penalty and other orders. On 22 & 25 June 2018, the penalty hearing took place. The matter is now awaiting judgment.	The ACCC alleges that Garuda Indonesia engaged in cartel conduct involving price fixing of surcharges on air cargo services.
PZ Cussons Australia Pty Ltd (appeal)		Conduct
commenced jurisdiction	20 February 2018 Full Federal Court Sydney	The ACCC alleges that Cussons was engaged in cartel and anti-competitive behaviour in supplying laundry detergent.

7.4. Anti-competitive agreements and practices proceedings finalised

Table 5.

Flight Centre Ltd		Conduct
commenced	11 March 2016	The ACCC alleges that Flights Centre made anti-competitive arrangements with three international airlines to eliminate differences in international airfares offered to customers.
concluded	4 April 2018	
jurisdiction outcome	Full Federal Court Penalties of \$12.5 million.	
Construction Forestry Mining and Energy Union (CFMEU)		Conduct
commenced	20 November 2014	The ACCC alleged that the CFMEU engaged in secondary boycott conduct which hindered or prevented the acquisition of concrete from Boral and its subsidiary Alsafe.
concluded	14 February 2018	
jurisdiction outcome	Federal Court Melbourne Penalty of \$1 million.	
Air New Zealand Ltd (appeal)		Conduct
Commenced	18 April 2016	The ACCC alleged that Air NZ made and gave effect to agreements with other airlines to fix the price of fuel and insurance surcharges on air freight services from Hong Kong, and insurance and security charges from Singapore, to various locations, including Australian airports, between 2002 and 2007.
concluded	27 June 2018	
jurisdiction outcome	High Court of Australia Penalties of \$15 million	

7.5. Anti-competitive agreements and practices proceedings commenced

Table 6.

Pacific National Pty Limited & Ors		Conduct
Commenced jurisdiction	19 July 2018 Federal Court Melbourne	The ACCC alleges that in July 2017 Pacific National and Aurizon reached an understanding that would lead to Aurizon exiting its intermodal business through a combination of closure and transactions with Pacific National. The effect of the understanding was that Aurizon would stop competing with Pacific National to supply intermodal and steel rail linehaul services throughout Australia
NSW Ports Operations Hold Co Pty Ltd & Ors		Conduct
Commenced jurisdiction	10 December 2018 Federal Court Sydney	The ACCC alleges that NSW Ports Operation and its subsidiaries Port Botany Operations and Port Kembla Operations made agreements with the State of New South Wales that had an anti-competitive purpose and effect. By making these agreements containing provisions, it would effectively compensate Port Kembla and Port Botany if the Port of Newcastle developed a container terminal.

7.6. Misuse of market power proceedings finalised

Table 7.

Pfizer Australia Pty Ltd		Conduct
Commenced concluded jurisdiction outcome	22 June 2018 High Court of Australia Unsuccessful	The ACCC alleged that Pfizer was involved in misuse of market power for the purpose of substantially lessening competition in relation to particular cholesterol-lowering products by offering to supply its originator brand of atorvastatin, Lipitor, and its own generic atorvastatin product to community pharmacies in early 2012.

7.7. Misuse of market power proceedings ongoing

Table 8.

Ramsay Health Care Australia Pty Ltd		Conduct
commenced jurisdiction	1 May 2017 Federal Court Sydney	The ACCC alleged that Ramsay Health Care was involved in anti-competitive conduct involving misuse of market power and exclusive dealing in the day surgery market in the Coffs Harbour region.

7.8. Merger review - Statement of Issues issued

- **Bingo Industries Limited** - proposed acquisition of Dial-a-Dump Industries Pty Ltd
- MYOB Group Ltd—proposed acquisition of Reckon Ltd’s Practice Management Group
- Pacific National Pty Ltd / Linfox—proposed acquisitions of Intermodal assets from Aurizon
- **Saputo Dairy Australia Pty Ltd**—proposed acquisition of Murray Goulburn’s operating assets

- **Siemens AG and Alstom S.A.** – proposed acquisition of Siemen's mobility business with Alstom
- **Sydney Transport Partners Consortium (including Transurban)**—proposed acquisition of WestConnex interest
- **TPG Telecom Limited (TPG)** - proposed merger with Vodafone Hutchison Australia Pty Ltd (VHA)

7.9. Public competition assessments issued

- **BP** - proposed acquisition of Woolworths' retail service station sites
- **Caltex Australia Petroleum Pty Ltd** - proposed acquisition of assets from Milemaker Petroleum
- **CK Consortium** - proposed acquisition of APA Group
- **Saputo Dairy Australia Pty Ltd**—proposed acquisition of Murray Goulburn’s operating assets.
- **Sydney Transport Partners Consortium (including Transurban)** - proposed acquisition of WestConnex interest