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Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

Annual Report on Competition Policy Developments in Australia

-- 2020 --

This report is submitted by Australia to the Competition Committee FOR INFORMATION.

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Australia

Executive Summary

1. This report primarily focuses on the activities of the Australian Competition and Consumer Commission (ACCC) in the 2020 calendar year. The ACCC is responsible for enforcing the *Competition and Consumer Act 2010 (CCA)*, which is the primary instrument of Australia's competition law. 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 of this report.
2. In 2020 there were a number of legislative changes proposed in relation to the competition provisions of the CCA that were influenced by ACCC advocacy:
 - On 20 April 2020, the Australian Government asked the ACCC to develop a mandatory code of conduct to address bargaining power imbalances between Australian news media businesses and digital platforms, specifically Google and Facebook.
 - The Code was passed by the Australian Parliament in February 2021. The Code is designed to address the significant bargaining power imbalance between major digital platforms and Australian news businesses, following findings in the 2019 Final Report of the ACCC's Digital Platforms Inquiry that each of Facebook and Google had become 'unavoidable trading partners' for Australian news businesses.
 - In December 2020 the ACCC made some important amendments to the Consumer Data Right Rules. The new rules expand the types of consumers who can use the Consumer Data Right (CDR) to include more business customers. From 1 November 2021, the major banks will enable these customers to share their data with accredited data recipients when shopping around for better services. The new rules also include provisions to improve the consumer experience and provide greater flexibility for participants' business models.
3. In 2020, the ACCC assessed 335 mergers under section 50 of the CCA. Of the 335 mergers considered, 30 underwent an informal public review and 304 were pre-assessed as not requiring a public review. One merger underwent a public review of an application for merger authorisation.
4. In 2020, the Government directed the ACCC to conduct inquiries into:
 - Digital Advertising Services (February 2020)
 - Digital Platform Services (February 2020)
5. The ACCC concluded the following government-directed inquiries:
 - Northern Australia Insurance Inquiry (November 2020)
 - Home loan price inquiry (November 2020)
 - Perishable Agricultural Goods Inquiry (December 2020).
6. In 2020, the ACCC was also directed by the Government to monitor airlines to ensure competitiveness of this market, which was severely impacted by the COVID-19 pandemic.

7. As a result of the global pandemic, the ACCC authorised crisis collaboration between competitors when it was necessary, authorising banks to jointly provide debt relief to borrowers, supermarkets to coordinate supply to ensure that their shelves were stocked with groceries, and medical equipment manufacturers to boost the supply and manufacture of equipment. All authorisations were granted on an interim basis and could be reviewed and revoked at any time.

8. The ACCC released two reports in 2020 about airline competition in Australia – the first report was released in September 2020 and the second report was released in December 2020.

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

1.1. Summary of new legal provisions of competition law and related legislation

9. In 2020 and the first 3 months of 2021, there were a number of legislative changes made to Australia’s competition laws that were influenced by ACCC advocacy. These include:

- News Media Bargaining Code
 - The Code was passed by the Australian Parliament in February 2021. The Code is designed to address the significant bargaining power imbalance between major digital platforms and Australian news businesses, following findings in the 2019 Final Report of the ACCC’s Digital Platforms Inquiry that each of Facebook and Google had become ‘unavoidable trading partners’ for Australian news businesses.
 - The Code requires designated digital platforms to participate in good faith commercial negotiations with eligible Australian news businesses through a mandatory negotiation/mediation/arbitration framework. The Code also includes a set of ‘minimum standards’ for the treatment of news on designated digital platform services, addressing issues such as advance notice of changes to algorithmic ranking and presentation of news, recognition of original content and information about user data collected through interactions with news on digital platform services.
- Consumer Data Right
 - The Australian Parliament passed the Treasury Laws Amendment (Consumer Data Right) Act 2019, which will introduce the Consumer Data Right (CDR) to the banking sector in 2020, and later in other sectors starting with energy and telecommunications. The Consumer Data Right will give consumers greater access to and control over their data. It will improve consumers’ ability to compare and switch between products and services, and will encourage competition between service providers, leading not only to better prices for customers but also more innovative products and services.
 - In December 2020 the ACCC made some important amendments to the Consumer Data Right Rules. The new rules expand the types of consumers who can use the CDR to include more business customers. From 1 November 2021, the major banks will enable these customers to share their data with accredited data recipients when shopping around for better services. The new rules also include provisions to improve the consumer experience and provide greater flexibility for participants’ business models.

- As a result of legislative changes, the CDR rule-making function was transferred from the ACCC to Treasury on 28 February 2021. The ACCC remains responsible for implementing the CDR in the banking sector.

1.2. Other relevant measures, including new guidelines

1.2.1. ACCC COVID-19 Taskforce

10. In response to the impact COVID-19 had on Australian consumers and businesses, the ACCC set up a COVID-19 Taskforce in March 2020 to communicate directly with businesses to educate them about their obligations in relation to cancellations, refunds and suspension of services because of COVID-19.

11. The ACCC also adjusted the focus of its regulatory activities accordingly, prioritising those activities of most relevance to competition and consumer issues arising from the impact of COVID-19. These priorities included advice to businesses regarding consumer guarantees, raising awareness about COVID-19 scams, addressing affordability issues and engaging with governments and businesses concerning potential authorisations that supported coordination between competitors that is ordinarily prohibited but which is necessary and in the public interest at this time.

1.2.2. Cartels: deterrence & detection - a guide for government procurement professionals

12. In January 2020, the ACCC released this guideline to assist procurement professionals understand cartel behaviour.

13. The guideline reviewed the provisions of the CCA that related to procurement practices by describing several types of prohibited, anti-competitive behaviour that can target procurement budgets and provided practical tips and warning signs that indicate when tenderers may be colluding.

14. The guideline also provided steps government procurement professionals could take to maximise competition and save organisations money, while also disrupting the possible operation of cartels by suppliers.

2. Enforcement of competition laws and policies

2.1. Action against anti-competitive practices, including agreements and abuses of dominant positions

15. 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 telecommunications-specific competition laws.

16. The ACCC's reviews its competition and consumer protection enforcement priorities annually and publishes them in its Compliance and Enforcement Policy,¹. In 2020, the ACCC's competition priorities included competition issues relating to:

¹ <https://www.accc.gov.au/publications/2019-compliance-and-enforcement-priorities>

- the funeral services sector
- pricing and selling practices of essential services, with a focus on electricity and telecommunications
- home loan pricing transparency
- digital platforms
- the commercial construction sector, including conduct impacting small businesses and large public and private projects

17. In addition, 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.

2.1.1. Anti-competitive conduct matters

18. The ACCC instigated directly or through the Commonwealth Director of Public Prosecutions (CDPP) six new competition enforcement cases in 2020:

- instituting proceedings against BlueScope Steel Limited for alleged cartel conduct in relation to the supply of flat steel products
- the CDPP laying criminal cartel charges against Norway-based global shipping company Wallenius Wilhelmsen Ocean AS for alleged cartel conduct concerning the international shipping of certain vehicles to Australia
- instituting proceedings against Tasmanian Ports Corporation Pty Ltd (TasPorts) for allegedly seeking to stop a new entrant from competing effectively with TasPorts' marine pilotage and towage businesses. This is the first case the ACCC has brought under the amended misuse of market power provision
- court enforceable undertakings from two Sydney roofing contractors who acknowledged that their conduct was likely to constitute an attempt to fix prices and may have raised concerns under the new concerted practices prohibition
- a court enforceable undertaking from Bromic Pty Ltd, a national distributor of outdoor heating products, which admitted to engaging in resale price maintenance when it introduced a 'minimum advertised pricing' policy.

19. Further detail about these cases is available in **Appendix A**.

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

21. Australian courts did not hand down any penalties for cartel conduct in 2020, however, there were a number of longstanding and ongoing cases dealt with during the period that continued to require considerable resourcing, including a number of important appeals to the Full Federal Court and High Court.

22. Longstanding matters included BlueScope Steel Limited & Anor, Cascade Coal Pty Ltd and Vina Money Transfer Pty Ltd & Ors. In addition, significant resourcing is being allocated to supporting ongoing criminal prosecutions by the CDPP against ANZ, Citigroup, Deutsche Bank and Country Care Group Pty Ltd.

23. The ACCC is also managing an ongoing criminal cartel proceeding against the Construction Forestry Maritime Mining and Energy Union (CFMMEU) and its ACT Divisional Branch Secretary.

24. Challenges ahead for the ACCC's competition work include continued efforts to achieve higher penalties for breaches of competition law, which are more likely to provide both specific and general deterrence, particularly for larger companies. This push for higher penalties follows a March 2018 OECD report finding that penalties in Australia for contraventions of the competition laws are significantly lower than those imposed in comparable OECD jurisdictions. Recent penalty judgments including the \$46 million penalty judgment against Yazaki Corporation in 2018, and 2019's \$34.5 million Kawasaki Kisen Kaisha Ltd demonstrate progress on this front, but given the importance of significant penalties to deter unlawful conduct, the ACCC will continue to prioritise seeking higher penalties.

Case study – Wallenius Wilhelmsen Ocean AS (WVO)

25. In 2020 Norwegian-based global shipping company Wallenius Wilhelmsen Ocean AS (WVO) entered a guilty plea in the Federal Court to criminal cartel conduct. The case has been adjourned for sentencing at a later date.

26. After an ACCC investigation, on 23 August 2019 the Commonwealth Director of Public Prosecutions (CDPP) charged WVO with cartel conduct regarding the transportation of vehicles, including cars, trucks and buses, to Australia between June 2011 and July 2012.

27. This cartel has been investigated and prosecuted in a number of other jurisdictions, including the United States. WVO is headquartered in Oslo with offices in Europe, Africa, Asia, the Americas, India, the Middle East, and Oceania (including Australia). WVO was previously known as Wallenius Wilhelmsen Logistics AS.

28. This is the third guilty plea in Australia in relation to this cartel. On 18 July 2016, Nippon Yusen Kabushiki Kaisha (NYK) pleaded guilty to criminal cartel conduct and was convicted and fined \$25 million on 3 August 2017. Kawasaki Kisen Kaisha Ltd (K-Line) pleaded guilty to criminal cartel conduct on 5 April 2018 and was convicted and fined \$34.5 million on 2 August 2019.

2.2. 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 whether a proposed merger or acquisition is likely to substantially lessen competition – 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 for merger parties to apply for merger authorisation, which enables claimed 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.

32. One merger authorisation application was received and assessed by the ACCC in 2020.

33. 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 from the merger parties under section 87B of the CCA to remedy those concerns.

34. In 2020, we assessed 335 mergers under section 50 of the CCA. Of the 335 mergers considered:

- 30 underwent an informal public review
- 304 were pre-assessed as not requiring a public review
- One merger underwent a public review of an application for merger authorisation.

35. In 2020, the following three mergers were cleared subject to remedies accepted from the merger parties:

- Elanco Animal Health Incorporated – proposed acquisition of Bayer Aktiengesellschaft’s animal health business
- Mylan N.V. and Upjohn Inc. - proposed merger
- Asahi Group Holdings – proposed acquisition of Carlton & United Breweries (owned by Anheuser Busch InBev SA/NV)

36. In 2020, the following four merger investigations did not proceed after the release of a Statement of Issues because the acquirers decided not to proceed with the proposed acquisitions:

- AlSCO Pty Ltd – proposed acquisition of the garment laundry and rental business of Spotless Group Holdings Limited
- South Pacific Laundry – proposed acquisition of Spotless Laundries
- Cengage Learning and McGraw-Hill Education – proposed merger
- iNova Pharmaceuticals (Australia) Pty Ltd – proposed acquisition of Juno PC Holdings Pty Ltd.

2.2.1. Case study - Proposed acquisition of Juno PC Holdings Pty Ltd by iNova Pharmaceuticals (Australia) Pty Ltd

37. On 6 January 2020 the ACCC discontinued its public review of the proposed acquisition of Juno PC Holdings Pty Ltd (Juno PC) by iNova Pharmaceuticals (Australia) Pty Ltd (iNova).

38. We discontinued the review after the parties notified us that they no longer intended to proceed with the acquisition. The parties’ decision to abandon the deal came shortly after the ACCC published a statement of issues on 19 December 2019. In the statement of issues we raised preliminary concerns that the proposed acquisition would be likely to limit future competition in the market for phentermine-based weight-loss medications and weight-loss medications more broadly.

39. iNova supplied a branded and a generic version of phentermine-based weight-loss medication. iNova’s products Duromine and Metermine were the only Therapeutic Goods Administration approved phentermine products sold in Australia.

40. Juno PC was a special purpose joint venture established for the development of a patent-protected, branded weight-loss phentermine product. At the time of the assessment, Juno PC’s product was not yet approved for sale.

41. The ACCC’s preliminary concern was that the proposed acquisition would remove the opportunity for Juno PC’s new product to enter the market as a strong competitor to

iNova. The acquisition of a potential future competitor can raise concerns in the same way that the acquisition of an existing competitor can. The ACCC considered that, if the acquisition did not take place, it was likely that another pharmaceutical company would acquire or partner with Juno PC and compete with iNova.

42. The ACCC's public review examined the constraint provided by other weight-loss medications, including Saxenda—a prescription product supplied by Novo Nordisk—and over-the-counter products such as Xenical (supplied by Roche Australia). However, our preliminary view was that, if not for the proposed acquisition, Juno PC's phentermine-based product would be likely to compete more vigorously with iNova's phentermine-based product than these alternatives.

43. The ACCC also examined the likelihood of other generic phentermine-based weight-loss medications entering the market and competing with iNova. However, the ACCC's preliminary view was that, even if such entry was to occur in the absence of the proposed acquisition, Juno PC's product would be likely to provide an additional competitive constraint on iNova, due to the claimed advantageous features of Juno PC's new patent-protected product, including a consistent slow-release profile.

2.3. Adjudication – authorisation applications and notifications

44. 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 net public benefits.

45. 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.

46. 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 authorise certain forms of conduct if it is satisfied that no substantial lessening of competition is likely.

2.3.1. Authorisations

47. In 2020, the ACCC issued 20 final authorisation decisions, excluding minor variations, for arrangements involving a wide range of industries. Among them were infrastructure, agriculture, waste services, banking, airlines, and retailing. Applicants sought authorisation for conduct such as collective bargaining, joint tender or buying processes, industry codes and other price or fee agreements.

48. The COVID-19 pandemic completely changed the economic landscape in Australia and the focus of the ACCC. The ACCC authorised crisis collaboration between competitors when it was necessary, authorising banks to jointly provide debt relief to borrowers, supermarkets to coordinate supply to ensure that their shelves were stocked with groceries, and medical equipment manufacturers to boost the supply and manufacture of equipment.

49. Importantly, all authorisations were granted on an interim basis and could be reviewed and revoked at any time.

50. Benefits of Australia's interim authorisation framework included they could be constructed to accommodate **temporary** exemptions during times of crisis without suspending the competition regime. This ensured necessary collaboration during the crisis did not have a permanent impact on markets and consumer welfare and was of great benefit in Australia during the COVID-19 pandemic.

51. An added advantage of the authorisation framework was that interim authorisations could be **revoked** at any time if the arrangement did not demonstrate the expected benefits, or if the arrangement was no longer necessary.

2.3.2. Case study – COVID-19-related interim authorisation – Coles Group and Participating Supermarkets

52. On 15 July 2020 the ACCC released a draft determination proposing to authorise supermarkets to continue working together until March 2021 to ensure the continued supply of food and groceries during the COVID-19 pandemic.

53. The proposed authorisation applies to Coles, Woolworths, Metcash and Aldi, along with other grocery retailers whose participation is approved by the ACCC. The draft determination proposes authorisation on broadly the same terms as the interim authorisation granted in March (revised in March and June), which allows the supermarkets to coordinate with each other when working with manufacturers, suppliers, and transport and logistics providers.

54. Importantly, the proposed and interim authorisations do not extend to the prices of any retail products. Retailers, suppliers, manufacturers and transport groups can choose to opt in or out of any arrangements. The proposed and interim authorisations cover only discussions and agreements made at meetings convened by government agencies, including the Department of Home Affairs' Supermarket Taskforce and its working groups, and the National Indigenous Australians Agency's COVID-19 working groups. The ACCC attends these meetings when relevant issues are discussed.

55. Under the interim authorisation, these meetings have allowed supermarkets and authorities to meet and coordinate responses rapidly, for example during meetings regarding the ongoing outbreak in Melbourne, or the significant grocery supply issues that occurred earlier in the year, particularly in regional and remote communities. Key issues discussed at these meetings include:

- health and safety within grocery stores
- working with suppliers and logistics providers to increase supply, and rapidly increasing the expansion of online delivery capabilities
- implementing product limits to ensure fair supply to customers, and
- some suppliers and supermarkets setting aside stock to support independent stores in regional and remote communities.

2.3.3. Notifications

56. 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.

57. Notification remains in place unless the ACCC revokes it. At any time, the ACCC can review the public benefit and detriment arising from the notified conduct to assess whether it should continue.

58. Changes to the CCA from 6 November 2017 mean that it is now possible for businesses 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 conduct amounting to resale price maintenance.

59. In 2020, the ACCC assessed four exclusive dealing notification matters, approved eight collective bargaining notifications, and allowed one resale price maintenance notification to stand.

2.4. Market studies and Inquiries

60. 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. On 10 February 2020 the Australian Government directed the ACCC to conduct an inquiry from 2020–2025 into markets for the supply of digital platform services, including internet search engine services, social media services, online private messaging services, electronic marketplace services, data brokers, digital content aggregation platform services and media referral services.
2. On 23 October 2020, the ACCC released its first interim report as part of its inquiry into markets for the supply of digital platform services. The report provided an in-depth focus on online private messaging services in Australia. It also updated the ACCC's previous analysis in relation to search and social media platforms and identified competition and consumer issues common across these platforms.
3. Also on 10 February 2020, the Government directed the ACCC to conduct an inquiry into markets for the supply of:
 - ad tech services: services facilitating the automated buying, selling and delivery of digital display advertising (e.g. Google Ads, Facebook Ads, MediaMath, AppNexus)
 - ad agency services: services provided by advertising and media agencies to assist with the purchase and optimisation of digital display advertising.
 - On 28 January 2021, the ACCC released its interim report for this inquiry, following the report being provided to the Treasurer.
4. On 10 March 2020 the ACCC released an issues paper seeking views on the key issues affecting markets for the supply of ad tech and ad agency services. Submissions to the issues paper were due by 21 April 2020. The ACCC must provide the Treasurer an interim report on this inquiry by 31 December 2020, with the final report due by 31 August 2021.
5. On 18 February 2020, the ACCC released its latest interim report for the inquiry into gas supply in Australia, focussing on the operation of the east coast gas market. The report revealed that the 2020 supply demand outlook in the east coast gas market has improved. The report also found the LNG netback prices have decreased, but domestic prices remain high and there is significant uncertainty about future supplies.
6. On 28 February 2020 the ACCC's 2018–19 private health insurance report was tabled with the Senate. The report was published on the ACCC website on 2 March 2020. The ACCC is required by the Senate to produce a report each year on key competition and consumer developments in private health insurance, and trends impacting on people's health cover.
7. On 20 April 2020 the Australian Government announced it had directed the ACCC to develop a mandatory code of conduct to address bargaining power imbalances between Australian news media businesses and each of Google and Facebook. On

- 19 May 2020 the ACCC released a concepts paper seeking views on each of the issues to be covered in the news media code, with responses received in early June.
- On 25 February 2021 the final legislation was passed by the Australian Parliament.
8. On 7 August 2019 the Government announced that it would direct the ACCC to conduct an inquiry into markets for tradeable water rights in the Murray-Darling Basin. The ACCC's inquiry will consult with a wide range of water market participants and other persons involved in water markets in the Murray-Darling Basin.
- On 30 June 2020 the ACCC provided the Murray-Darling Basin Inquiry interim report to the Treasurer and it was released to the public on 30 July 2020.
9. On 26 August 2020, the Treasurer directed the ACCC to commence a three-month inquiry into bargaining power imbalances in supply chains for perishable agricultural products in Australia.
- The inquiry examined trading practices throughout supply chains, including the relationships between farmers, processors, and retailers, and the extent to which any potential bargaining power imbalances in these relationships adversely impacted the efficient operation of these markets. The inquiry also examined the ability of current laws and regulations to address the harmful effects of bargaining power imbalances.
 - On 10 December 2020, the ACCC's report on this inquiry was publicly released.
10. On 14 October 2019, the Treasurer directed the ACCC to conduct an inquiry into home loan pricing. The inquiry focused on two issues: prices charged for home loans since 1 January 2019; and impediments to consumers switching to alternative home loan suppliers.
- The interim report, which was provided to the Treasurer on 30 March 2020, focused on the first issue.
 - The final report, which was provided to the Treasurer on 25 November 2020, focused on the second issue.
61. Appendix A provides a high level summary of the ACCC's competition activities during the period 2020.

2.5. Infrastructure regulation

62. 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 2020 are outlined below. More information can be found at acc.gov.au.

63. During 2020 the ACCC undertook a number of major regulatory activities including:

- progressing two key inquiries into the NBN consumer experience to address gaps in service standards and to restore competitive pricing of entry-level plans on the NBN
- progressing and concluding several inquiries into continued regulation and setting appropriate access terms for key wholesale telecommunications services, including fixed-line, mobile and transmission services

- undertaking several regulatory assessments in relation to compliance with existing pricing regulation in sectors including rail and post
 - publishing multiple monitoring reports on different infrastructure sectors, including airports, bulk grain ports, container stevedoring, telecommunications, water and petrol, to inform stakeholders of how the industry performed during the year.
64. The ACCC's other key activities in infrastructure regulation during 2020 included:
- completing investigations into misleading claims, or discriminatory conduct in NBN wholesale markets, that led to financial penalties or formal warnings
 - assisting broader government and industry initiatives by providing advice on suitable regulatory regimes or reforms in new, emerging or concentrated sectors
 - providing guidance for consumers across various industries, including fuel, airports and telecommunications
 - engaging with government and policy reform processes to promote efficient use of scarce resources, such as providing advice for allocation limits for an upcoming spectrum auction.

2.5.1. Access to essential facilities

65. 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.

66. 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.

Rail

67. 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.

68. In 2020 the ACCC completed an assessment of ARTC's compliance with the Hunter Valley Access Undertaking financial model for 2016. During the year we continued to work with ARTC and stakeholders on the development of a replacement Interstate Access Undertaking. The ARTC committed to base its replacement undertaking on a valuation of its network conducted by an ACCC-appointed consultant, who is currently carrying out the valuation.

69. On 23 April 2020 the ACCC engaged GHD Advisory to conduct a Depreciated Optimised Replacement Cost (DORC) valuation of the Australian Rail Track Corporation's (ARTC) Regulated Asset Base (RAB) of the interstate network. The valuation will occur over the coming six months and inform ARTC's replacement Interstate Access Undertaking.

70. On 19 June 2020 the ACCC issued a notice to extend the period of the 2008 Interstate Access Undertaking to 30 June 2021. This allows the existing regulatory framework to continue, whilst the DORC valuation process is finalised, ARTC develops a replacement undertaking and the ACCC assesses that undertaking

Ports

71. 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 that the ACCC arbitrate the dispute.

72. On 28 November 2019 the ACCC announced that it had applied to the Federal Court for a review of the Australian Competition Tribunal's (the Tribunal) October 2019 decision on the terms of access by Glencore Coal Assets Australia Pty Ltd (Glencore) to certain services at the Port of Newcastle (operated by Port of Newcastle Operations Pty Ltd (PNO)). The ACCC is seeking review of the Tribunal's treatment of user funding at the port.

73. A significant part of the dispute is about whether the costs that PNO is allowed to recover should include the costs for dredging the shipping channel that were historically funded by various users of the port. The ACCC excluded these user-funded amounts in its original arbitration while the Tribunal included these amounts. The Tribunal's decision allows PNO to recover the user funded amounts in its access charge.

74. The ACCC does not consider it to be economically efficient for a service provider to be allowed to charge any user for costs of assets that have already been funded by users. The ACCC's appeal will argue that there are errors in the way the Tribunal has approached the principles of user funding, which could have implications for other regulatory matters.

Airports

75. Under the CCA and the provisions of the *Airports Act 1996*, the ACCC has a role in monitoring prices, costs and profits and quality of aeronautical services and car parking at Brisbane, Melbourne, Perth and Sydney airports.

76. The ACCC released its Airport monitoring report 2018–19 on 24 February 2020. The key findings of the report include:

- Australia's four major airports (Brisbane, Melbourne, Perth and Sydney) have continued to report increasing levels of collective profits, reporting \$863.5 million in operating profit from aeronautical activities in 2018–19, up 3.6 per cent from the previous year.
- The monitored airports are still earning very high profit margins from car parking despite profitability of car parking continuing to fall due to passengers looking for alternative ways of getting to and from airports. The airports collectively earned \$276.1 million in operating profit from car parking in 2018–19, down 2.5 per cent.
- All four airports maintained a rating of 'good' for their overall quality of service in 2018–19, which occurred last year for the first time since 2005.
- Perth Airport received the highest overall rating of the four airports for the third year in a row, while Sydney Airport received its highest overall rating since ACCC monitoring began.

Stevedoring

77. Under Part VIIA of the CCA, the ACCC monitors the prices, costs and profits of container terminal operator companies at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney.

78. On 4 November 2020, the ACCC released its annual container stevedoring report. The report highlighted the ACCC's concerns that the benefits of greater competition between stevedores to provide services to shipping lines will be eroded by increasing Terminal Access Charges (TACs).

Telecommunications

79. 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.

80. 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.

81. In 2019–20 the ACCC progressed a number of projects directed at addressing key sources of consumer detriment. These projects are supported by a framework of monitoring of developing retail and wholesale NBN markets and providing appropriate guidance to consumers and industry.

82. A key issue of focus is evidence of poor consumer experience during the migration from legacy copper-based services and the subsequent poor performance of their NBN service. These outcomes were reflected in complaints to the ACCC and other bodies, with a significant number of consumers impacted by missed appointments and faults when connecting their NBN service and by slower than expected broadband speeds. We also observed entry-level plans on the NBN being withdrawn or priced higher, which left many consumers with no option but to pay more for their fixed-line communications than they had before being migrated to the NBN.

83. On 2 June 2020 the ACCC accepted an undertaking from NBN Co admitting that it misled Canberra consumers who lived in areas where the NBN was operating into thinking that their telephone and internet services supplied over the TransACT Network would be disconnected if they did not move to the NBN.

84. As part of a court-enforceable undertaking, NBN Co committed to reimburse the early termination costs paid by consumers and businesses that moved to NBN Co before 10 July 2019, and then chose to return to the TransACT Network.

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

85. 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

86. 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.

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

3.2. The Australian Competition and Consumer Commission

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

89. 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.

90. The ACCC was established in 1995. Prior to this, the Australian Trade Practices Commission had overseen Australia's competition and consumer laws since 1974.

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

3.3. The Australian Energy Regulator

92. 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.

93. While separate agencies with specific functions that vary according to their legislated responsibilities, the ACCC and AER share many common objectives, both working to protect, strengthen and supplement competitive market processes. Recognising this, the ACCC and AER work closely together, including by being co-located and utilising shared resources including staff and systems.

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

3.4. The National Competition Council

95. 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.

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

3.5. The Productivity Commission

97. 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.

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

3.6. The Australian Competition Tribunal

99. 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.

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

4. Resources of competition authorities

101. In 2020, the following changes occurred at the ACCC:

- Anna Brakey and Peter Crone were appointed as ACCC Commissioners on 10 December 2020.
- Commissioner Cristina Cifuentes completed her term at the ACCC on 3 July 2020.
- Scott Gregson was appointed to the role of Chief Operating Officer on 6 August 2020 following the retirement of Rayne de Gruchy.
- Clare Savage, incoming Chair of the Australian Energy Regulator, was appointed as an Associate Member of the ACCC following Paula Conboy's departure.

102. The total average number of staff employed by the ACCC over the 2020 calendar year was 1,177.

103. 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.

104. 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.

105. The ACCC's funding is provided on an Australian financial year, 1 July – 30 June. Therefore we are unable to identify funding appropriations for the 2020 calendar year. Table 1 outlines the funding appropriations for the 2019-20, and 2020-21 financial years.

Table 1. ACCC funding appropriations

	ACCC	
	2019-20	2020-21
	\$m	\$m
AUD	259.215	270.474
USD	198.608	207.235

Note: (Exchange rate at 31 Dec 2020 – A\$1 = US\$0.76619 = €0,81407)

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

5.1. Productivity Commission inquiries, reports and publications

106. As the Australian government’s principal review and advisory body on microeconomic policy and regulation, the Productivity Commission conducts research and completes inquiries that examine competition policy issues. In 2020, the Productivity Commission completed a number of public inquiries and commissioned research studies. These can be accessed at www.pc.gov.au. These include:

- Remote Area Tax Concessions and Payments
- Expenditure on Children in the Northern Territory
- National Transport Regulatory Reform
- Resources Sector Regulation

107. Competition-related inquiries and research studies underway as at 31 December 2020 include:

- Right to Repair

Appendix A - Summary of ACCC activities – competition matters

Cartel conduct proceedings commenced

Alkaloids of Australia Pty Ltd		Conduct
commenced	1 December 2020	The ACCC alleges that Alkaloids of Australia and other overseas suppliers of SNBB made and gave effect to arrangements to fix prices, restrict supply, allocate customers and/or geographical markets, and/or to rig bids for the supply of SNBB to international manufacturers of generic antispasmodic medications.
jurisdiction	Downing Centre Local Court Sydney	

Cartel cases ongoing²

Australia and New Zealand Banking Group Ltd (ANZ) and others		Conduct
commenced	5 June 2018	It is alleged that ANZANZ, Citigroup and Deutsche Bank (including certain employees) were involved or knowingly concerned in cartel arrangements involving trading in ANZ shares following an ANZ institutional share placement in August 2015.
jurisdiction	Downing Centre Local Court Sydney	
Country Care Pty Ltd & Ors		Conduct
commenced	14 February 2018	The alleged cartel conduct involves assistive technology products used in rehabilitation and aged care, including beds and mattresses, wheelchairs and walking frames.
jurisdiction	Magistrates Court of Victoria	
Construction Forestry Mining and Energy Union (CFMEU) & Anor		Conduct
commenced	16 August 2018	The alleged conduct involves attempted inducements to suppliers of steel-fixing services and scaffolding services to reach contracts, arrangements or understandings containing cartel provisions in relation to services provided to builders in the Australian Capital Territory
jurisdiction	ACT Magistrates Court	
Vina Money Transfer Pty Ltd & Ors		Conduct
commenced	11 April 2019	In April 2019 the Commonwealth Director of Public Prosecutions (CDPP) laid criminal cartel charges against a money transfer business and five individuals for allegedly fixing the Australian dollar / Vietnamese dong exchange rate and fees they charged their customers.
jurisdiction	Magistrate's Court of Victoria	

² Cases instituted before 1 January 2019, and ongoing as at 31 December 2019

Anti-competitive agreements and practices proceedings finalised

Ramsay Health Care Australia Pty Limited		Conduct
commenced	1 May 2017	The ACCC alleges that senior Ramsay executives told a group of surgeons planning to establish a competing private day surgery facility in Coffs Harbour that their access to operating theatre time at Baringa Private Hospital would be substantially reduced or withdrawn if they proceeded with their plans.
concluded	12 March 2020	
jurisdiction	Federal Court Sydney	
outcome	ACCC case dismissed	

Non-compliance and other proceedings commenced

Mr Jason Ellis (former BlueScope Steel General Manager)		Conduct
commenced	8 October 2019	The ACCC was investigating allegations that, between September 2013 and June 2014, BlueScope and Mr Ellis attempted to induce various steel distributors in Australia and overseas manufacturers to enter arrangements containing a price fixing provision.
concluded	16 December 2020	
jurisdiction	NSW local court	
outcome	Guilty plea	

Merger review - Statements of Issues issued

- **iNova Pharmaceuticals (Australia) Pty Ltd** - proposed acquisition of Juno PC Holdings Pty Ltd
- **Cengage Learning and McGraw-Hill Education** - proposed merger
- **Bis Industries Holdings Limited** - proposed acquisition of Cougar Mining Group
- **Assa Abloy Australia Pacific Pty Ltd** - proposed acquisitions of Seal Doors Group and E Plus Building Products Pty Ltd
- **New Forests Asset Management managed forestry investment fund** - proposed acquisition of Resource Management Service LLC's Tasmanian hardwood plantations

Public competition assessments issued

- **Mylan N.V. and Upjohn Inc.** - proposed merger - Mylan Upjohn - Public Competition Assessment
- **Elanco Animal Health Incorporated** - Bayer Aktiengesellschaft's animal health business - Public Competition Assessment
- **B&J City Kitchen Pty Ltd** - Jewel Fine Foods business and assets held by the entities set out below - B&JCK Jewel - Public Competition Assessment
- **Asahi Group Holdings** - Carlton & United Breweries (owned by Anheuser Busch InBev SA/NV) - Asahi-CUB - Public Competition Assessment