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**COMPETITION COMMITTEE**

## Annual Report on Competition Policy Developments in Australia

-- 2021 --

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 2021 calendar year. The ACCC is responsible for enforcing compliance with the *Competition and Consumer Act 2010 (CCA)*, which is the primary instrument of Australia's competition law. A range of other agencies is responsible for developing and implementing Australia's competition policy. The roles of these agencies are outlined in Section 4 of this report.
2. In 2021 there were several 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.
  - On 19 February 2021 the ACCC made amendments to the Consumer Data Right (CDR) Rules, which expanded the Rules to allow greater participation in Consumer Data Right by expanding the type of consumers who can use Consumer Data Right to include more business customers and improving consumer experience through greater flexibility for participants' business models.
    - The CDR rule-making function was transferred from the ACCC to Treasury on 28 February 2021.
3. Following an ACCC investigation, in February 2021, Norwegian-based global shipping company Wallenius Wilhelmsen Ocean AS (WVO) was convicted of criminal cartel conduct and ordered by the Federal Court to pay a fine of \$24 million.
4. In 2021 the ACCC assessed 473 mergers under section 50 of the CCA. Of the 473 mergers considered, 25 underwent an informal public review, 447 were pre-assessed as not requiring a public review, and 1 underwent a public review following lodgement of an application for merger authorisation by the merger parties.
5. In 2021 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 2021 the ACCC also released interim reports for four ongoing inquiries:
  - [Digital platform services inquiry \(March and September\)](#)
  - [Gas inquiry \(January and July\)](#)

- [Electricity market monitoring inquiry \(May and November\)](#).
  - The ACCC also continued its monitoring role over domestic air passenger transport services releasing four reports in 2021 (March, June, September, December) about the state of competition in the sector.
7. In June 2021, the [collective bargaining class exemption](#) became available for eligible businesses. This mechanism allows small business that meet certain revenue or structural criteria to collectively bargain without breaching competition laws, provided they notify the ACCC.

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

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

8. In 2021, there were a number of legislative changes made to Australia's competition law framework that were influenced by ACCC advocacy. These include:

#### *1.1.1. News Media Bargaining Code*

9. 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.

10. 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.

#### *1.1.2. Consumer Data Right*

11. The Consumer Data Right (CDR) gives 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.

12. On 19 February 2021 the ACCC made amendments to the Consumer Data Right Rules, which expanded the Rules to allow greater participation in Consumer Data Right by expanding the type of consumers who can use Consumer Data Right to include more business customers and improving consumer experience through greater flexibility for participants' business models.

13. As a result of legislative changes, the CDR rule-making function was transferred from the ACCC to Treasury on 28 February 2021. The ACCC has responsibility for compliance and enforcement, accreditation, and technology related functions of the CDR.

14. From 1 November 2021 major banks enabled customers to share their data with accredited data recipients when shopping around for better services. The new rules also included provisions to improve the consumer experience and provide greater flexibility for participants' business models.

## 1.2. Other relevant measures, including new guidelines

### 1.2.1. Collective Bargaining Class Exemption Guidelines

15. On 3 June 2021, the ACCC released new collective bargaining class exemption guidelines. The collective bargaining class exemption allows small businesses, franchisees and fuel retailers to use the ACCC's class exemption for collective bargaining. The class exemption allows collective negotiation without first having to seek ACCC approval.

16. The class exemption applies to businesses and independent contractors who form, or are members of, a bargaining group, and who each had turnover of less than \$10 million in the financial year before the bargaining group was formed. This covers more than 98 per cent of Australian businesses.

17. Under the arrangement, small businesses and farmers can bargain with their suppliers and processors, eligible franchisees will be able to collectively negotiate with a franchisor, and eligible fuel retailers will be able to collectively negotiate with a fuel wholesaler.

## 2. Enforcement of competition laws and policies

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

18. 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.

19. The ACCC reviews its competition and consumer protection enforcement priorities annually and publishes them in its Compliance and Enforcement Policy<sup>1</sup>. In 2021, the ACCC's competition priorities included issues relating to:

- competition issues in the context of the COVID-19 pandemic, including in the domestic air travel market
- competition in the funeral services sector
- digital platforms
- pricing and selling of essential services, with a focus on energy and telecommunications
- competition and investigating allegations of anti-competitive conduct in the financial services sector
- the commercial construction sector, including conduct impacting small businesses and large public and private projects.

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<https://www.accc.gov.au/system/files/2021%20Compliance%20and%20Enforcement%20Priorities.pdf>  
<https://www.accc.gov.au/publications/2019-compliance-and-enforcement-priorities>

20. 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*

21. The ACCC initiated or publicly resolved several competition enforcement cases in 2021, including:

- commencing civil proceedings in the Federal Court against overhead crane company NQCranes Pty Ltd, alleging it engaged in cartel conduct by agreeing with a competitor in the overhead crane market to share the market by not targeting each other's customers for overhead crane parts and servicing in Brisbane and Newcastle
- commencing Federal Court proceedings against Australasian Food Group Pty Ltd, trading as Peters Ice Cream (Peters), alleging it engaged in conduct which hindered or prevented competition for the supply of single-wrapped ice creams to petrol and convenience retailers.
- accepting a court enforceable undertaking from Visa (Visa AP (Australia) Pty Ltd and Visa Worldwide Pte Limited) in relation to concerns that Visa may have limited competition in relation to debit card acceptance through its dealings with large merchants.
- accepting a court enforceable undertaking from Tasmanian Ports Corporation Pty Ltd (TasPorts) requiring it to ensure it provides berth space to a competitor on reasonable commercial terms, charges an affected customer reasonable fees for regulatory functions, and spends \$1 million on the wharf infrastructure in question.

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

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 secured a number of significant outcomes in the Federal Court in 2021, including:

- In February 2021 the Federal Court handed down an AU\$24 million fine to Norwegian-based global shipping company Wallenius Wilhelmsen Ocean AS (WVO) who were convicted of criminal cartel conduct.
- In March 2021 B & K Holdings (QLD) Pty Ltd was ordered to pay a \$350,000 penalty after the Federal Court declared by consent that it engaged in resale price maintenance in relation to the wholesale supply of cycling and sporting products in Australia

25. There were also 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. This included longstanding matters in court against Vina Money Transfer Pty Ltd and NSW Ports Operations Hold Co Pty Ltd.

### *2.1.2. Case study – Final conviction in Wallenius Wilhelmsen Ocean AS (WVO) cartel case*

26. On 4 February 2021, Norwegian-based global shipping company Wallenius Wilhelmsen Ocean AS (WVO) was convicted of criminal cartel conduct and ordered by the Federal Court to pay a fine of \$24 million. WVO was convicted and sentenced for one criminal charge of giving effect to cartel provisions. WVO also admitted guilt in relation

to two further offences of giving effect to cartel provisions in 2009, which was taken into account on sentence.

27. This brings to a close an extensive investigation by the ACCC into an international cartel involving several international shipping companies in relation to the shipping of vehicles to Australia from Asia, Europe and the US on behalf of major car manufacturers. Shipping cartel fines resulting from this investigation now total \$83.5 million.

## 2.2. Mergers and acquisitions

28. 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.

29. 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.

30. 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.

31. 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.

32. In 2021:

- the ACCC assessed 473 mergers under section 50 of the CCA. Of the 473 mergers considered:
  - 25 underwent an informal public review
  - 447 were pre-assessed as not requiring a public review
  - One merger underwent a public review of an application for merger authorisation.
- one merger was cleared subject to remedies accepted from the merger parties:
  - Veolia Environment SA – proposed acquisition of Suez SA. <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/asahi-group-holdings-carlton-united-breweries-owned-by-anheuser-busch-inbev-sa-nv>
- one merger investigation did not proceed after the release of a Statement of Issues because the acquirers decided not to proceed with the proposed acquisitions:
  - Aon - proposed combination with Willis Towers Watson <https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/alsco-pty-ltd-spotless-garment-business>.
- the ACCC took legal action to block one merger:
  - Virtus Health Limited – proposed acquisition of Adora Fertility. In October 2021, the ACCC sought an urgent injunction to prevent the acquisition and the

Federal Court granted an interlocutory injunction. In December 2021, Virtus announced it had abandoned the transaction.

### ***2.2.1. Case study - National Australia Bank's proposed acquisition of 86 400 Holdings***

33. On 30 March 2021 the ACCC announced that it would not oppose the proposed acquisition of 86 400 Holdings Ltd (86 400) by National Australia Bank Limited (NAB). 86 400 was launched in 2019 operating as a digital-only bank, delivering its services through a smartphone application.

34. As digital-only banks and other fintechs are increasingly playing a critical role in challenging the established banks and leading to more innovative and cheaper banking for consumers, the ACCC examined the proposed acquisition closely to determine whether 86 400 was important to the competitive dynamics in the market because of its provision of innovative products and services despite its small size.

35. The ACCC's consultation included banks, non-bank lenders, fintechs, mortgage brokers and industry and consumer bodies.

36. The ACCC found that while 86 400 is innovative, particularly in reducing the effort required by applicants to complete a home loan application and increasing the speed with which those applications are assessed, a number of other lenders have similar offerings or the ability to easily replicate what 86 400 offers. In particular, a number of second-tier banks have increased their share of new home loans by innovating. Post-acquisition, they are likely to continue to compete with and attempt to challenge the 'big 4' banks.

37. The ACCC also found that 86 400's small market share across savings, transactions and home loan products would not strongly enhance NAB's market position.

38. While the ACCC found that the acquisition of 86 400 by NAB was unlikely to substantially lessen competition, we will continue to closely scrutinise proposed acquisitions of emerging competitors, particularly by the major banks.

39. In reaching a decision on this merger, the ACCC was able to use the institutional knowledge gained from its specialised enforcement, market inquiry and advocacy work in the financial services sector.

## **2.3. Adjudication – authorisation applications and notifications**

40. 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.

41. 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.

42. 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***

43. Between July 2020 and June 2021 the ACCC assessed 57 authorisation applications, granted 10 urgent interim authorisations and granted 16 interim authorisations



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.

44. The COVID-19 pandemic completely changed the economic landscape in Australia and the focus of the ACCC. The ACCC granted 30 authorisations relating to the COVID-19 pandemic. Applications fell into five main categories: response to medical needs and securing supply of COVID-19-related medicines and medical equipment; hospital capacity management between governments and private providers; adjusting supply chains and market operation; promoting consistent relief or benefits for economic issues and hardship; and conduct responding to issues resulting from the medical, economic or social consequences of COVID-19, such as collective bargaining by tenants with landlords.

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

46. 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.

47. 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.

48. The ACCC also made its first ever 'class exemption', allowing businesses with an aggregated turnover of less than \$10 million in the financial year prior to them forming or joining a bargaining group to collectively bargain with customers or suppliers; and franchisees and fuel retailers to collectively bargain with their franchisor or fuel wholesaler regardless of their size.

49. The collective bargaining class exemption became available for businesses to use on 3 June 2021.

#### *Case study – COVID-19-related interim authorisation – Coles Group and Participating Supermarkets*

50. On 23 March 2020 the ACCC granted interim authorisation to supermarkets to work together to ensure the continued supply of food and groceries during the COVID-19 pandemic. The authorisation applied to Coles, Woolworths, Metcash and Aldi, along with other grocery retailers whose participation was approved by the ACCC.

51. The supermarkets were authorised to coordinate with each other when working with manufacturers, suppliers, and transport and logistics providers. Importantly, authorisation did not extend to the prices of any retail products. Manufacturers, suppliers, and transport and logistics providers could choose to opt in or out of any arrangements.

52. Authorisation covered 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 COVID-19 working groups. The ACCC attended those meetings when issues relevant to the authorisation were discussed.

53. The interim authorisation was revised in March and June 2020 and was confirmed in a final determination on 3 September 2020 that expired on 31 March 2021. These

authorisations allowed supermarkets and authorities to meet and rapidly coordinate responses to, for example, panic buying in response to lockdown announcements or the grocery supply issues that occurred in 2020, particularly in regional and remote communities.

54. On 12 March 2021 Coles lodged a new application for authorisation to continue coordination by the supermarkets until 31 March 2022. It noted that the value of the authorised beneficial collaboration between the supermarkets as issues emerged had been demonstrated during COVID-19 outbreaks in various capital cities in late 2020 and early 2021.

55. On 25 March 2021 the ACCC granted interim authorisation to allow the coordination to continue, pending a final determination.

### ***2.3.2. 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. Between July 2020 and June 2021, the ACCC assessed five exclusive dealing notification matters, approved five 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:

### ***2.4.1. Digital Platform Services Inquiry***

61. In 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.

62. On 28 April 2021, the ACCC released its second interim report as part of its inquiry into markets for the supply of digital platform services. The report provided in-depth consideration of competition and consumer issues associated with the distribution of mobile apps to users of smartphones and other mobile devices and focused specifically on the Apple App Store and Google Play Store used in Australia.

63. On 28 October 2021, the ACCC released its third interim report as part of its inquiry into markets for the supply of digital platform services. The report examined the provision

of web browsers and general search services to Australian consumers and the effectiveness of choice screens in facilitating competition and improving consumer choice.

#### ***2.4.2. Digital Advertising Services Inquiry***

64. In 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.

65. On 28 January 2021, the ACCC released its interim report, which found that a lack of competition and transparency in the digital advertising technology supply chain was impacting publishers, advertisers and consumers and needed to be addressed.

66. On 28 September 2021, the ACCC published its final report as part of its inquiry into the markets for the supply of ad tech services and ad agency services. The report provided in-depth analysis of competition and efficiency in the supply of these services, and detailed the ACCC's recommendations to improve competition and efficiency in the supply of ad tech services.

#### ***2.4.3. Gas Inquiry***

67. On 16 February 2021 the ACCC released its tenth interim report for the inquiry into gas supply in Australia, focussing on the operation of the east coast gas market. The report revealed that commercial and industrial (C&I) users reported improved market conditions in the form of lower price offers and contracts for 2021–22 and, in some cases, improved responsiveness of gas suppliers, including greater flexibility in contract terms for a few users, however suggested some fragility to improved market conditions, especially for southern states.

68. On 17 August 2021 the ACCC released its eleventh interim report for the inquiry into gas supply in Australia, focussing on the operation of the east coast gas market, which found that domestic spot and LNG prices had risen considerably since February 2021.

#### ***2.4.4. Murray-Darling Basin Water Markets Inquiry***

69. 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.

70. On 26 March 2021, the ACCC released its final report into the Murray-Darling Basin Inquiry. The report made recommendations to enhance markets for tradeable water rights, including their operation, transparency, regulation, competitiveness and efficiency.

#### ***2.4.5. Electricity Market Inquiry***

71. On 20 August 2018, the Treasurer directed the ACCC to hold a public inquiry into the prices, profits and margins in the supply of electricity in the National Electricity Market (NEM).

72. On 24 June 2021, the ACCC released its fifth report into the prices, profits and margins in the supply of electricity in the National Electricity Market (NEM). The report found that wholesale electricity prices had fallen significantly, with market offers remaining cheaper than standing offers. Hardship and payment plan customers had the lowest rates of solar panels and the highest bills overall.

73. On 13 December 2021, the ACCC released its sixth report of this inquiry, which found that electricity costs were the lowest in eight years and lower wholesale spot market prices had started to flow through to customers.

#### ***2.4.6. Funeral Services Sector Market Study***

74. On 2 December 2021, the ACCC released the funeral services sector report. The report highlighted key issues of concern in the funeral services sector and called on businesses to review their contracts and pricing practices to ensure they comply with consumer and competition laws.

75. **Appendix A** provides a high level summary of the ACCC's competition activities during the period 2021.

### **2.5. Infrastructure regulation**

76. 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 2021 are outlined below. More information can be found at [acc.gov.au](http://acc.gov.au).

77. During 2021 the ACCC undertook a number of major regulatory activities including:

- authorised a special working group comprising NBN Co and other key stakeholders that enabled industry to coordinate their response to the significant increase in network demand
- published two electricity market monitoring reports detailing recent market developments, including the effects of the COVID-19 pandemic on electricity use and affordability
- published multiple monitoring and inquiry reports on different infrastructure sectors (including airports, bulk grain ports, telecommunications, gas, electricity and petrol) to inform stakeholders of how businesses performed during the year.

78. The ACCC's other key activities in infrastructure regulation during 2021 included:

- promoting competition at the wholesale and retail levels by providing market information to increase transparency and remedy market failure across the supply chain
- delivering network regulation, with a continued focus on National Broadband Network (NBN) pricing and performance issues and its long-term regulatory framework
- progressing regulatory decisions in relation to rail, communications and wheat markets
- monitoring and reporting on highly concentrated, newly deregulated or emerging markets, with a focus on affordability issues and increasing information to help consumer choice and switching

- advocating for appropriate regulation of monopoly infrastructure, including in areas where there are efficiency concerns independent of competition concerns.

### *2.5.1. Access to essential facilities*

79. 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.

80. 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*

81. 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.

82. The Hunter Valley Coal Network Access Undertaking establishes a regulatory regime that provides operational benefits to the coal industry in the Hunter Valley. Throughout 2020 the ACCC engaged with and assisted the Australian Rail Track Corporation and Access Holders on varying the existing undertaking.

83. On 2 June 2021 the ACCC published its final decision, with the revised undertaking operational from 1 July 2021 to 31 December 2026.

84. The variation provided a range of benefits to downstream users, including reductions in access charges, regulatory certainty and other administrative improvements such as in reporting and transparency. The industry will benefit from the regulatory certainty provided by the undertaking.

#### *Ports*

85. 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.

86. Since 2016 Glencore Coal Assets Australia Pty Ltd (Glencore) has been in dispute with Port of Newcastle Operations Pty Ltd (PNO) in relation to asset values (impacting price) and scope of services. The dispute has gone through ACCC arbitration, the Australian Competition Tribunal and the Full Federal Court.

87. In August 2020 the Court allowed the application by Glencore on both scope and asset value, remitting the matter back to the Tribunal for determination. Specifically the Court found that there was an error of law by the Tribunal in failing to have regard to user contributions and in confining the terms of the determination to instances where Glencore was the party in control of the ship carrying Glencore’s coal. PNO applied for special leave to the High Court to appeal the Federal Court’s decision.

88. On 12 March 2021 the High Court granted PNO special leave to appeal the Federal Court’s decision.

89. On 8 December 2021 the High Court decided that Glencore was able to seek an access determination under Part IIIA of the Competition and Consumer Act in respect of navigation charges at the port.

### *Airports*

90. 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.

91. The ACCC released four Airport Monitoring reports in 2021. The key findings of the reports included:

- Airports were dramatically impacted by the global COVID-19 pandemic in the latter part of the 2019–20 monitoring period. Total passenger numbers fell by 26.5% for the year as a result.
- Aeronautical revenue dropped for the full year across the four monitored airports (Brisbane, Melbourne, Perth and Sydney) by between 15.5% and 21.6%.
- With high fixed costs, the monitored airports' aeronautical operating profit also fell by between 47.4% and 61.8% for the year.
- Car parking revenue was also down by between 20.5% and 26.1% across the monitored airports due to substantially reduced demand for airport car parking.

### *Stevedoring*

92. 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.

93. On 4 November 2021, the ACCC released its annual container stevedoring report. The report found that the COVID-19 pandemic destabilised the global container freight supply chain, leading to delayed shipments and rapidly rising freight rates.

### *Telecommunications*

94. 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.

95. 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.

96. In 2021 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.

97. The ACCC undertook a range of compliance and enforcement activities during 2020 to promote positive consumer outcomes for those transitioning to the NBN by targeting misinformation.

98. This included enforcement action where the ACCC identified misleading speed claims; and action against NBN Co itself to address representations it made to consumers about the need to move to the NBN. The ACCC published revised broadband speed claims industry guidance in October 2020 to further assist retail service providers in providing consumers with reliable and clear information.

99. In June 2021 the Federal Court handed down its decision in the ACCC's proceedings against Dodo and iPrimus for misleading broadband speed claims, ordering a penalty of \$2.5 million.

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

100. 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**

101. 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.

102. More information can be found at <https://www.treasury.gov.au/>.

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

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

104. 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.

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

106. More information can be found at <https://www.accc.gov.au/>.

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

107. 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.

108. 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.

109. More information can be found at <https://www.aer.gov.au/>.

### 3.4. The National Competition Council

110. 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.

111. More information can be found at <https://www.ncc.gov.au/>.

### 3.5. The Productivity Commission

112. 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.

113. More information can be found at <https://www.pc.gov.au/>.

### 3.6. The Australian Competition Tribunal

114. 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.

115. More information can be found at <https://www.competitiontribunal.gov.au/>.

## 4. Resources of competition authorities

116. In 2021 the following changes occurred at the ACCC:

- Commissioner Sarah Court departed the ACCC on 29 April 2021 to become Deputy Chair of the Australian Securities and Investments Commission (ASIC).
- Throughout 2021 the ACCC conducted its first major internal reorganisation in several years. The main change was to create separate divisions for its competition enforcement and consumer protection and fair trading work.

117. The total average number of staff employed by the ACCC over the 2021 calendar year was 1,207.

118. 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.

119. 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.

120. 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 2 outlines the funding appropriations for the 2020-21, and 2021-22 financial years.

**Table 1. ACCC funding appropriations**

ACCC		
	2020-21 \$m	2020-21 \$m
AUD	270,474	286,646
USD	196,253	207,987

Note: Exchange rate as at 31 December 2021 – A\$1 = US\$0.72559 = €0.6407

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

### 5.1. Productivity Commission inquiries, reports and publications

121. 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 2021, the Productivity Commission completed a number of public inquiries and commissioned research studies. These can be accessed at [www.pc.gov.au](http://www.pc.gov.au). These include:

- Right to Repair
- Vulnerable Supply Chains

122. Competition-related inquiries and research studies underway as at 31 December 2021 include:

- Productivity Inquiry

## 5.2. Summary of ACCC activities – competition matters

**Table 2. Cartel conduct proceedings commenced**

NQCranes Pty Ltd		Conduct
commenced jurisdiction	10 October 2020 Federal Court Sydney	The ACCC alleges that NQCranes entered into a signed agreement with a competitor in the overhead crane market in August 2016. This agreement allegedly included a cartel provision to share the market by not targeting each other's customers for overhead crane parts and servicing in Brisbane and Newcastle.

**Table 3. Cartel cases ongoing<sup>2</sup>**

Construction Forestry Mining and Energy Union (CFMEU) & Anor		Conduct
commenced jurisdiction	16 August 2018 ACT Magistrates Court	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
Vina Money Transfer Pty Ltd & Ors		Conduct
commenced jurisdiction	11 April 2019 Magistrate's Court of Victoria	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.

**Table 4. Anti-competitive agreements and practices proceedings finalised**

Construction Forestry Mining and Energy Union (CFMEU) & Anor		Conduct
commenced concluded jurisdiction outcome	14 October 2020 21 March 2021 Federal Court Sydney ACCC case upheld	The ACCC alleged that B&K Holdings (QLD) Pty Ltd engaged in resale price maintenance for the wholesale supply of cycling and sporting products in Australia. The Federal Court ordered wholesale distributor B & K Holdings (QLD) Pty Ltd, trading as FE Sports, to pay a \$350,000 penalty after it declared by consent that FE Sports engaged in resale price maintenance in relation to cycling and sporting products.
Food Group Pty Ltd (trading as Peters Ice Cream)		Conduct
commenced concluded jurisdiction outcome	20 November 2020 25 March 2021 Federal Court Sydney ACCC case upheld	The ACCC alleges that Australasian Food Group Pty Ltd, trading as Peters Ice Cream (Peters), engaged in conduct, which hindered or prevented competition for the supply of single-wrapped ice creams to petrol and convenience retailers.
Country Care Pty Ltd & Ors		Conduct
commenced concluded jurisdiction outcome	14 February 2018 2 June 2021 Magistrates Court of Victoria Acquitted	The alleged cartel conduct involved assistive technology products used in rehabilitation and aged care, including beds and mattresses, wheelchairs and walking frames.

<sup>2</sup> Cases instituted before 1 January 2019, and ongoing as at 31 December 2019

**Table 5. Misuse of market power proceedings finalised**

Tasmanian Ports Corporation Pty Ltd (TasPorts)		Conduct
commenced	9 December 2019	The ACCC alleged that TasPorts sought to stop a new entrant, Engage Marine Tasmania Pty Ltd (Engage Marine), from competing effectively with TasPorts' marine pilotage and towage businesses, with the purpose, effect and likely effect of substantially lessening competition.
concluded jurisdiction	5 May 2021	
outcome	Federal Court Sydney ACCC case upheld	

### *5.2.1. Merger review - Statements of Issues issued*

- Aon - proposed merger with Willis Towers Watson
- **Woolworths** – proposed acquisition of PFD Food Services
- **National Australia Bank** – proposed acquisition of 86 400 Holdings
- AlSCO Pty Ltd – proposed acquisition of the garment laundry and rental business of Spotless Group Holdings Limited

### *5.2.2. Public competition assessments issued*

- **MYOB Invest Co Pty Ltd** – proposed acquisition of GreatSoft Pty Ltd
- **Are Media Pty Ltd** – proposed acquisition of Ovato Retail Distribution Pty Ltd
- **Turnitin, LLC** - proposed acquisition of Ouriginal Group AB
- **Veolia Environment S.A** – proposed acquisition of Suez S.A