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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRALIA

-- 2010 --

This report is submitted by Australia to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19-20 October 2011.

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Executive Summary

1. This report addresses events that have occurred in the past financial reporting year (1 July 2010 until 30 June 2011). However, significant developments since 30 June 2011 have also been included where appropriate.

2. There have been important reforms to Australia's competition laws and policies during the period 2010-2011. On 1 January 2011, the primary legislation relating to competition policy, the *Trade Practices Act 1974* (TPA) was renamed as the *Competition and Consumer Act 2010* (CCA) and incorporated the Australian Consumer Law (ACL, see part 3.8), a uniform set of consumer protection laws designed to ensure consumers are afforded the same statutory rights across Australia.

3. Additionally, the Federal Government introduced into Parliament two Bills proposing key amendments to the CCA. The Competition and Consumer Amendment Bill (No. 1) 2011 seeks to outlaw certain types of anti-competitive information disclosures between competitors (see part 1.6) and the Competition and Consumer Legislation Amendment Bill 2011 seeks to clarify the current provisions of the CCA in relation to creeping acquisitions (see part 1.7). These Bills remain under consideration in Parliament.

4. The Australian Government also continued to progress reforms in the areas of telecommunication infrastructure and energy.

5. The enforcement of the CCA remains strong. Australia's enforcement authority, the Australian Competition and Consumer Commission (ACCC), considered 377 matters for compliance with mergers and acquisitions provisions of the CCA during the period 2010-11. The ACCC has also been involved in bringing a number of successful court actions against companies engaged in anti-competitive practices in breach of the CCA, and continues to be heavily engaged in a number of pricing and access issues.

1. Changes to competition laws and policies

1.1 Council of Australian Governments (COAG) Reform Agenda

6. On 20 December 2007, COAG agreed to a new reform agenda across a broad range of issues, such as health, water, regulatory reform and the broader productivity agenda. As part of the COAG Reform Agenda, in November 2008, COAG agreed to the National Partnership Agreement to Deliver a Seamless National Economy (the NPA). The NPA is intended to contribute to:

- creating a seamless national economy, reducing costs incurred by business in complying with unnecessary and inconsistent regulation across jurisdictions;
- enhancing Australia's longer-term growth, improving workforce participation and overall labour mobility; and
- expanding Australia's productive capacity over the medium-term through competition reform, enabling stronger economic growth.

7. The NPA's Implementation Plan comprises three parts:

- Part 1: 27 Deregulation priorities, where inconsistent and overlapping regulation across jurisdictions in 27 separate areas is impeding business productivity and innovation, and impeding workforce mobility and skill acquisition;

- Part 2: eight priority areas of competition reform; and
- Part 3: developing and enhancing existing processes for regulation-making and review.

8. Under the NPA, the Commonwealth committed to provide funding to the States and Territories of up to \$550 million over five years. The payments are in two components: \$100 million in facilitation payments to assist States and Territories meet the costs associated with implementing reforms; and up to \$450 million in reward payments to States and Territories that succeed in achieving the reform milestones set under the NPA.

9. The Implementation Plan sets out the key milestones to be achieved by each jurisdiction for individual reforms. The progress of each jurisdiction in achieving these key milestones is assessed annually by the COAG Reform Council (CRC). All jurisdictions provide a detailed report to the CRC on its progress against the key milestones for each financial year during the life of the NPA.

10. The Commonwealth will provide reward payments taking into account the CRC's advice on the achievement of the key milestones for the 27 deregulation priorities. There are no reward payments tied to the achievement of the competition reforms or the further improvements to processes for regulation-making and review.

11. Over half of the deregulation priority reforms are now operational and jurisdictions continue to work together to progress the remaining reforms. Recognising the good progress made in implementing the Seamless National Economy reforms, on 13 February 2011 COAG agreed to bring forward the completion date for the NPA from June 2013 to December 2012. In addition, given the high priority all governments attach to boosting productivity and the competitiveness of the economy, COAG asked relevant ministers and officials for options to be developed for a further wave of regulatory and competition reforms for its consideration at the end of 2011.

1.2 Energy market reform

12. In 2004, COAG endorsed a major energy market reform program proposed by the Ministerial Council on Energy, which was expanded in 2006. The reform agenda focuses on improving regulatory and governance arrangements, electricity transmission and distribution networks, planning and regulation, gas market development and operation and end-user participation in the energy market.

13. In 2007, COAG committed to establish the Australian Energy Market Operator (AEMO) as a single national electricity and gas market operator. AEMO commenced operations on 1 July 2009 and includes a new national transmission planning function. COAG also committed to the development of a national framework for the roll out of smart meters to improve demand management for consumers and infrastructure providers.

14. In relation to gas market development, the creation of a national gas market bulletin board in July 2008 represents a move towards a more transparent and integrated gas market. The bulletin board was also designed to assist with the management of gas emergencies affecting participating pipelines.

15. Another key gas market reform is the commencement on 1 September 2010, of a new gas Short Term Trading Market (STTM) initially for New South Wales and South Australia. An objective of the STTM is to facilitate the short term trading of gas between pipelines, participants and production centres. The STTM is being expanded, to Queensland, with a Brisbane hub to commence on 1 December 2011.

16. The Ministerial Council on Energy has developed a new National Energy Customer Framework, which establishes a legal framework for the regulation of energy retailers and distributors in their dealings with end use customers. The new framework brings together existing jurisdictional frameworks and represents the final stage of transition to a national energy framework. The *National Energy Retail (South Australia) Act 2011* received the Royal Assent on 17 March 2011 and participating jurisdictions are working towards a common target date of 1 July 2012 for implementation of the National Energy Customer Framework. Under the Framework the Australian Energy Regulator (AER) will undertake responsibility for granting authorisations and exemptions for retail operators, approve retailers' customer hardship policies, administer a retailer or last resort scheme and undertake compliance and performance monitoring functions under the new law. The AER will also develop a national retail price comparator service to assist customers select an appropriate energy provider. The service is expected to be in operation from July 2012.

1.3 Telecommunications

17. On 7 April 2009 the Government announced the establishment of a new company – NBN Co – to build a national broadband network, to operate on an open access, wholesale-only basis. The Government's intention is that up to 93 per cent of all premises will be covered by a fibre network, with the remaining 7 per cent to be connected through wireless and satellite technologies. Legislation governing NBN Co's structure and operations was passed by the Australian Parliament in late 2010 and early 2011; it provides for the ownership and privatisation of NBN Co, establishes the wholesale-only nature of the network, and creates reporting obligations for NBN Co. The legislation also exempts from the general competition law certain conduct connected with the establishment and network design of the national broadband network, and streamlines the telecommunications access regime in Part XIC of the CCA.

18. The Government has also introduced reforms to the regulatory arrangements in the telecommunications sector, to promote greater competition across the industry. Importantly, the new arrangements provide for the structural separation of the dominant incumbent telecommunications firm, Telstra. Measures in the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* provide for Telstra submitting a structural separation undertaking to the ACCC. If it does not secure ACCC acceptance of its undertaking, Telstra will be required to undergo functional separation, and may be denied access to forthcoming auctions of valuable radiofrequency spectrum. On 29 July 2011, Telstra submitted a proposed structural separation undertaking, which is currently being considered by the ACCC.

19. In March 2010, the Australian Government announced its approach to the reissue of current 15-year radio frequency spectrum licences. The first of these licences will expire in 2013, with the remainder expiring by 2017. While the licences currently range from 500 Megahertz (MHz) to 31 Gigahertz (GHz), it is expected that there will be a focus on the spectrum licences in the 800MHz, 1800MHz, 2.1GHz, 2.3GHz and 3.4GHz bands. The Government is currently progressing discussions with the incumbent licensees on the possible renewal of these spectrum licences and has stated that an auction of the licences remains an option if it is not satisfied that their renewal is in the public interest.

20. On 24 June 2010, the Australian Government announced that it had decided to release a contiguous block of scarce and highly-valued radiofrequency spectrum currently used for television broadcasting known as the 'digital dividend'. The 'digital dividend' refers to spectrum in the 694 to 820 MHz range that will be made available as a result of the Government's decision to switchover from analog to digital television by 31 December 2013. The Government aims to auction the digital dividend spectrum in the second half of 2012.

21. On 14 December 2010, the Minister for Broadband, Communications and the Digital Economy announced a comprehensive review of Australia's communications and media regulation. The 'Convergence Review', which is being conducted by a three-member expert Committee, is considering the appropriate policy framework for communications and media services in an era of converging content, platforms and devices. The Committee is consulting widely, and released an 'Emerging Issues Paper' on 6 July 2011. The Committee is expected to deliver its final report to the Government in the first quarter of 2012.

22. On 25 November 2010, the Minister for Broadband, Communications and the Digital Economy announced a number of changes to Australia's anti-siphoning scheme, which regulates the acquisition of sports rights and the screening of sport on television in Australia. The anti-siphoning scheme was introduced in 1994 to ensure that events of national importance and cultural significance were made freely available to the Australian public. Changes to the scheme mean that certain 'Tier A' events must be broadcast live and in full, while 'Tier B' events may be broadcast within certain timeframes and on a broadcaster's second or third digital channel.

1.4 National access regime

23. On 14 July 2010, a package of reforms to the National Access Regime came into effect. The reforms are intended to streamline its operation and remove delays affecting decision-making and arbitration processes. The amendments introduce binding time limits for regulatory decision-making, and limit the scope of merits review under the National Access Regime. The reforms improve the clarity and timeliness of regulatory processes and promote greater consistency between state access regimes and the National Access Regime.

24. The Council of Australian Governments has agreed that the Productivity Commission (PC) will conduct a review of the National Access Regime, to commence by the end of 2012. The timing of the review will allow the recent amendments to settle, and will allow for informed consideration of recent litigation concerning access to certain railway tracks in the Pilbara region (see below 2.7.2).

1.5 Water reform

25. In 1994, the COAG Agenda was broadened to include water reform. In 2004, COAG renewed this commitment by agreeing to the National Water Initiative to increase the efficiency of Australia's water use, leading to greater certainty for investment and productivity, for rural and urban communities, and for the environment. The need for further reform in Murray-Darling Basin (the Basin) jurisdictions led to the Commonwealth *Water Act 2007* (Water Act).

26. The Water Act established the Murray Darling Basin Authority (MDBA) to develop a Basin Plan to ensure water resources are managed in an integrated and sustainable way. The Water Act also provided the ACCC with a key role in developing and enforcing water charge and water market rules that regulate the activities of operators in the Basin, and also in advising the MDBA on water trading rules to inform the Basin Plan.

27. A key element of this reform is the removal of barriers to water trade to facilitate the operation of efficient water markets and provide opportunities for water trading. Water trading will allow water to be traded to its highest value use. The ACCC has provided advice to the Minister for Water on developing rules to facilitate this outcome. In 2009 the Australian government introduced Water Charge (Termination Fees) Rules 2009 (WCTFR), and Water Market Rules 2009 (WMR) to promote the efficient functioning of water markets by removing distortions and freeing up trade in water. The development of these rules continued in 2010-2011.

28. The Water Charge (Planning and Management Information) Rules, which were given effect from July 2010, require state governments to publish information on the water planning and management activities and costs that they fund through charges.

29. In October 2010, the ACCC's final advice to the Murray-Darling Basin Authority (MDBA) on the Basin Plan water trading rules was made public to coincide with the MDBA's release of the Guide to the proposed Basin Plan. The MDBA adopted the ACCC's advice with minor amendments. Throughout 2010-11, the ACCC has assisted the MDBA in drafting the water trading rules.

30. The Water Charge (Infrastructure) Rules came into effect from January 2011 and apply a tiered structure to regulation of rural water infrastructure charging across the Murray-Darling Basin, with the rules ranging from publication requirements for all infrastructure operators, to network service planning processes or price approvals or determinations for larger operators.

31. In April 2011, the ACCC's *Water Monitoring Report 2009-10* to the Minister was published. The monitoring report covers regulated water charges, transformation arrangements and compliance with the water market rules and water charge rules in the Murray Darling Basin while also making key observations on the expansion in the size of water markets and an increased capacity for market participants to engage in trade.

1.6 *Anti-competitive price signalling and other information disclosures*

32. In 2009, the Department of the Treasury issued a discussion paper which sought submissions regarding the adequacy of the current interpretation of the term "understanding" in section 45 (prohibition on anti-competitive vertical arrangements) of the CCA (then TPA) to capture anti-competitive conduct. That process identified that anti-competitive price signalling and information disclosures were not captured by the CCA and rather than amend the meaning of understanding, this anti-competitive conduct could be directly targeted by new prohibitions under the CCA.

33. In December 2010, as part of its Competitive and Sustainable Banking System package, the Government committed to introduce new laws to prohibit banks from engaging in anti-competitive price signalling and information disclosures.

34. If enacted by the Parliament, the Competition and Consumer Amendment Bill (No. 1) 2011 (CCAB), introduced into Parliament on 24 March 2011, will amend the CCA to prohibit:

- the private disclosure of pricing information to a competitor or potential competitor, where doing so is not in the ordinary course of business; and
- the disclosure of information related to price, supply or production capacity or commercial strategy to a competitor or potential competitor, where that disclosure has been made for the purpose of substantially lessening competition in a market.

35. The new prohibitions will only apply to sectors which are specified in regulations. The Government has stated that it intends to limit regulations to the banking sector in the first instance.

36. CCAB provides for appropriate exceptions and immunity arrangements will be available for the new prohibitions, similar to those in place for existing anti-competitive conduct prohibitions in the CCA.

37. Breaches will be subject to civil penalties of up to \$10 million, 10 per cent of a business's annual turnover or three times the benefit of the conduct – whichever is higher.

38. CCAB has passed the lower house is currently awaiting debate in the upper house of the Parliament.

1.7 Creeping acquisitions

39. The CCA prohibits mergers and acquisitions that would be likely to result in a substantial lessening of competition. In the *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (the Grocery Inquiry), the ACCC raised concerns that the prohibition in the CCA does not encompass the acquisition of a number of smaller individual assets or businesses over time, which collectively have significant competitive impacts.

40. The Government proposed four broad models for reform in its two discussion papers released in 2008 and 2009. Submissions made in response to the discussion papers indicated that there was no clear consensus of support for any individual model, and views varied as to whether, in practice, there was a substantive problem to be addressed.

41. As a result of this public consultation, the Government identified two areas in the law where it considered clarification would assist in addressing creeping acquisitions concerns. These amendments were contained in the Competition and Consumer Legislation Amendment Bill 2010, which passed the House of Representatives and was awaiting introduction into the Senate prior to lapsing at the prorogation of the 42nd Parliament of Australia before the 2010 Election.

42. The Bill was reintroduced as the Competition and Consumer Legislation Amendment Bill 2011 (CACLAB) on 15 June 2011. CACLAB was passed by the House of Representatives on 17 August 2011 and introduced into the Senate on 18 August 2011. CACLAB is awaiting debate in the Senate.

1.8 New guidelines

43. The ACCC produced and released 63 new publications for business and industry sectors as well as consumers in print, electronic and multimedia formats. These publications related to consumer protection issues such as guidance on component pricing, mobile telephone premium services, warranty and refund rights, codes of conduct and the outcome of ACCC enforcement actions as well as competition issues.

44. In April 2011 the ACCC updated its *Enforcement Guidelines—Water Market and Charge Rules* to reflect amendments made to the rules. The enforcement guidelines note the ACCC intends to use a cooperative approach, including working with irrigation infrastructure operators to achieve compliance with the rules. However, when necessary, the ACCC is prepared to use remedies available to it under the Water Act.

45. In most cases, publications are available from the ACCC's web site at www.accc.gov.au.

2. Enforcement of competition laws and policies

46. The CCA prohibits a wide range of anticompetitive practices, including cartel conduct, arrangements that substantially lessen competition, secondary boycotts, misuse of substantial market power, mergers or acquisitions that may substantially lessen competition, and resale price maintenance. The CCA also contains telecommunication- specific competition rules.

47. In addition to the ACCC's enforcement function under the CCA, provision is also made for any person to independently seek a remedy from a court. This right of private action generally enables persons who consider that the CCA has been contravened to approach a court directly, irrespective of the view of the ACCC. This also enables private parties to commence third party damages claims following ACCC action.

2.1 *Anticompetitive Conduct Matters*

48. In the course of 2010-11, the ACCC commenced litigation in two non-merger competition matters covering a range of conduct the ACCC considers raises concerns under the competition provisions of the TPA and CCA. Proceedings were concluded in six competition matters during the year.

2.1.1 *Black and White Cabs Pty Ltd*

49. The ACCC commenced proceedings in August 2010 against Black and White Cabs Pty Ltd for allegedly engaging in third line forcing conduct in requiring some taxi operators, as part of a sub-lease agreement to exclusively use the 'Cabcharge Payment System' when processing electronic payments. Proceedings concluded in December 2010. The Federal Court imposed pecuniary penalties of \$110 000. The court also ordered Black and White Cabs Pty Ltd to implement a trade practices corporate compliance program.

2.1.2 *IGC Dorel Pty Ltd and Robert Berchik*

50. The ACCC commenced proceedings in July 2010 against IGC Dorel Pty Ltd and Robert Berchik for alleged resale price maintenance in relation to 'Bertini' brand prams, by supplying the prams to retailers on condition that retailers must sell or advertise those prams at prices specified by IGC Dorel. The proceedings concluded in November 2010. The Federal Court ordered IGC Dorel Pty Ltd to send a letter to its current retailers of Bertini products to notify them of the outcome of the proceedings and to inform them of the illegality of resale price maintenance, implement a trade practices law compliance and education program. The Federal Court imposed pecuniary penalties totalling \$100,000 on IGC Dorel Pty Ltd and its managing director, Robert Berchik.

2.1.3 *Baxter Healthcare Pty Ltd*

51. The ACCC commenced proceedings against Baxter Healthcare Pty Ltd in November 2002 for alleged misuse of market power and exclusive dealing in relation to the supply of health products to state government purchasing authorities. Though the Federal Court and Full Federal Court found that Baxter Healthcare had misused its market power in its dealings with State Hospitals, it was immune from contravening the CCA due to an earlier High Court of Australia decision which extended crown immunity to private corporations who dealt with certain arms of government (in Baxter Healthcare's case, State owned hospitals). The ACCC appealed to the High Court, who in 2007 overturned its previous decision on derivative crown immunity, extending the reach of Australia's competition laws. After the High Court decision, the proceedings reverted to the Federal Court to determine its remedies against Baxter Healthcare. In August 2010 the Federal Court imposed pecuniary penalties of \$4.9 million on Baxter Healthcare.

2.1.4 *Cabcharge Australia Ltd*

52. In September 2010, the ACCC finalised proceedings brought against Cabcharge Australia Limited in 2009 for alleged contraventions of sections 45 and 46 of the TPA. The Federal Court imposed penalties and costs of \$15 million on Cabcharge. The court also ordered Cabcharge to implement a trade practices corporate compliance program.

2.1.5 *Cartel proceedings*

53. The detection and prosecution of cartel activity (now subject to criminal sanctions) remains a priority for the ACCC. At year's end, the ACCC had 11 cartel proceedings still before the courts—eight of them relating to the alleged air cargo cartel. The following cartel matters finalised in 2010-11:

- Japan Airlines International Co Ltd was ordered to pay a \$5.5 million penalty for price fixing in respect of fuel and insurance surcharges on the international carriage of freight. This brings to more than \$46 million the total penalties imposed on cartel participants since the ACCC's investigation into alleged cartel activity in air cargo services began in 2006.
- The ACCC successfully concluded the long running international cartel enforcement action—*ACCC v April International Marketing Services Australia Pty Ltd and others*. The Federal Court ordered penalties totalling \$4.2 million against Singapore-based Asia Pulp & Paper Co Ltd (APP Singapore) and a related Indonesian company, PT Indah Kiat Pulp and Paper Tbk (Indah Kiat), for fixing the price of photocopy paper and uncoated woodfree folio paper supplied to Australian customers. In proceedings brought by the ACCC, the two companies admitted certain facts about their involvement in the price fixing arrangements. The Federal Court imposed total penalties of \$8.2 million on corporations involved in these arrangements.

2.2 *Mergers and Acquisitions*

54. In 2009-10 the ACCC refined its reporting processes to distinguish between matters that do not require review because competition concerns are pre-assessed as being low, and matters that require review. Pre-assessed matters were often referred to the ACCC by other agencies, such as the Foreign Investment Review Board, by the merger parties as a courtesy, or as a result of the ACCC's intelligence activities.

55. In 2010-11 the ACCC considered 377 matters for compliance with section 50 of the CCA. Of these, 141 underwent a public or confidential review. Of the 141 matters reviewed, three matters were publicly opposed; confidential opposition or concerns were expressed in four; and seven were allowed to proceed after the acceptance of undertakings to address competition concerns. Fourteen matters were withdrawn by the parties before a decision could be made, or were confidential matters where no view could be formed without market inquiries. Of the 141 matters reviewed, 33 were conducted confidentially and 108 were public reviews. The ACCC unconditionally cleared 78 per cent of all mergers reviewed.

Table 1: Merger matters assessed and reviewed in 2010–11

Financial Year 1 July 2010 – 30 June 2011

Total Matters Assessed and Reviews Undertaken	377
Matters pre-assessed - no review required	236
Reviews undertaken	141
<i>Total reviews can be broken down into the following categories:</i>	
Not Opposed	110
Finished - no decision (incl. withdrawn)	14
Publicly Opposed outright	3
Confidential review - Opposed or ACCC concerns expressed	4
Resolved through undertakings	7
Variation to undertaking accepted	3
Variation to undertaking rejected	0

56. The ACCC communicates with international counterpart agencies when assessing the implications of international mergers and acquisitions. These discussions relate to aspects, such as the appropriate market definition, barriers to entry, possible remedies and emerging market dynamics as well as the timing of the various reviews.

57. Two of the major merger reviews conducted by the ACCC in 2010-11 are discussed below.

2.2.1 *Asahi Holdings (Australia) Pty Ltd – proposed acquisition of P&N Beverages Australia Pty Ltd*

58. On 9 March 2011, the ACCC decided to oppose the proposed acquisition of the business of P&N Beverages by Asahi Holdings after forming the view that the proposed acquisition was likely to result in a substantial lessening of competition in the markets for the supply of carbonated soft drinks and cordial.

59. Subsequent to the ACCC's decision, the merger parties proposed remedies to address the competition concerns. The remedies involved Asahi making a revised proposal to acquire P&N and simultaneously divesting P&N's CSD, cordial and energy drink business to Tru Blu Beverages Pty Ltd (a newly created company established by the former owner of P&N) while retaining P&N's bottled water and fruit juice business. On 11 August 2011, the ACCC announced that it would not oppose the proposed acquisition on the basis that the competition concerns would be resolved by the court enforceable undertaking provided by Asahi to the ACCC.

60. A Public Competition Assessment is available on the ACCC's website.

2.2.2 *Metcash Trading Limited - proposed acquisition of Interfrank Group Holdings Pty Ltd (Franklins)*

61. The ACCC decided in November 2010 to oppose the acquisition of the Franklins supermarket business by Metcash Trading, Australia's largest grocery wholesaling and distribution company, which supplies independent grocery retailers throughout the country. The ACCC formed the view that the proposed acquisition was likely to result in a substantial lessening of competition. The ACCC's position was not accepted by the merger parties, and the matter was contested before the Federal Court.

62. On 8 December 2010, the ACCC filed an application for injunctions and other orders under section 80 of the TPA and Statement of Claim. The Federal Court handed down its judgment on 25 August 2011, finding that the acquisition of the issued shares in the capital of Franklins by Metcash would not substantially lessen competition in contravention of section 50 of the TPA. The ACCC has appealed the Federal Court's findings to the Full Court.

2.3 **Pricing Matters**

2.3.1 *Airports*

63. Under the *Airports Act* and Part VIIA of the CCA, the ACCC monitors and reports annually on a range of indicators—including quality of service, prices, costs, profits and investment levels—relating to aeronautical and car-parking services at Australia's five major airports. While the indicators do not provide conclusive evidence as to whether the airports have been earning monopoly rents, trends in those indicators over time can identify those airports whose performance might require greater scrutiny.

64. In the 2008-09 airport monitoring report released in March 2010, the ACCC found the performance of Sydney Airport to be of greatest concern due to signs investment was being inefficiently delayed. The ACCC also raised concerns that the major airports' monopoly position in car parking could be used to exploit the public, with car parking prices likely reflecting an element of monopoly rent.

65. Following the ACCC's 2008-09 report, the Minister for Infrastructure and Transport announced that the Government would bring forward a PC inquiry into the economic regulation of airport services from 2012. The PC commenced its inquiry in December 2010 and issued its draft inquiry report in August 2011. The PC's final report is expected to be handed to Government in December 2011.

2.3.2 *Australia Post*

66. The ACCC has an ongoing role in assessing increases in the prices of letter services over which Australia Post has a legislated monopoly under Part VIIA of the CCA. In 2010–11, the ACCC assessed a proposal by Australia Post to increase prices for its monopoly business mail services. Australia Post, to encourage more efficient and flexible use of its postal network, also proposed an improvement in the delivery standards for Off Peak letters. In June 2011, the ACCC decided to not object to the proposed price increases and the product design changes for Off Peak letters.

2.3.3 *Petrol*

67. The ACCC monitors the retail prices of petrol, diesel and automotive liquefied petroleum gas (LPG) in the capital cities and around 150 regional centres and country towns, as well as international crude oil and refined petrol prices. It also closely follows developments in the petroleum industry.

68. The ACCC provides information on its website on petrol price cycles in the five largest metropolitan cities (Sydney, Melbourne, Brisbane, Adelaide and Perth), to increase consumers' understanding of petrol price cycles. In particular, the ACCC provides consumers with information on the cheapest and most expensive days of the past weeks to buy petrol in the five largest metropolitan cities. The ACCC also provides a comparison of Australian retail petrol price movements with the Singapore Mogas 95 (seven day rolling average) benchmark over the previous three months. The website also includes information on what determines petrol prices, country petrol prices and provides answers to some frequently asked questions. It also has links to a number of other websites that have information about petrol prices and petrol pricing issues.

69. In December 2007 the Australian Government instructed the ACCC to undertake formal monitoring of unleaded petrol prices, and report to the Government every year for a period of three years. The ACCC produced reports in 2008, 2009 and 2010. The Australian Government has further directed the ACCC to formally monitor unleaded petrol prices again in 2011 and 2012.

70. The Government also asked the ACCC to have a renewed focus on the informal monitoring of diesel and liquefied petroleum gas (LPG) prices on 16 February 2008, and to advise the Government if further powers in this area are necessary or desirable. The ACCC has been informally monitoring diesel and LPG prices since this time and has reported on them in its monitoring reports.

2.3.4 *Container Stevedoring Monitoring*

71. The ACCC issued its monitoring report for the 2009–10 year on 8 November 2010. The report shows that industry operating performance improved largely as a result of increased demand for stevedoring services associated with improved economic conditions, following the impact of the global financial crisis (GFC) during 2008–09. Total industry revenues in 2009–10 increased due to higher volumes. Total average costs also increased and profits increased slightly.

72. The report also shows that some measures of capital productivity have not increased since June 2001. Further incentives for the existing stevedores to offer a more productive service are needed. Competition is the most effective means of driving productivity in the operation of existing capacity, and the most effective way of driving efficient investment in new capacity.

73. Capital investment by the two existing stevedores could result in more intense competition between them. That said, capacity expansion plans that provide for new entry are likely to result in further benefits. Plans for new entry are well advanced in Brisbane and Sydney, with Hutchison Port Holdings scheduled to commence operations in 2012. The Victorian Government is currently deciding how the Port of Melbourne, Australia's largest container port, will cater for future increases in demand.

2.4 Copyright Remuneration

74. Under the *Copyright Act 1968*, the ACCC may join matters as a party in the Copyright Tribunal relating to the price paid by businesses for intellectual property provided by copyright licensing societies. The ACCC may also produce guidelines that the Copyright Tribunal must take into account if requested to do so by a party to a Tribunal proceeding.

75. Before the end of 2011, the ACCC expects to release draft copyright guidelines for public consultation. The draft guidelines will set out what the ACCC considers to be an appropriate economic approach to determining copyright remuneration and will assist in providing guidance to copyright licensees on when the ACCC will seek to participate in Copyright Tribunal matters in the future.

2.5 Monitoring/enforcement of water charge and water market rules

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

77. On 27 July 2010 the ACCC accepted an enforceable undertaking¹ following an investigation into Murray Irrigation Limited's compliance with rule 5 of the Water Charge Termination Fee Rules (WCTFR). Murray Irrigation admitted imposing a fee for surrendering delivery entitlements on 112 occasions and overcharging 64 irrigators for termination fees. It undertook to put procedures in place to avoid future contraventions and provided refunds in excess of \$140,000 to affected irrigators.

78. On 6 September 2010 the ACCC gave three infringement notices² totalling \$66,000 to Murrumbidgee Irrigation Limited. The infringement notices, which were paid, related to alleged contraventions of rule 5 of the WCTFR. The ACCC also accepted an enforceable undertaking from Murrumbidgee Irrigation in relation to this matter in which it admitted contravening rule 5 by overcharging 27 irrigators for termination fees. It undertook to put procedures in place to avoid future contraventions and provided refunds in excess of \$640,000 (including interest) to affected irrigators.

79. In March 2011 the *ACCC Water Monitoring Report 2009-10* was provided to the Minister. The report was published in April 2011.

2.6 Energy Infrastructure regulation and energy market monitoring/enforcement

80. In 2010-11, the AER completed regulatory determinations for five electricity distribution businesses in Victoria. The AER also approved network prices in the electricity sector for 12 distribution businesses.

81. In addition, the Victorian Government has conferred responsibilities on the AER to assess the costs associated with the transition to smart meters for Victorian electricity consumers. In 2010-11 the AER assessed charges revision applications that set out the distributors' forecast costs for the final years of the smart meter rollout in Victoria, as well as charges for these years to cover their forecast costs. A draft determination on the distributors' budget and charges applications was released in July 2011. A final determination must be made by 31 October 2011.

¹ Section 163 of the Water Act allows the ACCC to accept court enforceable undertakings in relation to contraventions of the water market rules and water charge rules.

² Section 156 of the *Water Act* allows the ACCC to give infringement notices to operators in relation to alleged contraventions of certain of the water market rules and water charge rules.

82. In the gas sector, the AER published two gas distribution decisions in relation to Queensland and one in relation to South Australia gas distribution networks. The AER also published its draft decision for the Northern Territory transmission pipeline with the final decision to be released in July 2011. During 2010-11 the AER also approved annual tariff variations for the Victorian principal gas transmission system, three transmission pipelines and eight distribution systems.

83. Over the same period, the AER has continued with its technical audits program, completing one and commencing two new audits. It also conducted compliance reviews of targeted electricity and gas obligations. No enforcement action was undertaken by the AER in 2010-11.

84. The economic regulation and enforcement activities by the AER continue to increase as additional functions and responsibilities are moved from State jurisdictions to the AER. Additional functions that the AER has prepared for over the last year include retail energy market regulation (other than retail pricing) for all states except Western Australia and the Northern Territory. The AER undertook a public consultation process to assist it in the development of key regulatory guidelines and instruments that will support the new National Electricity Customer Framework on its commencement from July 2012. The AER is in the process of preparing for its new functions in relation to small customers and will continue to do so throughout the transitional period.

85. Publications such as guidelines, weekly reports into market outcomes in the electricity and gas markets, annual regulated business performance reports and quarterly compliance reports, are issued regularly by the AER. The most significant publication is the annual State of the Energy Market report. This provides a comprehensive overview of activity in the Australian energy and gas sectors. In 2010-11, the AER also issued one investigation report relating to compliance with the planning and consultation requirements for a new large transmission asset and seven high electricity price reports.

2.7 Access to Infrastructure Facilities

86. Under National Competition Policy (NCP), all Australian governments agreed to the introduction of an economy-wide access regime for essential infrastructure services. The National Access Regime, which was established in 1995 through Part IIIA of the CCA, provides an avenue for firms to access certain essential infrastructure services on reasonable terms and conditions in cases where commercial negotiations on access are unsuccessful. The regime provides three regulatory routes for access, with administration of the arrangements being carried out by a number of Commonwealth bodies. In addition to the (generic) National Access Regime, there are also a number of industry-specific access regimes, both at the Commonwealth level — for example, access to telecommunications services is provided for under Part XIC of the CCA — and at State and Territory level.

87. In 2010-11 a number of state-based third party access regimes were submitted to the National Competition Council (NCC) for recommendation for certification as effective access regimes. This was in accordance with a COAG agreement for each jurisdiction to submit its access regimes. Certification decisions in 2010-11 (and 2011-12 to date) were made by the designated Minister (in this case the Parliamentary Secretary to the Commonwealth Treasurer) for the South Australian Ports Access Regime and Queensland's Dalrymple Bay Coal Terminal Access Regime for periods of ten years. The Western Australian, Queensland and South Australian Rail Access Regimes were certified as effective access regimes for periods of five, ten and ten years respectively.

2.7.1 Telecommunications

88. The ACCC continues to oversee the telecommunications access regime under Part XIC of the CCA. However, there were significant changes to this regime under the *Telecommunications Legislation*

Amendment (Competition and Consumer Safeguards) Act 2010, particularly the shift from the ‘negotiate-arbitrate’ model to an ‘up-front price setting’ model.

89. The transitional provisions provide that existing access disputes under the old model would remain active until a ‘final access determination’ comes into force, under the new model, for the service in dispute. As of July 2011, 13 separate access disputes were under consideration by the ACCC, all of which related to the unconditional local loop service (ULLS) and line sharing services (LSS) provided by Telstra over its copper access network.

90. In the fourth quarter of 2010, the ACCC undertook public consultation and provided advice to the government on the appropriate number and location of initial points of interconnection (POIs) for the National Broadband Network. The advice recommended a semi-distributed approach, with 120 POIs located in areas serviced by two or more transmission operators or where a transmission route is likely to become competitive. This list was confirmed (with minor variations) in March 2011 after a public consultation process.

91. On 22 December 2010, the ACCC updated its list of exchange service areas (ESAs) that are exempted from certain access regulations. As a result, Telstra will be exempt in a further 52 ESAs from the standard access obligations for the provision of declared wholesale line rental (WLR), local carriage service (LCS) and public switched telephone network (PSTN) originating access (OA) services from 30 June 2011. However, the ACCC has also flagged its intention to review the future of these geographic exemptions.

92. Since 1 January 2011, the ACCC has had the power to make access determinations setting up-front price and non-price terms for regulated wholesale access services. These terms will apply in the absence of agreement between access providers and access seekers. The ACCC has made interim and final determinations for the following declared services: ULLS, LSS, LCS, WLR, PSTN OA and PSTN terminating access services. In addition, the ACCC made an interim access determination for the domestic transmission capacity service (DTCS). The ACCC has commenced public inquiries into making final access determinations for DTCS and the mobile terminating access service.

93. In 2010-11, the ACCC investigated allegations of vertical price squeeze behavior in relation to the supply of wholesale ADSL services by Telstra. In late 2010, the ACCC wrote to interested parties in relation to the potential for an inquiry into declaration of a wholesale ADSL service. The ACCC received responses from seventeen interested parties. In April 2011, after considering submissions and undertaking further market inquiries, the ACCC decided not to commence a declaration inquiry at the present time and published a letter sent to Telstra explaining this decision.

94. The ACCC initiated one other major investigation into alleged anti-competitive conduct in the telecommunications industry in 2010-11. This investigation is ongoing.

2.7.2 *Rail – third party access*

95. In May 2011 the Full Court of the Federal Court of Australia handed down a judgment on appeals from a decision of the Australian Competition Tribunal (ACT) regarding declaration of railway lines in the Pilbara region of Western Australia.

96. Fortescue Metals Group had sought declaration of four iron ore railway lines operated by BHP Billiton (Mt Newman and Goldsworthy lines) and Rio Tinto (Hamersley and Robe lines). Under Part IIIA of the CCA, a business may be required to supply a service which has natural monopoly characteristics where this will promote competition in another market. A person may apply to the NCC for a recommendation to the relevant Minister (in this case, the Commonwealth Treasurer) that a service be

declared. Parties may apply to the Tribunal for review of the Minister's decision. If the service is declared and the parties are unable to agree upon the terms and conditions of access, either party may notify the ACCC of the dispute. The ACCC then arbitrates the dispute.

97. The NCC, in response to applications received from Fortescue Metals Group in June 2004 (Mt Newman), November 2007 (Hamersley and Goldsworthy) and January 2008 (Robe), recommended that the services be declared. The relevant Minister was deemed not to have declared the Mt Newman service (May 2006); the relevant Minister decided to declare the Hamersley, Goldsworthy and Robe services (October 2008). Appeals were made on the Ministers' decisions to the Tribunal.

98. On 30 June 2010 the ACT reached a decision on the appeals, and:

- affirmed the Minister's decision to declare the Goldsworthy service for a period of 20 years to 19 November 2028;
- affirmed the Minister's decision to declare the Robe service but reduced the duration of the declaration by 10 years to 19 November 2018;
- affirmed the Minister's deemed decision not to declare the Mt Newman service; and
- set aside the Minister's decision to declare the Hamersley service.

99. On 13 August 2010, applications for judicial review by the Full Federal Court of Australia of the ACT's decisions were lodged by Fortescue Metals Group (in respect of Hamersley and Robe) and Rio Tinto (in respect of Robe). On 4 May 2011 the Full Court decided to dismiss Fortescue Metals Group's appeals and to allow Rio Tinto's appeal. As a result of the Full Court's decision, only BHP's Goldsworthy service remains declared.

100. The NCC and Fortescue Metals Group have each lodged applications to the High Court of Australia for special leave to appeal the decision of the Full Federal Court.

2.7.3 *Australian Rail Track Corporation*

101. On 29 June 2011, the ACCC accepted an access undertaking under Part IIIA of the CCA from the Australian Rail Track Corporation (ARTC). The undertaking relates to the rail network operated by ARTC in the Hunter Valley region of New South Wales. The network is predominantly used to transport coal from the region's mines to the Port of Newcastle for export, but also services general and bulk freight, passenger trains and coal shipments to domestic customers such as power stations.

102. The undertaking was accepted for a period of five years and sets out processes by which parties may access the network, as well as regulating ARTC's prices under a revenue cap. Additional features of the undertaking seek to ensure operational alignment between the rail network and other components of the Hunter Valley coal chain, and also to ensure efficient investment in the network into the future.

103. The ACCC previously accepted an access undertaking from ARTC on 30 July 2008 in relation to the Australian interstate rail network. The interstate rail network covers the mainline standard gauge track linking Kalgoorlie in Western Australia, Adelaide, Wolsley and Crystal Brook in South Australia, Melbourne and Wodonga in Victoria and Broken Hill, Cootamundra, Albury, Macarthur, Moss Vale, Unanderra, Newcastle (to the Queensland border) and Parkes in New South Wales.

104. In 2010-11 the ACCC also continued to monitor and administer relevant provisions of the ARTC interstate undertaking and will continue to monitor and perform functions pursuant to both the interstate and Hunter Valley undertakings into the future.

2.7.4 *Bulk wheat port terminal services*

105. On 22 June 2011, the ACCC accepted a wheat access undertaking under Part IIIA of the CCA from GrainCorp Operations Ltd, a bulk handling business. It is currently assessing undertakings from three other bulk handling businesses (Viterra Operations Ltd, Cooperative Bulk Handling and Australian Bulk Alliance). Collectively, these undertakings cover wheat export terminals at 18 ports. Existing undertakings (accepted by the ACCC in September 2009) are in place for Viterra and CBH—these undertakings expire on 30 September 2011.

106. The aim of these undertakings is to unlock constraints at grain ports and benefit the Australian economy by promoting the development of a wheat export marketing industry that is efficient and competitive and advances the needs of wheat growers. The undertakings provide robust prohibitions against port operators anti-competitively discriminating in favour of their own wheat trading businesses or hindering access to their port terminal services. They enable the ACCC to order independent audits of each port operator's compliance with the non-discrimination obligations.

107. These access undertakings were offered by the companies to comply with the *Wheat Export Marketing Act 2008* (Cth) which requires vertically integrated bulk handling companies to have access undertakings in place in order to be accredited as bulk wheat exporters. The wheat export marketing arrangements were reviewed by the PC, which released its report in October 2010, recommending that the existing accreditation of bulk wheat exporters be abolished but that the current access requirements and continuous disclosure obligations continue to 2014. The Government has not yet responded to the PC report.

2.8 *Adjudication*

108. The ACCC assesses the public benefit and detriment resulting from certain anticompetitive practices prohibited by the CCA through adjudication processes. The ACCC can authorise parties to engage in these practices where there is a net public benefit, providing immunity from legal proceedings under the CCA. A simpler process known as notification provides immunity for exclusive dealing and, from 1 January 2007, collective bargaining conduct.

109. In addition, the ACCC assists the ACT in its consideration of applications for review of adjudication decisions. There were no applications for review lodged with the ACT during the 2010-11 year.

110. The ACCC assessed two collective bargaining notifications in 2010-11. Of these, one was revoked and one was allowed to stand facilitating collective bargaining by certain citrus growers in Queensland.

111. The ACCC issued 27 final determinations on authorisation matters during 2010-11. These arrangements spanned a wide range of industries, including hoteliers, retailers in the telecommunications, market paint manufacturing, aviation, agricultural and veterinary chemicals and joint marketing for natural gas.

112. Approximately 714 exclusive dealing notifications were decided by the ACCC in 2010-11. The vast majority of these were allowed to stand.

113. The ACCC issued a notice revoking the legal protection afforded to Co-operative Bulk Handling Limited (CBH) for tied arrangements whereby Western Australian growers acquiring grain storage and handling services from CBH were also required to acquire grain transport services from CBH to move their grain to port for export. An application seeking review of the ACCC's decision to revoke the notification lodged by CBH was lodged in July 2011 and is currently before the ACT.

3. The Role of Competition Authorities in the Formulation and Implementation of Other Policies

114. The role of competition authorities in Australia has underpinned a broad based reform agenda that was developed to provide a consistent approach and address reforms across markets.

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

3.1 The Department of the Treasury

116. 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.

117. The Infrastructure, Competition and Consumer Division is located in the Treasury's Markets Group and focuses its policy role on three streams: competition policy; economic regulation of infrastructure; and consumer policy. The ACCC, AER, NCC, PC and ACT are Treasury portfolio agencies.

3.2 The Australian Competition and Consumer Commission

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

119. The ACCC also has responsibilities under the Water Act to advise the Minister on water charge and market rules and monitor compliance with, and enforce those rules.

3.3 The Australian Energy Regulator

120. The AER was formed in 2005 under Part IIIAA of the CCA and is a separate legal entity which operates as a constituent part of the ACCC. The AER comprises three statutorily appointed members, consisting of a Commonwealth member and two State/Territory members. The Commonwealth member must also be a member of the ACCC. One of the members is appointed as the Chair of the AER.

121. The ACCC and the AER have a single body of staff that support and advise both the ACCC and the AER in their respective electricity and gas regulation work.

122. The AER is the economic regulator of the wholesale electricity market and electricity transmission networks in the national electricity market. 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 will also regulate retail markets (other than retail pricing) in all states except Western Australia and the Northern Territory as part of the National Energy Consumer Framework. These retail functions will transition to the AER on 1 July 2012.

3.4 *The National Competition Council*

123. The NCC was formed in 1995 under Part IIA of the CCA. It may comprise up to five members; there are currently three councillors, including the President. The NCC considers applications in relation to major infrastructure services under Part IIIA of the CCA, and makes recommendations to the relevant decision-making Ministers.

124. The NCC has a similar role under the National Gas Law, where it makes recommendations on coverage, the form of regulation (light or full regulation), classifying pipelines (as transmission or distribution) and various exemptions for greenfields gas pipelines.

3.5 *The Productivity Commission*

125. The 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.

3.6 *The Australian Competition Tribunal*

126. The ACT was created in 1966 as the Trade Practices Tribunal. It was renamed the ACT in 1995. The ACT is an independent statutory tribunal whose primary role is to review decisions of the ACCC.

127. Decisions of the ACCC which may be referred to the ACT for reconsideration include decisions on whether or not to grant authorisations under the CCA, and arbitration decisions in cases involving access to essential facilities. The ACT may also consider applications at first instance for authorisation in relation to mergers and acquisitions under the CCA. The legislation requires that the ACT seek information and assistance from the ACCC in carrying out this role.

3.7 *COAG Reform Council*

128. The role of the CRC was expanded in March 2008 to enhance accountability and promote reform as part of the new Commonwealth-State financial framework. When requested by COAG, the CRC reports to the Prime Minister on the publication of nationally-comparable performance information for all jurisdictions against national specific purpose payments, independently assesses predetermined milestones and performance benchmarks under the National Partnership Agreement arrangements, and monitors the aggregate pace of activity in COAG's agreed reform agenda. To assist the CRC in its role, the PC is to report to COAG on the economic impacts and benefits of COAG's agreed reform agenda every two to three years.

3.8 *Other reforms*

3.8.1 *Consumer policy reforms*

129. In Australia, competition and consumer policy are closely linked in policy, legislative and enforcement contexts. This reflects the Australian Government's view that competition and consumer policy are mutually reinforcing, and share common aims in ensuring Australian markets are efficient and well-functioning.

130. In keeping with its regulatory reform agenda, since 2008 Australia's governments have developed a fundamental reform of Australia's consumer policy framework, which:

- provides a single legislative focus for general consumer policy through the ACL;
- develops an enhanced cooperative decision-making process for national consumer policy, administrative and enforcement issues;
- develops common resources and approaches to consumer policy development; and
- provides opportunities for cooperative and coordinated consumer policy and research between Commonwealth, State and Territory consumer protection agencies.

131. The ACL was implemented through two pieces of national legislation. The *Trade Practices Amendment (Australian Consumer Law) Act (No.1) 2010* created the ACL, implemented the unfair contract terms law and introduced new penalties, enforcement powers and consumer redress options. An Intergovernmental Agreement signed by the Council of Australian Governments underpins the establishment of the ACL. The *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010* implemented the consumer guarantees law, product safety law, unsolicited selling and lay-by rules and transferred remaining provisions on unfair practices in the CCA (then TPA) into the ACL. The ACL was then applied by each State and Territory through their own legislation.

132. The ACL, which replaced provisions in 20 national, State and Territory consumer laws, commenced as a law of the Commonwealth and of each State and Territory on 1 January 2011. The ACL applies nationally and in all States and Territories, and to all Australian businesses.

4. Resources of Competition Authorities

133. The total average number of staff employed by the ACCC at 30 June 2011 was 746.3 (up from 733.1 in 2009-10). It should be noted that in addition to competition matters, the ACCC has consumer protection and national infrastructure services regulatory functions. The ACCC consists of seven full-time members, four associate members; three of these are ex-officio, being economic regulators from other federal or state and territory bodies.

134. The ACCC's total funding for 2010-11 was \$141.9 million, comprising the original appropriation of \$141.3 million and other revenue of \$0.575 million. The ACCC's total appropriation in 2011-12 is \$149.1 million.

135. The NCC had an average staff of twelve over 2010-11. The NCC's total funding was \$2.8 million in 2010-11, comprising original appropriation of \$2.8 million. (Exchange rate at 30 June 2011 – A\$1= US\$1.0591)

Table 2: ACCC and NCC funding appropriations

	ACCC*		NCC*	
	2011-12	2010-11	2011-12	2010-11
A	149.1	141.9	2.8	2.8
US	157.9	150.3	3.0	3.0

* Foreign exchange rate used for conversion purposes: 1A\$ = US\$1.0591

5. Studies and reports

5.1 *Petroleum industry*

136. The ACCC published its third *Monitoring of the Australian petroleum industry* in December 2010. Some of the key findings of this report were that:

- Contrary to last year, over the course of 2009-10, retail unleaded petrol prices in Australia were relatively stable, on average ranging only 14 cents per litre (cpl) from a low of 116 cpl to 130 cpl;
- Australia had the fourth lowest retail unleaded petrol price in the OECD; and
- Similarly to last year, the most important influences on retail petrol prices were:
 - The international price of refined petroleum (Mogas 95)
 - The exchange rate of the Australian dollar against the US dollar

137. The well-established weekly retail price cycles which operate in the large capital cities and affect the day-to-day prices of petrol.

- The established weekly retail price cycles in the largest capital cities—though less stable than in the previous year—continue to indicate a degree of coordination between firms that is a concern for the ACCC.
- Profits for companies in the supply, wholesale and retail of petrol were in the order of 2-4 cpl
- Sales of ethanol blended fuel have increased primarily due to the reaction to the state government mandates in New South Wales for the supply of ethanol. There has been a related increase in sales of premium unleaded petrol.
- One refiner-marketer has sold its retail network and other refiner-marketers indicated they were considering similar strategies. Specialist retailers including supermarkets have increased their involvement in fuel retailing.
- There has been an increase in imports of petroleum products by companies other than the refiner-marketers.

5.2 *Telecommunications Sector*

138. The ACCC has a number of ongoing statutory reporting requirements that it must comply with in relation to the telecommunications sector. Below is a summation of the sector-specific reports published by the ACCC during the reporting period.

139. The ACCC continued to collect pricing information for a number of telecommunications services. Together with usage data provided by major carriers and carriage service providers, this information was used to determine and report on the changes in price for telecommunications services in 2009-10. The report was provided to the Minister in June 2011.

140. The ACCC published quarterly reports on imputation testing and non-price terms and conditions relating to the accounting separation of Telstra (June quarter 2010, September quarter 2010, December

quarter 2010, March quarter 2011). The ACCC also published bi-annual reports on current cost accounting reports (for the second half of 2009-10 and first half of 2010-11) relating to the same regime.

141. In February 2011 the ACCC published information about the availability of competitive fibre infrastructure across the country based on information collected from telecommunications carriers. The information is in the form of an aggregated list of exchange service areas with more than two fibre infrastructure owners present.

142. In April 2011, the ACCC released a consultation paper on the reporting requirements on the status of access to Telstra's exchange facilities. Telstra is currently required to report monthly on which exchanges are unavailable for access seekers to install equipment and the length of time that access seekers have been waiting for access to exchanges. The consultation paper proposed to keep the current arrangements, with minor variations.

143. In October 2010, the ACCC released a methodology for calculation of particular retail price movements under the Telstra retail price control arrangements. This methodology applies to the operation of Telstra's retail price control arrangements until 30 June 2012. The methodology formed the basis of the ACCC's report assessing Telstra's compliance with the price control arrangements in 2009-10, which was published in March 2011.

144. The ACCC also closely monitors industry developments and the conduct of its participants to ensure that regulation is operating effectively. One such example during the reporting period was the ACCC's continued monitoring of Telstra's compliance with the operational separation plan. The operational separation plan seeks greater equivalence and transparency in Telstra's supply of certain wholesale services, and ongoing assurance that Telstra is not favouring its own retail business units by implicitly supplying services to itself at unjustifiably lower prices or higher quality than those offered to downstream competitors.

145. The ACCC has the power to make a record keeping rule (RKR) by written instrument and require that carriers and carriage service providers comply with it. Through the use of RKRs the ACCC continued to monitor the effect of Telstra's bundling of residential services using on competition in telecommunications markets.

5.3 Water sector

146. The ACCC provided the first annual water monitoring report to the minister. The report provides data for the 2009-10 year and covers regulated water charges, transformation arrangements and compliance with the water market rules and water charge rules in the Murray Darling Basin. The ACCC has collected data through its monitoring and investigation activities which indicates that compliance has generally been good. The ACCC found that there is a need for continued market reform to reduce barriers to trade and improve water market outcomes.

147. The ACCC has also published substantial guidance material to support wider market reforms, including the Water Charge (Infrastructure) Rules and Water Charge (Planning and Management Information) Rules which come into full effect in 2010-11. Initial monitoring of water charges has revealed variation in the structure and level of water charges in the Murray-Darling Basin, which will be monitored in future ACCC reports.

5.4 Airports

148. The ACCC released its *Airport Monitoring Report 2009-10: Price, financial performance and quality of service monitoring* in February 2011. The ACCC continued to express concerns about

investment at Sydney Airport, which the airlines identified as the least responsive of the monitored airports with respect to service delivery and quality over a sustained period. The report also found that Melbourne Airport appears to have reduced the ability of off-airport parking and private bus operators to compete with on-airport parking by imposing excessive levies, and controlling the availability and allocation of capacity.

5.5 *Australia Post*

149. In addition to its role in assessing increases in the prices of letter services over which Australia Post has a legislated monopoly under Part VIIA of the CCA, the ACCC also produces annual cross subsidy reports. These reports analyse Australia Post's regulatory accounts for the preceding year, to determine whether it has used revenue from its reserved services to cross-subsidise its non-reserved services. (Reserved services are services for which Australia Post has a statutory monopoly; non-reserved services are services it provides in competition with other businesses.)

150. In 2009-10 the ACCC released the 2008-09 and 2009-10 cross subsidy reports. In both reports the ACCC did not find evidence that Australia Post was cross-subsidising its competitive services with revenue from its monopoly services. Australia Post's logistics services were shown in both cases to continue to be subsidised. However, the source of that subsidy appears to be Australia Post's other competitive services, rather than its monopoly services.

5.6 *Container Stevedoring*

151. The ACCC issued its container stevedoring monitoring report for the 2009–10 year in November 2010. The report shows that industry operating performance improved largely as a result of increased demand for stevedoring services associated with improved economic conditions, following the impact of the global financial crisis (GFC) during 2008–09. Total industry revenues in 2009–10 increased due to higher volumes. Total average costs also increased and profits increased slightly. The report also shows that some measures of capital productivity have not increased since June 2001. Investment in port infrastructure and further improvements in stevedoring productivity will be required to meet demand for stevedoring services, which is forecast to grow strongly over the next decade and beyond.

5.7 *Energy*

152. In addition to its regulatory, monitoring, reporting and enforcement activities, the AER published *State of the energy market 2010*, a flagship report which provides a detailed analysis of energy market outcomes over the calendar year. The AER published quarterly compliance reports summarising the compliance and enforcement activities in the gas and electricity sectors, as well as weekly electricity and gas market analysis reports, in addition to seven reports into circumstances where the spot price of electricity exceeds \$5000/MWh in 2010-11. The AER also released its transmission network service providers electricity performance report for 2008-09 and an annual report for 2009 on the financial and service quality performance of Victoria's distribution network service providers.

153. In response to ongoing problems with the quality of offer, bid and rebid information submitted by participants, the AER issued Compliance Bulletin No 3 Monitoring and enforcing compliance of electricity offer, bid and rebid information in the National Electricity Market in December 2010. The bulletin outlines the AER's three stage process for enforcing compliance with the relevant provisions of the National Electricity Rules.

5.8 Productivity Commission Inquiries, Reports and Publications

5.8.1 Australian Government-Commissioned Projects

154. In the past year, the PC completed a number of public inquiries and commissioned research studies. These can be accessed at www.pc.gov.au. Completed inquiries included:

- Rural Research and Development Corporations;
- Wheat Export Marketing Arrangements; and
- Caring for Older Australians

155. The PC also completed commissioned research studies during the year. These involved examinations of:

- Carbon Emission Policies in Key Economies;
- Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments;
- Vocational Education and Training Workforce;
- Report on Government Services 2011 - Indigenous Compendium - Steering Committee for the Review of Government Service Provision Report;
- Report on Government Services 2011 - Steering Committee for the Review of Government Service Provision Report;
- Impacts and Benefits of COAG Reforms: Reporting Framework;
- Bilateral and Regional Trade Agreements;
- Population and Migration: Understanding the Numbers; and
- Annual Review of Regulatory Burdens on Business: Business and Consumer Services;

5.8.2 Other Research

156. The PC also produces a number of Staff Working Papers. Projects completed in 2010-11 include:

- Labour Force Participation of Women Over 45;
- Childhood Obesity: An Economic Perspective;
- Links Between Literacy and Numeracy Skills and Labour Market Outcomes;
- Investments in Intangible Assets and Australia's Productivity Growth: Sectoral Estimates;

5.8.3 Current Work Program

157. The PC is currently undertaking inquiries into:

- Economic Regulation of Airport Services;
- Australia's Export Credit Arrangements; and
- Economic Structure and Performance of the Australian Retail Industry

158. The PC is also undertaking commissioned research studies into:

- Impacts and Benefits of COAG Reforms;
- Education and Training Workforce: Early Childhood Development;
- Identifying and Evaluating Regulation Reforms;
- Business Regulation Benchmarking: Role of Local Government; and
- Education and Training Workforce: Schools.

6. Glossary

ACCC Australian Competition and Consumer Commission

ACT Australian Competition Tribunal

AEMC Australian Energy Market Commission

AER Australian Energy Regulator

CCA Competition and Consumer Act 2010

COAG Council of Australian Governments

CPA Competition Principles Agreement

NCC National Competition Council

NCP National Competition Policy

NECA National Electricity Code Administrator

NEM National Electricity Market

NWC National Water Commission

NWI National Water Initiative

PC Productivity Commission