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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRALIA

-- 2011 --

This report is submitted by Australia to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 24-25 October 2012.

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Executive Summary

1. This report addresses events that have occurred in the past financial reporting year (1 July 2011 to 30 June 2012). However, where appropriate, significant developments since 30 June 2012 have also been included.
2. Over the course of the previous year, Australia's competition law and policy has undergone several important revisions. The Federal Parliament passed two key amendments to the *Competition and Consumer Act 2010* (CCA). The *Competition and Consumer Amendment Act (No. 1) 2011* amended the CCA to outlaw certain types of anti-competitive information disclosures between competitors (see part 1.6) and the *Competition and Consumer Legislation Amendment Act 2011* clarified the previous provisions of the CCA in relation to creeping acquisitions (see part 1.7). These Acts both received Royal Assent on 6 December 2011.
3. The Council of Australian Governments (COAG) has continued to progress its agenda of reform, focussing on the standardisation of regulation across states on a range of issues relating to the broader productivity agenda. The Australian Government continued to progress reforms in the areas of telecommunication infrastructure and energy.
4. The CCA continued to be rigorously enforced by Australia's enforcement authority, the Australian Competition and Consumer Commission (ACCC). Over the course of 2011–12, the ACCC successfully concluded a number court actions against companies engaged in anticompetitive practices and continues to be heavily engaged in a number of pricing and access issues. Six first-instance competition proceedings were concluded, three of which related to the Air Cargo freight cartel bringing fines in that cartel to date of over \$58 million. The ACCC considered 340 matters for compliance with the mergers and acquisitions provisions of the CCA.
5. The ACCC continued to revise and develop its role regulating key markets including the telecommunications, water and energy.
6. Extensive work was done to lay the foundations for the transition to, and implementation of, the National Broadband Network (NBN). The ACCC accepted undertakings from Telstra that require structural reform of markets for fixed line communications. The undertakings promote competition and safeguard consumers in the transition to the new industry structure.
7. The ACCC sought to facilitate competition in the market for the export of bulk wheat. In 2011-12 it accepted access undertakings from four operators of port terminal facilities who also export bulk wheat to ensure that third party exporters are able to access the terminals.
8. The ACCC achieved cost effective and practical outcomes in its investigations of breaches of the water market rules and water charge rules. A decline in the significance and number of identified breaches demonstrated continuing improvement in operator and irrigator understanding of, and compliance with, the rules.
9. In 2011-12 the Australian Energy Regulator (AER) made determinations for the Amadeus Gas pipeline (gas transmission), Envestra (gas distribution), Powerlink (electricity transmission) and Aurora (electricity distribution).

1. Changes to competition laws and policies

1.1 COAG reform agenda

10. COAG is the peak intergovernmental forum in Australia, comprising the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association. In November 2008, COAG agreed to the *National Partnership Agreement to Deliver a Seamless National Economy* (the SNE NP). The SNE NP 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.

11. The SNE NP'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.

12. Australia's Productivity Commission (PC) recently examined 17 of the deregulation priorities and estimated that, with full implementation, these reforms could lower business and other costs by around A\$4 billion per year and, through improvements to productivity, increase GDP by over A\$6 billion in the longer term.

13. 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 progress against the key milestones for each financial year during the life of the SNE NP.

14. Under the SNE NP, 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 SNE NP.

15. In 2012, the Commonwealth Government paid States and Territories the full allocation of A\$200 million in 2011-12 reward funding, based on the CRC's assessment in its 2010-11 Report on Performance that 15 of the 27 deregulation priority reforms have been implemented. The payment of the 2012-13 reward funding will depend on the delivery by each jurisdiction of the remaining reforms. There are no reward payments tied to the achievement of the competition reforms or the further improvements to processes for regulation-making and review.

16. To date, 17 of the 27 deregulation priority reforms are operational, including reforms in the areas of environmental assessment, standard business reporting, health workforce, rail safety, consumer credit, consumer law and product safety. Jurisdictions continue to work together to progress the remaining reforms. Three competition reforms are also complete, with work on going to complete reforms in the areas of energy, transport, road reform, infrastructure and access regimes.

17. With the SNE NP coming to an end in December 2012, COAG announced in April this year its priority areas for a new productivity-enhancing competition and regulatory reform agenda. The reform priorities were identified in consultation with business through the Prime Minister's Business Advisory Forum (BAF). They include addressing duplicative and cumbersome environment legislation; streamlining the process for approvals of major projects; rationalising carbon reduction and energy efficiency schemes; delivering energy market reforms to reduce costs; improving assessment processes for low risk, low impact developments; and best practice approaches to regulation. COAG has established an inter-jurisdictional COAG Taskforce of officials to take this work on competition and regulatory reform forward.

1.2 *Energy market reform*

18. Energy market reform continues to be a priority for the Australian Government. To that end the Standing Council on Energy and Resources (SCER) and its associated regulatory authorities initiated a number of major reviews of the National Electricity Market (NEM) in 2011-12:

- In March 2011, the Australian Energy Markets Commission (AEMC) commenced a review of market and regulatory arrangements to identify options that would better enable supply and demand to build an economically efficient electricity market. A draft of the AEMC's *Power of Choice* review was released for consultation in September and October 2011 and a final report will be presented to SCER in November 2012.
- In January 2011, the PC commenced a review of electricity network regulation. The PC will examine the use of benchmarking under the regulatory framework, incorporating and providing advice on how different benchmarking methodologies could be used to enhance efficient outcomes. The PC will also examine whether the regulatory regime is delivering economically efficient interconnector investment in the NEM. The PC is due to release a draft report in October 2012, and a final report in April 2013.
- In December 2011, SCER engaged an independent panel of experts to review the operation of the limited merits review regime that applies to network regulatory decisions of the AER. The Panel is due to provide its final report to SCER before the end of 2012.

19. In addition, the AEMC is considering several changes to the National Electricity Rules (NER) requested by the AER, energy users and market participants during 2011-12. During September 2011, the AEMC released a draft rule change proposal in relation to network regulation. These rule changes would introduce benchmarking into AER network revenue determinations, as well as require greater consumer engagement by networks and the AER when proposing and assessing revenue determinations, respectively. The AEMC's final decisions on these rule changes will be released by the end of 2012.

20. At its 25 July 2012 meeting, COAG expressed concern over the recent electricity price increases arising from increases in transmission and distribution charges, and requested energy ministers to focus current reviews of market regulation on achieving efficient future investment which does not result in undue price pressures on consumers and business. COAG has asked the COAG Taskforce to undertake further work and advise COAG in late 2012 on any additional action required to deliver a regulatory

framework that promotes a competitive retail electricity market, including appropriate support for vulnerable customers, and efficient investment. In August 2012, Prime Minister Gillard called for national and sub-national governments to prioritise energy market reform to put downward pressure on future electricity price increases by the end of 2012. COAG will discuss pressures on electricity prices, reforms already underway and possible additional policy responses at its meeting in December 2012.

21. In relation to gas markets, following the commencement of gas Short Term Trading Markets (STTM) in Sydney, Adelaide and Brisbane during 2010 and 2011, SCER is investigating the establishment of a brokerage hub at the intersections of the Queensland Gas Pipeline, the Roma to Brisbane Pipeline and the South-West Queensland Pipeline in Queensland.

22. SCER has developed a new National Energy Customer Framework (NECF), 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. The NECF commenced for electricity customers in Tasmania and the Australian Capital Territory on 1 July 2012. On 31 May 2012, the New South Wales Government announced that it would defer the commencement of the NECF until 2014. On 13 June 2012, the Victorian Government announced that the NECF would not commence in Victoria on 1 July 2012, and has not yet announced a commencement date. Under the Framework the 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. On 8 June 2012, Energy Ministers (except Queensland) committed (through the SCER Communiqué) to maintaining the NECF package as originally agreed and introducing it as soon as practical.

1.3 Telecommunications

23. On 7 April 2009, the Government announced the establishment of a new company – NBN Co – to build the NBN, 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 NBN, and streamlines the telecommunications access regime in Part XIC of the CCA.

24. 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 (SSU) to the ACCC. On 29 February 2012, the ACCC accepted Telstra's SSU and approved its draft Migration Plan. On 6 March 2012, Telstra's SSU and Migration Plan came into force.

25. Together, the SSU and Migration Plan implement a form of structural reform to the telecommunications sector that responds to the longstanding competition concerns that have arisen from Telstra's vertical integration. Due to the adoption of a migration model of structural separation – whereby Telstra will cease to use its own fixed line access networks and will instead use the wholesale-only NBN to

supply downstream services – the structural reform will be progressively implemented as the NBN fibre access network is built.

26. Given this progressive implementation, the SSU specifies a range of measures that will apply to Telstra's supply of fixed line access services to its wholesale customers during the interim period. These measures are intended to promote equivalence and transparency in Telstra's supply of those services to wholesale customers and its retail businesses.

27. In March 2010, the Australian Government announced its approach to the reissue of current 15-year radiofrequency spectrum licences. The first of these licences will expire in 2013, with the remainder expiring by 2017. The Government indicated that reissue would be offered to those telecommunications providers that are already using their spectrum licences to provide services to significant numbers of Australian consumers, or who have in place networks capable of providing services to significant numbers of consumers, provided they also meet the public interest criteria.

28. On 10 February 2012, the Minister for Broadband, Communications and the Digital Economy announced a determination under subsection 82(3) of the *Radiocommunications Act 1992* and a direction to the Australian Communications and Media Authority (ACMA) – under subsection 294(2) of that Act – which allows for the possible reissue of licences by ACMA to the same licensee where that is in the public interest.

29. The determination includes mobile voice and data services provided in the 800MHz, 1800MHz and 2GHz spectrum bands, wireless broadband services provided in the 2.3 GHz and 3.4 GHz spectrum bands, and satellite services in the 27 GHz spectrum band.

30. The ACMA is currently examining licences in the relevant spectrum bands to ascertain whether they have been used in the delivery of services specified in the Determination and are therefore eligible for reissue.

31. 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, of which 90 MHz 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 90 MHz of digital dividend spectrum in the second half of 2012.

32. On 14 December 2010, the Minister for Broadband, Communications and the Digital Economy announced a comprehensive independent review of Australia's communications and media regulation. The 'Convergence Review', which was conducted by a three-member expert Committee, considered the appropriate policy framework for communications and media services in an era of converging content, platforms and devices. On 30 April 2012, the Government released the *Convergence Review Final Report*. The Government is currently considering the recommendations of the report and will respond in due course.

33. 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.

34. On 22 March 2012, the Australian Government introduced into Parliament the Broadcasting Services Amendment (Anti-siphoning) Bill 2012 (the Bill). The Bill gives effect to the reforms to the anti-siphoning scheme and list announced by the Minister on 25 November 2010. The Bill is currently before Parliament.

1.4 National Access Regime

35. A number of reforms intended to streamline the operation National Access Regime and remove delays affecting decision-making and arbitration processes have been implemented. The amendments introduce binding time limits for regulatory decision-making, and limit the scope of merits review under the National Access Regime. The reforms also improve the clarity and timeliness of regulatory processes and promote greater consistency between state access regimes and the National Access Regime. The reforms came in effect on 14 July 2010.

36. COAG has agreed that the 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 amendments from 2010 to settle, and will allow for informed consideration of the Australian High Court's decisions of 14 September 2012 on litigation concerning access to certain railway tracks in the Pilbara region (see below 2.7.2).

1.5 Water reform

37. 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).

38. 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.

39. 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*, and *Water Market Rules 2009* to promote the efficient functioning of water markets by removing distortions and freeing up trade in water.

40. The *Water Charge (Planning and Management Information) Rules 2010*, 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.

41. 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. The ACCC has provided ongoing assistance to the MDBA in drafting the water trading rules.

42. The *Water Charge (Infrastructure) Rules 2010* 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.

1.6 *Anti-competitive price signalling and information disclosures*

43. In 2009, 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 the *Trade Practices Act 1974*) 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.

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

45. The *Competition and Consumer Amendment Act (No. 1) 2011* introduced prohibitions on anti-competitive price signalling and information disclosures between competitors, which apply to the banking sector only - taking effect on 6 June 2012. Broadly, the new laws prohibit:

- the private disclosure of pricing information between competitors which is not made in the ordinary course of business (section 44ZZW); and
- the disclosure of pricing or other specified information if the disclosure is made for the purpose of substantially lessening competition (section 44ZZX).

46. The new prohibitions apply only to those classes of goods and services prescribed by regulation. The prohibitions were applied to the banking sector by the *Competition and Consumer Amendment Regulation 2012 (No. 1)*. There are no plans to extend the regulations to other sectors at this time.

47. The amending Act provides for appropriate exceptions and immunity arrangements for the new prohibitions, similar to those in place for existing anti-competitive conduct prohibitions in the CCA.

48. 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 (section 76 of the CCA).

1.7 *Creeping acquisitions*

49. 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.

50. 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.

51. 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. The amendments:

- clarified that a court or the ACCC can consider the impact of a proposed merger on competition in ‘any’ market (rather than ‘a’ market), ensuring consideration can be given to the competitive impacts of a merger on multiple markets in the one investigation; and
- clarified that the ACCC or a court can examine local markets where creeping acquisitions concerns may arise in the future, by removing the requirement that a market in which the competition effects of a merger or acquisition are assessed must be a ‘substantial’ market.

52. The Competition and Consumer Legislation Amendment Bill 2011 took effect on 6 February 2012.

1.8 New guidelines

53. The ACCC and AER continued their commitment to the provision of comprehensive and up-to-date information to support compliance releasing 69 guidance materials in both print and electronic form, and another 14 web-only publications. In the past financial year, the ACCC distributed 984,215 print items compared to 396,300 in 2010–11 and recorded 868,935 visits to its online publications as compared to 820,448 in 2010–11.

54. In 2011-12 the AER completed a range of guidelines on its new functions under the National Energy Retail Law. The AER published guidelines on: retail pricing information and the price comparator website, the retailer of last resort scheme, performance reporting procedures, retailer authorisation and exempt selling and connection charges. The AER also released a guideline on electricity network service provider exemptions. The AER undertook extensive consultation with a range of energy market stakeholders when developing these guidelines.

55. In most cases, publications are available from the ACCC and AER websites at www.accc.gov.au or www.aer.gov.au.

2. Enforcement of Competition Laws

56. The purpose of the CCA is to enhance the welfare of Australians by:

- promoting competition among business
- promoting fair trading by business
- providing for the protection of consumers in their dealings with business.

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

58. The CCA provides the ACCC with a range of enforcement remedies, including court based outcomes and court enforceable undertakings. The ACCC also resolves many matters administratively. In enforcing the provisions of the CCA, the ACCC's primary aims are to:

- stop the unlawful conduct;
- deter future offending conduct;
- undo the harm caused by the contravening conduct;
- encourage the effective use of compliance systems; and
- where warranted, punish the wrongdoer by the imposition of penalties or fines.

59. The ACCC cannot pursue all the complaints it receives and the ACCC is unlikely to become involved in resolving individual disputes. While all complaints are carefully considered, the ACCC's role is to focus on widespread consumer detriment and the ACCC exercises its discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for consumers.

60. The ACCC also identifies a number of areas where it will prioritise its work. In competition regulation this year, these included conduct that may impede emerging competition involving online traders and competition issues in highly concentrated sectors, in particular in the supermarket and fuel sectors.

61. 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 *Anti-competitive Conduct Matters*

62. In the course of 2011–12, the ACCC commenced litigation in three non-merger competition matters covering a range of conduct the ACCC considers raises concerns under the competition provisions of the CCA. Six first-instance competition proceedings were concluded, three of which related to cartel conduct.

2.1.1 *Eternal Beauty Products Pty Ltd*

63. In January 2012, the ACCC commenced proceedings against Eternal Beauty Products Pty Ltd and its only Australian director for alleged resale price maintenance. The ACCC alleged that Eternal Beauty, a wholesaler and retailer of skin care products, induced or attempted to induce two retailers not to sell products online at prices less than those specified by Eternal Beauty. The proceedings concluded in May 2012. The Federal Court imposed penalties totalling \$90 000 against Eternal Beauty Products and its Australian director.

2.1.2 *Link Solutions Pty Ltd & Ors*

64. In September 2008, the ACCC commenced proceedings against multiple respondents related to telecommunications and related companies, finance companies and their directors alleging third line forcing and misleading or deceptive conduct. Proceedings were concluded in April 2012. The Federal Court ordered declarations and injunctions against the remaining respondents in the proceedings.

2.1.3 *Ticketek Pty Ltd*

65. In December 2011, the ACCC finalised proceedings brought against Ticketek Pty Ltd for misusing its market power. Ticketek was held to have misused its market power by refusing, on four occasions in 2009 and 2010, to set up ticket deals because they were being promoted by a new rival. Ticketek admitted that it had contravened section 46 of the then *Trade Practices Act 1974* and consented to the penalties imposed by the court. The Federal Court imposed a \$2.5 million penalty against Ticketek.

2.1.4 *Air Cargo Cartel*

66. The detection and prosecution of cartel activity (now subject to criminal sanctions) remains a priority for the ACCC. At the year's end, the ACCC had eight cartel and anti-competitive price agreement proceedings still before the courts—six of them relating to the alleged Air Cargo cartel. The following cartel matters were finalised in 2011–12:

67. Air cargo—Korean Air Lines Co Ltd and Malaysian Airlines Cargo (Mascargo) were ordered to pay a \$5.5 million penalty and a \$6 million penalty respectively for price fixing in relation to fuel and security surcharges and customs fees on international freight carriage. On 11 October 2012, Emirates admitted to its role in price fixing and was ordered to pay \$10 million in penalties. This penalty was made up \$7million for giving effect to illegal understandings relating to a fuel surcharge, a security surcharge and a customs fee on air freight carried from Indonesia to Australia and other countries between October 2001 and May 2006 and \$3 million for attempting to arrive at an understanding with DAS Air Cargo relating to rates charged for the supply of air freight services from Australia. This brings the total penalties imposed on cartel participants to more than \$68 million since the ACCC's investigation into alleged cartel activity in the air cargo services began in 2006.

2.1.5 *TF Woollam & Son Pty Ltd*

68. TF Woollam & Son Pty Ltd—three Queensland-based construction companies were ordered to pay penalties totalling \$1.3 million for engaging in a form of illegal price controlling known in the construction industry as cover pricing. Cover pricing involves one company asking one of its competitors (who intends to make a genuine bid) to provide them with a 'cover price'. Both companies understand that this 'cover price' will be higher than the tender price for the genuine bid. The company who received the 'cover price' (should it choose to tender) will submit a tender price that is at or above the 'cover price'. As the 'cover price' is higher than the tender price for the genuine bid, it is unlikely that the company who submits the 'cover price' will win the contract. Cover pricing is a form of misleading conduct with the effect of manipulating the tender process and defeating the purpose of a competitive tender—to deliver the best value for money.

2.2 *Mergers and Acquisitions*

69. In its reporting, the ACCC distinguishes between matters that do not require review because competition concerns are pre-assessed as being unlikely to arise, 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 are identified as a result of the ACCC's intelligence activities.

70. In 2011-12 the ACCC considered 340 matters for compliance with section 50 of the CCA. Of these matters, 90 underwent a public or confidential review. Of the 90 matters reviewed, one matter was publicly opposed; confidential opposition or concerns were expressed in six; and three were allowed to proceed after the acceptance of undertakings to address competition concerns. 17 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 90 matters reviewed, 16 reviews were conducted confidentially and 74 were public reviews. The ACCC unconditionally cleared 67 per cent of all mergers reviewed during the period.

Table 1. Merger matters assessed and reviewed in 2011-12

Financial Year 1 July 2011 – 30 June 2012	
Total matters assessed and reviews undertaken	340
Matters pre-assessed - no review required	250
Reviews undertaken	90
<i>Total reviews can be broken down into the following categories:</i>	
Not Opposed	60
Finished - no decision (incl. withdrawn)	17
Publicly Opposed outright	1
Confidential review - Opposed or ACCC concerns expressed	6
Resolved through undertakings	3
Variation to undertaking accepted	3
Variation to undertaking rejected	0

71. 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.

72. Two of the merger reviews merit further discussion:

2.2.1 FOXTEL - Proposed Acquisition of Austar United Communications Limited

73. On 10 April 2012, the ACCC decided not to oppose the proposed acquisition of subscription television operator Austar United Communications by subscription television operator FOXTEL. The ACCC had been concerned about the likely effect of the acquisition on the supply for subscription television, fixed broadband and fixed voice services. The decision not to oppose was made after the ACCC accepted court-enforceable undertakings from FOXTEL. The undertakings will prevent FOXTEL from acquiring exclusive internet protocol television (IPTV) rights for a range of attractive television programme and movie content.

2.2.2 AGL Energy - Acquisition of Loy Yang A Power Station

74. On 24 May 2012, the ACCC decided not to oppose the proposed acquisition by AGL Energy (AGL) of the remaining 67.46 per cent interest in Greater Energy Alliance Corporation (GEAC) that it did not already own. GEAC owns the Loy Yang A power station, which is the largest power station in the State of Victoria. In 2003, the purchase of an interest of up to 35 per cent of Loy Yang A by AGL had been the subject of Federal Court proceedings, which had cleared the transaction subject to undertakings from AGL that it would not be involved in the contracting, dispatch or bidding of electricity produced from Loy Yang A.

75. In its 2012 review, the ACCC concluded that, despite aggregation of Loy Yang A and AGL's generation assets, competition provided by other key generators following the acquisition and the potential for investment in new generation would be likely to preserve competitive tension in relation to the supply of electricity by generators. In addition, the ACCC noted that from 2016 a significant proportion of LYP's generation capacity was effectively committed to Alcoa under long-term contract. The ACCC also found

that the independence of Loy Yang A had facilitated entry and expansion by electricity retailers since 2003. However the ACCC concluded that Loy Yang A ceasing to act as an independent generator would not be likely to have the effect of substantially lessening competition in relevant markets. This was primarily due to improvements in the level of competition in the Victorian retail market since 2003, including the presence and potential further entry of sufficiently strong rivals to AGL in those markets.

2.2.3 Metcash Trading Limited – proposed acquisition of Interfrank Group Holdings Pty Ltd (Franklins)

76. The ACCC appealed to the Full Federal Court from a decision of the Federal Court following the ACCC's decision to oppose the acquisition of the Franklins supermarket business by Metcash trading, Australia's largest grocery wholesaling and distribution company. On 30 November 2011, the Full Federal Court upheld the first instance decision that the acquisition would not substantially lessen competition in contravention of section 50 of the CCA.

2.3 Pricing Matters

2.3.1 Airports

77. Under Part VIIA of the CCA, Parts 7 and 8 of the *Airports Act 1996*, and related Airports Regulations 1997, the ACCC monitors and reports annually on a range of indicators—including quality of service, prices, costs, profits and investment levels—relating to aeronautical and car-parking services at Australia's five major airports. While the indicators do not provide conclusive evidence as to whether the airports have earned monopoly rents, trends in those indicators over time can identify those airports whose performance might require greater scrutiny. Further information about the 2010-11 monitoring report is available in Part V of this report under Airports.

78. Due to some concerns raised in the ACCC's 2008-09 monitoring report, the Minister for Infrastructure and Transport announced that the Government would bring forward a PC inquiry into the economic regulation of airport services, which had been scheduled to take place in 2012. The PC commenced its inquiry in December 2010 and gave its final inquiry report to the Government in December 2011. In March 2012, the Government tabled the PC's final inquiry report in parliament, publicly released the report, and issued its response to the recommendations made in the report. The Government agreed with the PC's recommendation for the ACCC to continue monitoring at Brisbane, Melbourne, Perth and Sydney airports (thereby removing Adelaide Airport from the monitoring regime). The Government also agreed in principle with a number of recommendations to improve the operation of the monitoring regime, although the Government noted that it is the responsibility of the ACCC to give effect to a number of the recommendations as it sees fit.

79. The ACCC is now in the process of considering the recommendations, which includes undertaking a review of quality of service monitoring by the end of June 2013.

2.3.2 Airservices Australia

80. The ACCC has an ongoing role in assessing proposed price increases (price notifications) for terminal navigation (TN), en route navigation (en route) and aviation rescue and fire-fighting (ARFF) services provided by Airservices Australia (Airservices) under Part VIIA of the CCA.

81. In 2011, the ACCC undertook a detailed assessment of Airservices' proposal for a long-term pricing agreement (LTPA) that outlined a path of prices for TN, en route and ARFF services for a five-year period (from 2011 to 2016). The ACCC raised three concerns with Airservices' proposal: prudence of capital expenditure, drivers of efficiency and rate of return on capital.

82. Airservices addressed the ACCC's concerns in its final proposal, which incorporated commitments by Airservices to improve its consultation processes and develop key performance indicators (KPIs). The ACCC therefore decided not to object to Airservices' final proposal. The new prices for the first year came into effect on 1 October 2011.

83. Under the LTPA, Airservices is required to approach the ACCC each year prior to increasing its prices. In 2012, Airservices submitted that it had made reasonable progress on improving its consultation processes and developing KPIs. The ACCC agreed and decided not to object to Airservices implementing prices for the second year of its LTPA. These prices came into effect on 1 July 2012.

2.3.3 *Australia Post*

84. The ACCC has had an ongoing role in assessing increases in the prices of some of the letter services over which Australia Post has a legislated monopoly under Part VIIA of the CCA. In 2011, the Australian Government undertook a Regulatory Impact Analysis, as a result of which it has decided to limit the ACCC's price surveillance of Australia Post's monopoly letter services. While the basic postage rate and other ordinary letter services remain subject to ACCC price surveillance, price increases for Australia Post's other monopoly letter services are no longer required to be assessed by the ACCC.

85. The ACCC also produces annual cross subsidy reports, to determine whether Australia Post has used revenue from its reserved services to cross-subsidise its non-reserved services. Further information about the 2010-11 report is available in Part V under Australia Post.

2.3.4 *Petrol*

86. The ACCC monitors the retail prices of petrol, diesel and automotive liquefied petroleum gas (LPG) in the capital cities and around 180 regional locations, as well as international crude oil and refined petrol prices. It also closely follows developments in the petroleum industry.

87. The ACCC provides information on its website about petrol price cycles in the five largest cities (Sydney, Melbourne, Brisbane, Adelaide and Perth), to increase consumers' understanding of petrol price cycles in those cities. In particular, the ACCC provides consumers with information on the cheapest and most expensive days of the week to buy petrol. The ACCC also provides a comparison of Australian retail petrol price movements with movements in the relevant international benchmark (Singapore Mogas 95), and wholesale prices, over the previous three months. The website includes information on what determines petrol prices, petrol prices in regional areas 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.

88. In December 2007, the Australian Government instructed the ACCC to undertake formal monitoring of prices, costs and profits relating to the supply of unleaded petroleum prices in the petroleum industry, and report to the Government every year for a period of three years. It has subsequently extended this direction to 2013. The ACCC has produced reports in 2008, 2009, 2010 and 2011.

89. The Government also asked the ACCC to have a renewed focus on diesel and automotive LPG prices in February 2008. The ACCC has been informally monitoring diesel and LPG prices since this time and has reported on them in its monitoring reports.

90. In addition, during 2012, the ACCC announced two investigations in the Australian retail petrol industry:

- The ACCC commenced an investigation into price information sharing arrangements in the retail fuel industry because it is concerned that such arrangements may breach the CCA. The ACCC is concerned that these petrol price sharing arrangements may lessen price competition in petrol retailing to the detriment of consumers. The competition provisions of the CCA prohibit contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition.
- The ACCC commenced an assessment into whether substantial foreclosure of competition is likely to arise from the size of the shopper docket discounts (shopper docket discounts reward supermarket shoppers with a per-litre price reduction at the supermarket-owned service station if they spend more than a specified amount in the supermarkets) on the price of fuel offered by the major supermarket chains and the frequency and duration of these offers. The ACCC is working with industry participants to gather information to assist with assessing the effects of supermarket shopper docket fuel discounts and whether competition issues arise.

91. These investigations are ongoing. Further information about the ACCC's petroleum industry monitoring report for 2010-11 is available in Part V of this report under Petroleum Industry.

2.3.5 Container Stevedoring Monitoring

92. Under Part VIIA of the CCA, the ACCC monitors prices, costs and profits of container stevedoring operators located in the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney. The ACCC releases the monitoring reports annually. Further information about the ACCC's monitoring report for 2010-11 is available in Part V of this report under Container Stevedoring.

2.4 Copyright Remuneration

93. 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. The ACCC did not join any matters in the Copyright Tribunal in 2011-12.

2.5 Monitoring/Enforcement of Water Charge and Water Market Rules

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

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

95. During 2011-12, the ACCC observed generally improved levels of compliance with these rules. However, the ACCC continues to receive inquiries and complaints from irrigators and identify concerns with the compliance efforts of water infrastructure operators under these rules. While not commencing any litigation against water operators, in the course of 2011-12, the ACCC agreed to the administrative resolution of a number of investigations into breaches of these rules. The ACCC continues to provide guidance to water infrastructure operators to help them comply with the rules.

96. The legislation allows the ACCC to make determinations of regulated water charges imposed by certain large water infrastructure operators or to accredit arrangements for a state regulator to make determinations. In February 2012 the ACCC accredited arrangements for the Essential Services Commission of Victoria (ESCV) to approve or determine water charges for applicable Victorian water operators in the Basin. Prices determined by ESCV under the accreditation arrangements will apply to these operators from 1 July 2013.

97. In April 2012, the ACCC released the *Water Monitoring Report 2010-11*. Under the Water Act, the ACCC is required to provide the Minister with a monitoring report covering regulated water charges, transformation arrangements and compliance with the water market rules and water charge rules. See Part V for more detail of the report's observations.

2.6 Energy Infrastructure Regulation and Energy Market Monitoring/Enforcement

98. One of the roles of the AER is to make electricity determinations and gas decisions for transmission and distribution networks in accordance with the NER and National Gas Rules (NGR). Based on an assessment of the efficient costs to provide these services, the AER determines the revenue required by each business to operate efficiently.

99. In 2011-12, the AER completed regulatory determinations for one electricity transmission business in Queensland and an electricity distribution business in Tasmania. The AER revoked and substituted determinations for two electricity distribution network businesses and commenced work on new determinations for electricity distribution in New South Wales and the Australian Capital Territory and electricity transmission in South Australia and the direct current interconnector between South Australia and Victoria/New South Wales.

100. The AER also approved network prices for twelve electricity network service providers in 2011-12 and assessed applications from a number of distribution and transmission businesses seeking to pass through costs in network tariffs that were not anticipated at the time price determinations were made.

101. The Victorian Government conferred responsibilities on the AER to assess the costs associated with the transition to smart meters for Victorian electricity consumers. On 31 October 2011, the AER released its final determination on metering charges for Victorian electricity distribution businesses for 2012-15.

102. In July 2011, the AER published an access arrangement for the SA gas distribution network and the Northern Territory gas pipeline and the Roma to Brisbane pipeline. During 2011-12, the AER commenced work on access determinations for Victorian gas distribution and transmission businesses and approved annual tariff variations for twelve gas network service providers.

103. 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 the AER 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 completed its preparations for the new National Energy Retail Law which commenced on 1 July 2012 in Tasmania and the Australian Capital Territory. Throughout 2011-12, the AER finalised all required guidelines, approved the hardship policies of all retailers, authorised new retailers and developed a website to assist consumers buy and use energy more effectively. These outcomes were achieved in close consultation with stakeholders.

104. A focus for the AER through 2011-12 was monitoring compliance in the gas STTM. A high number of data failures by STTM facility operators led the AER to adopt a specific compliance strategy of

monitoring, tougher enforcement and education to address these concerns. The AER issued its first infringement notice in June 2012 for data failures by a gas network service provider in South Australia. Improving the provision of accurate information in the electricity market was also a focus of the AER during the year. The AER was concerned about the quality of information being provided by electricity generators when they were altering their bids.

105. The AER carried out audits of electricity generators and gas STTM facility operators to assess the systems and processes these parties have in place to achieve compliance with their respective obligations. The AER also published five compliance bulletins outlining its expectations regarding compliance with various parts of the NER and NGR.

106. 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 AER's annual *State of the Energy Market* report provides a comprehensive overview of activity in the Australian energy and gas sectors. In 2011-12, the AER published its first newsletter (AER Energy Update) to provide timely and succinct information to stakeholders. The AER also publishes reports when the spot price for electricity exceeds \$5000/MWh and when gas prices are high. The AER produced two such reports in 2011-12.

107. In May 2012, the AER also launched a new website to provide links to its regulatory, monitoring, reporting and enforcement activities. The website includes enhanced features and resources for all energy market participants.

2.7 Access to Infrastructure Facilities

108. Under the National Competition Policy reforms of the mid 1990s, all Australian Governments agreed to the introduction of an economy-wide access regime for essential infrastructure services. The National Access Regime, which was established in 1995 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. 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.

109. In September 2011, the Council of Financial Regulators (CFR) invited the ACCC to participate in a working group to develop analysis on competition in markets for the clearing and settlement of securities. The working group comprises the Australian Securities and Investments Commission (ASIC), the Reserve Bank of Australia (RBA), the Australian Treasury and the ACCC.

110. The working group developed a discussion paper on competition in the clearing and settlement of the Australian cash equity market. The discussion paper set out a preliminary assessment of, and sought comments on, the implications of competition in those markets as they related to the responsibilities of the agencies - that is, the effective functioning of markets, financial stability and competition and access.

111. The discussion paper was released publicly on 15 June 2012, submissions closed on 10 August 2012. The ACCC continues to participate in the working group.

2.7.1 Telecommunications

112. Telstra voluntarily submitted an undertaking to the ACCC in accordance with the legislative framework for structural reform introduced in November 2010. These reforms were intended to address

longstanding competition concerns about Telstra's market power and vertical integration, and its ability to favour its retail business at the expense of access seekers. The undertaking proposed a form of structural separation whereby Telstra would progressively migrate its fixed-line customers across to the NBN and cease to provide services over its copper network. The undertaking was accepted by the ACCC in February 2012. The undertaking included commitments to ensure that, in the interim period while the NBN is being built, Telstra will supply regulated services to access seekers on an equivalent basis to its own retail business. Recent reforms prevent NBN Co and designated 'superfast network' operators from discriminating between access seekers. The ACCC released explanatory material relating to these non-discrimination provisions on its website on 19 April 2012.

113. The ACCC continues to oversee the Telecommunications Access Regime under Part XIC of the CCA. 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. The transitional provisions provide that existing access disputes between access providers and access seekers over the terms and conditions of access would remain active until the ACCC set terms and conditions for the service through a final access determination. As at July 2012, fifteen separate access disputes were under consideration by the ACCC.

114. The access regime applies to services which have been 'declared' by the ACCC, and services that are the subject of a special access undertaking that is accepted by the ACCC. The ACCC declared a wholesale ADSL service in February 2012. The ACCC also received a special access undertaking from NBN Co, setting out proposed terms and conditions for access to its fibre, wireless and satellite networks. The ACCC suspended its assessment of the undertaking in June 2012 in the expectation that NBN Co would soon submit a revised special access undertaking.

115. The ACCC can set terms and conditions for access to declared services through final access determinations. In 2011-12, the ACCC issued such determinations for various fixed line services, the mobile terminating service and the domestic transmission service.

116. Recent reforms prevent NBN Co and designated 'superfast network' operators from discriminating between access seekers. The ACCC released explanatory material relating to these non-discrimination provisions on its website on 19 April 2012.

2.7.2 Rail

117. 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.

118. 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 National Competition Council (NCC) for a recommendation to the relevant Minister (in this case, the Commonwealth Treasurer) that a service be declared. Parties may apply to the ACT 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.

119. 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) and decided to declare the Hamersley, Goldsworthy and Robe services (October 2008). Appeals were made on the Minister's decisions to the ACT.

120. 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.

121. 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 Federal Court decided to dismiss Fortescue Metals Group's appeals and to allow Rio Tinto's appeal.

122. The NCC and Fortescue Metals Group each lodged applications to the High Court of Australia for special leave to appeal the decision of the Full Federal Court. On 14 September 2012, the High Court determined that the ACT's review of decisions relating to Fortescue Metals Group access to rail infrastructure in the Pilbara region under Part IIIA of the CCA had not been undertaken according to law. As a result, the High Court quashed the ACT's determinations and remitted the matters back to the ACT for determination according to law.

2.7.3 *Australian Rail Track Corporation*

123. On 29 June 2011, the ACCC accepted an access undertaking under Part IIIA of the CCA from 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.

124. 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.

125. On 30 July 2008, the ACCC had accepted an access undertaking from ARTC, in relation to the Australian interstate rail network. The interstate rail network covers the mainline standard gauge track linking Kalgoorlie in Western Australia, Adelaide, Wolseley 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.

126. In 2011-12 the ACCC continued to monitor and administer relevant provisions of the ARTC interstate undertaking and the Hunter Valley undertaking.

2.7.4 Bulk Wheat Port Terminal Services

127. In 2011, the ACCC accepted new access undertakings from four bulk wheat port terminal operators which build on a framework established in access undertakings accepted by the ACCC in 2009. On 22 June 2011, the ACCC accepted access undertakings from GrainCorp Operations Ltd, and from Australian Bulk Alliance (now a wholly owned subsidiary of the Emerald Group Australia), and on 28 September 2011 from Co-operative Bulk Handling and Viterra Operations Limited.

128. 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.

129. These access undertakings were offered by the companies to comply with the *Wheat Export Marketing Act 2008* which requires wheat exporters who also own and operate port terminal facilities to have access undertakings in place in order to be accredited as bulk wheat exporters. However, changes to the legislation may mean this accreditation of bulk wheat exporters will be abolished from 1 October 2014. If the Wheat Export Marketing Amendment Bill 2012 is passed in its current form and a non-prescribed voluntary code of conduct for all grain export terminals has been developed and approved by the Minister for Agriculture, Fisheries and Forestry, then the vertically integrated port operators will no longer be required to have access undertakings. After this time, access issues in the wheat export industry will be governed by the voluntary code of conduct and by general competition law.

2.8 Adjudication

130. The authorisation and notification provisions of the CCA allow businesses to obtain protection from legal action for certain conduct that might otherwise raise concerns under the competition provisions in the CCA, where that conduct delivers public benefits. The authorisation and notification provisions reflect a recognition that, in certain circumstances, arrangements which restrict competition can nonetheless be in the public interest. Authorisation and notification provides protection from legal proceedings under the CCA for certain anti-competitive practices where there is a net public benefit.

131. The ACCC issued 20 final determinations on authorisation matters during 2011-12. The arrangements covered by the authorisations spanned a wide range of industries, including aviation, telecommunications, coal, real estate, furniture retailing and primary production.

132. During 2011-12 the ACCC assessed four collective bargaining notifications covering a large number of small businesses in areas ranging from primary production, newsagents, grocery retailing in regional communities, and paint retailing.

133. Approximately 505 exclusive dealing notifications were considered by the ACCC in 2011-12. The vast majority of these were allowed to stand. However, decisions by the ACCC to revoke two exclusive dealing notifications were reviewed by the ACT during the period. One matter was withdrawn before the ACT considered the application for review and the other was heard in May 2012 and the ACT's decision is pending.

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

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

135. 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

136. 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.

137. Competition policy advice to the Government is largely provided by the Competition and Consumer Policy Division and the Infrastructure Division. Both are located in the Treasury's Markets Group. Competition and Policy Division focuses on competition and consumer policy, while Infrastructure Division focusses on the economic regulation of infrastructure. These divisions also contribute competition advice to other government agencies to support a whole-of-government approach to competition. The ACCC, AER, NCC, PC and ACT are Treasury portfolio agencies, thus the Treasury provides advice to Government about legislation administered by these bodies, and on their resourcing and operation.

3.2 The Australian Competition and Consumer Commission

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

139. 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

140. The AER is the economic regulator of the wholesale electricity market and electricity transmission networks in the 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 will also regulate retail markets (other than retail pricing) in all states except Western Australia and the Northern Territory as part of the NECF. The NECF commenced in the Australian Capital Territory and Tasmania from 1 July 2012; other jurisdictions are yet to implement the framework (see section 1.2 above).

141. 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.

142. 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.

3.4 *The National Competition Council*

143. 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. The NCC was formed in 1995 under Part IIA of the CCA. It may comprise up to five members; there are currently four councillors, including the President.

144. 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*

145. 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 (ACT)*

146. 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.

147. 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.

3.7 *The Office of Best Practice Regulation (OBPR)*

148. The OBPR promotes the Government's objective of improving the effectiveness and efficiency of regulation. The OBPR plays a central role in assisting Australian Government departments and agencies to meet the Australian Government's requirements for best practice regulatory impact analysis and in monitoring and reporting on their performance. The OBPR is required to assess whether a Regulation Impact Statement (RIS) is required.

149. The OBPR is a division within the Department of Finance and Deregulation but has independence from the Department and portfolio Ministers in assessing and reporting on compliance with the best practice regulation requirements.

3.8 *COAG Reform Council*

150. When requested by COAG, the CRC reports to the Prime Minister, in her role as the chair of COAG:

- on the progress of various reforms;
- publishes nationally-comparable performance information for all jurisdictions using agreed performance indicators;

- independently assesses predetermined milestones and performance benchmarks tied to reward payments under the National Partnership Agreements; and
- monitors the aggregate pace of reform under COAG's agreed reform agenda.

151. 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.

152. 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. The PC's first report on the impacts of the COAG Reforms: Business Regulation and Vocational Education and Training (VET) was released on 15 May 2012.

4. Resources of Competition Authorities

153. The total average number of staff employed by the ACCC at 30 June 2012 was 807 (up from 746 in 2010-11). 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.

154. The ACCC's total funding for 2011-12 was \$152.8 million, comprising the original appropriation of \$151.3 million and other revenue of \$1.5 million. The ACCC's total appropriation in 2012-13 is \$152.9 million.

155. The NCC had an average staff of 11 over 2010-11. The NCC's total funding was \$2.8 million in 2010-11, comprising original appropriation of \$2.3 million. (Exchange rate at 29 June 2012 – A\$1= US\$1.0191)

156. Figures have not been included on the other competition agencies listed above, as they were not available at the time of publication.

Table 2. ACCC and NCC funding appropriations

	ACCC*		NCC*	
	2012-13	2011-12	2012-13	2011-12
A	153.0	151.3	2.8	2.3
US	155.9	154.2	2.9	2.3

5. Studies and reports

5.1 *Petroleum industry*

157. In December 2011, the ACCC published its fourth report, Monitoring of the Australian petroleum industry — Report of the ACCC into the prices, costs and profits of unleaded petrol in Australia 2011.

- Similarly to last year, the most important influences on retail petrol prices were:
 - The international price of refined petroleum (the principal benchmark being the Singapore Mogas 95 Unleaded); and

* Foreign exchange rate used for conversion purposes: 1A\$ = US\$1.0191.

- The exchange rate of the Australian dollar against the US dollar, due to the international benchmark prices of refined petrol being established in US dollars.
- During 2010-11, Australian petrol prices closely followed international benchmark prices for refined petrol and continued to be amongst the lowest in countries in the OECD.
 - Over the course of 2010-11, retail unleaded petrol prices across the five largest cities in Australia were higher and more volatile than in 2009-10. On average, prices ranged 31 cents per litre (cpl) from a low of around 116 cpl to around 147 cpl;
- There are well-established retail price cycles which operate in the large capital cities and affect the day-to-day prices of petrol. Price cycles used to be weekly but recently the duration of the price cycles has increased.
- Profits for companies in the combined supply, wholesale and retail of petrol were estimated to be in the order of -1.28 to 2.81 cpl. A large part of the variability is due to the fluctuations in the value of stock holdings in response to changes in international prices.
- Sales of ethanol blended fuel continue to increase, partly due to the reaction to the state government mandates in New South Wales for the supply of ethanol. In Queensland, where plans for introducing a mandate were suspended in October 2010, sales of ethanol blended fuel fell slightly.
- The retail market share of refiner-marketers continues to decline, with two major refiner-marketers now effectively out of petrol retailing. Independent and specialist retailers, including major supermarket chains, have been increasing their exposure to fuel retailing.
- Imports of petroleum products by independent operators continued to increase in 2010-11.

5.2 *Telecommunications Sector*

158. 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.

159. 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 published in September 2011.

160. The ACCC published quarterly reports on imputation testing and non-price terms and conditions relating to the accounting separation of Telstra (June quarter 2011, September quarter 2011, December quarter 2011, March quarter 2012). The ACCC also published bi-annual reports on current cost accounting reports (for the second half and full year of 2010-11 and first half of 2011-12) relating to the same regime.

161. 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.

162. 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.

163. 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 2010-11, which was published in March 2012.

164. 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.

165. 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

166. The ACCC provided its second annual water monitoring report to the minister. The report provides data for the 2010-11 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 markets have been generally responsive to changing environmental conditions, and have taken advantage of new water rules to maximise the value of held water assets. However, there is a need for continued market reform to reduce barriers to trade and improve water market outcomes.

167. The ACCC has also published substantial guidance material to support wider market reforms.

5.4 Airports

168. The ACCC released its *Airport Monitoring Report 2010-11: Price, financial performance and quality of service monitoring* in March 2012. The report found that aeronautical operating margins on a per passenger basis, and quality of service ratings increased at most of the monitored airports. The report also found that total car parking revenue increased for all of the monitored airports. For Adelaide and Sydney airports, these increases were wholly attributable to an increase in demand for car parking services, while for Brisbane, Melbourne and Perth airports, these increases in revenue were attributable to increases in both demand and prices.

5.5 Australia Post

169. 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.)

170. 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

171. In November 2011, the ACCC issued its container stevedoring monitoring report for the 2010–11 year. The report shows that industry operating performance was affected by increased demand for stevedoring services. Unit total costs decreased as a result of higher container volumes, and unit total revenues (which are indicative of average prices) were only slightly higher than 2010–11 levels. Industry profitability increased in 2010–11 as a result of higher volumes, higher stevedoring margins and a reduction in the value of the industry's asset base. Quay-side productivity measures decreased as an average across the five mainland container ports. Capacity expansion plans that provide for new entry are well underway in Brisbane and Sydney; however, there is a risk that future capacity problems could emerge in Melbourne if demand is higher than anticipated.

5.7 Energy

172. In addition to its regulatory, monitoring, reporting and enforcement activities, the AER published *State of the energy market 2011*, 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.

173. In 2011, the AER examined the operation of the national electricity rules in respect of network regulation, informed by its experience in assessing revenue and price determination proposals over the preceding four years. This resulted in the AER submitting a comprehensive rule change proposal to the AEMC on 29 September 2011. This rule change would ensure that the AER is able to determine network revenues that provide for recovery of efficient cost while ensuring that consumers pay no more than necessary for a safe and reliable energy supply. The AEMC is expected to release its final determination in November 2012.

5.8 Productivity Commission Inquiries, Reports and Publications

5.8.1 Australian Government-Commissioned Projects

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

- Export Credit Arrangements;
- Economic Regulation of Airport Services;
- Economic Structure and Performance of the Australian Retail Industry;
- Australia's Urban Water Sector; and
- Disability Care and Support.

175. The PC also completed commissioned research studies during the past financial year. These included examinations of:

- Role of Local Government as Regulator;

- COAG Reforms (seamless national economy deregulation priorities, and vocation education and training reforms);
- Schools workforce;
- Identifying and Evaluating Regulation Reforms; and
- Early Childhood Development Workforce.

176. As a Secretariat to the Council of Australian Government, the PC also reports annually on government performance in relation to indigenous expenditure, national agreements, national partnerships, and government services.

5.8.2 *Other Research*

177. The PC also produces a number of Staff Working Papers. Projects completed in 2011-12 include:

- Productivity in Electricity, Gas and Water: Measurement and Interpretation;
- Influences on Indigenous Labour Market Outcomes; and
- Multifactor Productivity Growth Cycles at the Industry Level.

5.8.3 *Current Work Program*

178. As at 30 June 2012, the PC was undertaking inquiries into:

- Strengthening Economic Relations between Australia and New Zealand;
- Compulsory Licensing of Patents;
- Default Superannuation Funds in Modern Awards; and
- Electricity Network Regulation.

179. The PC was also undertaking a commissioned research study into Regulatory Impact Analysis: Benchmarking.

6. **Glossary**

ACCC	Australian Competition and Consumer Commission
ACT	Australian Competition Tribunal
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
CCA	<i>Competition and Consumer Act 2010</i>
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