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## ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN AUSTRALIA

-- 2012 --

*This report is submitted by Australia to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 30-31 June 2013.*

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## **1. Executive summary**

1. This report addresses events that have occurred in the past financial reporting year (1 July 2012 to 30 June 2013). However, where appropriate, significant developments since 30 June 2013 have also been included.

2. This report covers the activities primarily of the Treasury, Australian Competition and Consumer Commission (ACCC), Australian Energy Regulator (AER) and NBN Co. It should be noted, however, that Australia's conception and implementation of competition is broad, occurring under an overarching framework, and being implemented by a range of agencies. For a full list of relevant agencies and a short description of their function, see Appendix A.

3. In 2012-13, the Council of Australian Governments (COAG) continued to progress a range of competition and regulation reforms to improve productivity. One highlight was the comprehensive energy market reform package agreed to by COAG in December 2012.

4. The Competition and Consumer Act 2010 (CCA) continued to be rigorously enforced by Australia's enforcement authority, the ACCC. Over the course of 2012-13, five first-instance competition proceedings relating to the Air Cargo freight cartel were concluded, bringing penalties imposed to date in that cartel to almost \$100 million. The hearing against the only two airlines not to settle concluded after almost 60 days (13 settled in total, some without a contested hearing). Judgment was reserved. In one further matter, proceedings were concluded against one party, with proceedings continuing against two other parties. The ACCC also commenced civil proceedings against Visa Inc and others alleging misuse of market power for the purposes of preventing the expansion of 'dynamic currency conversion' services to new merchant outlets in Australia.

5. The ACCC considered 289 matters under the mergers and acquisitions provisions of the CCA. It conducted a public review in 64 cases and a confidential review in 12 cases. Six mergers were publicly opposed; confidential opposition or concerns were expressed in five cases. Two mergers were allowed to proceed after the acceptance of remedies to address competition concerns. In four cases either the parties withdrew their proposal before a decision could be made, or no view could be formed following a confidential review without conducting market inquiries.

6. The ACCC continued to revise and develop its role regulating key markets including telecommunications and water. For example it continued to assess access arrangements for the National Broadband Network and to implement and monitor the undertakings accepted from Telstra that require structural reform of markets for fixed line communications.

7. Significant changes are occurring in the way in which energy markets operate, creating challenges for energy consumers, businesses, regulators and policy makers. The AER undertook its work program in 2012-13 in the context of community concerns about whether energy markets are functioning efficiently and delivering services at reasonable prices. There were reviews across the full spectrum of regulation, some of which are ongoing, the most significant reform being a major overhaul in November 2012 of the energy rules setting out how network prices are determined.

## 2. Changes to competition laws and policies<sup>1</sup>

### 2.1 COAG reform agenda

8. In Australia, COAG contributes to structural reforms that are of economy-wide significance and which require cooperative action by Australian governments. COAG comprises the Prime Minister, State Premiers, Territory Chief Ministers and the President of the Australian Local Government Association.

#### 2.1.1 Competition and deregulation reforms

9. In November 2008, COAG agreed to the *National Partnership Agreement to Deliver a Seamless National Economy* (the SNE NP). These reforms encourage competition reform in key sectors (primarily infrastructure, energy and transport), progress deregulation or regulatory harmonisation in 27 deregulation priority areas, and improve regulation-making and review processes.

10. In 2012, the Productivity Commission (PC) examined 17 of the deregulation priorities and assessed that, with full implementation, these reforms could lower business and other costs by around \$4 billion per year and, through improvements to productivity, increase GDP by over \$6 billion in the longer term.

11. The SNE NP ended on 31 December 2012. In April 2013, COAG noted that 18 of the 27 deregulation and four of the eight competition reform streams had been completed under the SNE NP. A report card on the progress of the reforms was published by COAG and is available at: <http://www.coag.gov.au/node/499>. Jurisdictions continue to work together to progress the remaining reforms, and have agreed to continue to report to COAG on a six-monthly basis.

12. In December 2012, the National Compact on Regulatory Competition Reform was signed by all jurisdictions and peak business organisations. Key priorities under the Compact included energy market reform, rationalising carbon reduction and energy efficiency schemes, and reforms to lift regulatory performance and reduce red-tape for business. A report card on the progress of these reforms was published by COAG in April 2013 and is available at: <http://www.coag.gov.au/node/500>.

### 2.2 Energy market reform

13. In December 2012, COAG agreed to a comprehensive energy market reform package. The COAG reforms were designed to put downward pressure on electricity prices in the long-term and ensure that regulatory frameworks are better able to take into account consumer views. The key reforms included:

- Changes to the National Electricity Rules to allow for improvements in the cost determinations for network investments. The Australian Energy Market Commission (AEMC) made the rule changes in November 2012. The AER is consulting with stakeholders to develop new guidelines on its approach to the implementation of these rule changes.
- An additional \$23.2 million over four years in Commonwealth funding to the AER, around a 20 per cent increase, to implement the new rules, improve consumer engagement and enhance technical capability.
- Enhancements to consumer engagement in regulatory determination processes through the establishment of a Consumer Challenge Panel (CCP) within the AER to represent consumers'

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<sup>1</sup> In September 2013 there was a change of Government following the Australian federal election.

interests in the assessment of energy network business spending proposals. The AER established the CCP on 1 July 2013 with the appointment of 13 members for an initial three year term.

- A recommitment from jurisdictions to implement the National Energy Customer Framework (NECF) as soon as practicable, and by no later than 1 January 2014, to provide a consistent nationwide regulatory and institutional regime for the sale and supply of electricity and gas by retailers and distributors to retail customers. The NECF involves the transfer of current state and territory (except Western Australia and the Northern Territory) legislation to a single set of national laws, regulations and rules. On 1 July 2013, New South Wales joined South Australia, Tasmania and the Australian Capital Territory, in implementing the NECF. Implementation of the NECF in Queensland and Victoria requires action at the state government level.
- Reiteration of state and territory commitment to deregulate retail prices where effective competition exists. Victoria and South Australia are the only jurisdictions to have deregulated retail prices to date.
- The AEMC to develop a nationally consistent framework for reliability standards that incorporates the value that consumers place on reliability for consideration by jurisdictions.

14. A number of major reviews and reports were published in 2012-13:

- In November 2012, the then Australian Government released the Energy White Paper 2012, Australia's energy transformation, which sets out a strategic policy framework to address the challenges in Australia's energy sector.
- The AEMC released a report on its Power of Choice review in November 2012, which included recommendations to facilitate demand-side participation in energy markets. Various recommendations of the review were incorporated into the COAG energy market reforms, including the phasing in of efficient and cost-reflective retail energy prices through the application of time varying network tariffs.
- The PC released a final inquiry report on Electricity Network Regulatory Frameworks on 26 June 2013. The Productivity Commission's report contained 63 recommendations which related to regulatory benchmarking, interconnectors, incentive regulation, network ownership, demand management, reliability standards, governance of National Electricity Market institutions, consumer engagement, and the timeliness in decision making in energy market reform.
- In September 2012, an independent panel of experts appointed by the Standing Council on Energy and Resources (SCER) completed a review of the operation of the limited merits review regime that applies to network regulatory decisions of the AER. The review examined improvements to the review regime to ensure that arrangements better promote the national electricity and gas objectives. Changes to the limited merits review regime are being progressed through amendments to the National Electricity and Gas Rules and the *Competition and Consumer Regulations 2010*.
- In May 2013, SCER endorsed a National Harmonised Regulatory Framework for Natural Gas from Coal Seams. The Framework puts in place a suite of leading practice principles to ensure robust and efficient regulation across all Australian jurisdictions, which improves community confidence and enables the sustainable development of Australia's gas resources.

- Throughout 2012-13 there has been an effort to improve gas market participation and competition through the ongoing refinement of trading facilities in Sydney, Adelaide and Brisbane. Work began on the establishment of a gas supply hub trading market in Queensland by early 2014 to provide for more flexible upstream gas trading options.
- On 27 May 2013, the then Australian Government announced it is undertaking a new, comprehensive analysis of the domestic gas market outlook. The Domestic Gas Market Study will provide better information on the demand and supply of gas to help identify potential supply constraints. The Study is due to be completed by the end of 2013.

### **2.3 Telecommunications**

15. On 7 April 2009, the then Government announced the establishment of a new company – NBN Co – to build the national broadband network (NBN), to operate on an open access, wholesale-only basis. Legislation governing NBN Co's structure and operations 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. The ACCC is currently considering access arrangements for the NBN.

16. Reforms have also been introduced 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. Together, the Structural Separation Undertaking and Migration Plan, which came into force on 6 March 2012, 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. The ACCC is continuing to implement and monitor the undertakings accepted from Telstra.

### **2.4 National Access Regime**

17. The National Access Regime is a regulatory framework through which third parties may seek access to nationally significant infrastructure services and includes Part IIIA of the CCA. A number of reforms intended to streamline the operation of the National Access Regime, remove delays affecting decision-making and arbitration processes, and promote greater consistency between state and national access regimes were implemented in 2010. COAG also agreed that the PC should conduct a full review of the National Access Regime.

18. The PC commenced an inquiry into the National Access Regime in October 2012. The inquiry is intended to assess the role and efficacy of the National Access Regime and propose ways of improving its operation to ensure the efficient operation and investment in infrastructure, thereby encouraging competition in dependent markets. The PC released its draft report at the end of May 2013 and its final report is due in October 2013.

19. Key issues emerging from the inquiry to date include: the role of industry-specific access regimes; the role of regulators; the implications of a recent High Court decision on the interpretation of the declaration criteria; and the role of the Australian Competition Tribunal (ACT).

## **2.5 New guidelines**

20. The ACCC and AER continued their commitment to the provision of comprehensive and up-to-date information to support compliance, releasing 84 guidance materials, including 39 in both print and electronic forms, and another 45 web-only publications. In the past financial year, the ACCC distributed 701,248 print items compared to 984,215 in 2011–12 and recorded 830,119 visits to its online publications as compared to 868,935 in 2011–12.

21. In 2012-13 the ACCC issued updated Authorisation Guidelines that reflect its current approach to assessing applications for authorisation under the CCA.

22. In most cases, publications are available from the ACCC and AER websites at [www.accc.gov.au](http://www.accc.gov.au) or [www.aer.gov.au](http://www.aer.gov.au).

## **3. Enforcement of competition laws**

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

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

24. 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.

25. 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 goals are to maintain and promote competition and remedy market failure, and protect the interests and safety of consumers and support fair trading in markets. With these goals in mind the ACCC takes action to:

- stop unlawful conduct;
- deter future offending conduct;
- where possible, obtain remedies that will undo the harm caused by the contravening conduct (for example, by corrective advertising or securing redress for consumers and businesses adversely affected);
- encourage the effective use of compliance systems; and
- where warranted, take action in the courts to obtain orders which punish the wrongdoer by the imposition of penalties or fines and deter others from breaching the CCA.

26. The ACCC cannot pursue all the complaints it receives about the conduct of traders or businesses and the ACCC is unlikely to become involved in resolving individual consumer or small business disputes.

While all complaints are carefully considered, the ACCC's role is to focus on those circumstances that harm the competitive process or result in widespread consumer detriment. The ACCC therefore exercises its discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for competition and consumers.

27. The ACCC reviews its priorities regularly. There are some forms of conduct that are so detrimental to consumer welfare and the competitive process that the ACCC will always assess them as a priority. These include cartel conduct and anti-competitive agreements, and the misuse of market power.

28. In addition, the ACCC is currently prioritising its work in a number of areas including online competition and consumer issues such as:

- conduct which may impede emerging competition between online traders or limit the ability of small businesses to effectively compete online;
- competition and consumer issues in highly concentrated sectors, in particular in the supermarket and fuel sectors; and
- credence claims, particularly those in the food industry with the potential to have a significant impact on consumers or the competitive process.

29. 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.

### **3.1 *Anti-competitive conduct matters***

30. In the period 1 July 2012 to 30 June 2013, the ACCC commenced litigation in three non-merger competition matters. Four first-instance competition proceedings (that is, not appeals) were concluded during the period. Proceedings in one further matter have been partially concluded; with proceedings resolved against one party, and proceedings continuing against two other parties in that matter. These proceedings are detailed below.

31. At 30 June 2013, the ACCC had five matters involving alleged cartel conduct, two matters involving alleged anti-competitive agreements and two matters involving alleged misuse of market power before the courts.

#### **3.1.1 *Proceedings instituted***

32. Renegade Gas Pty Ltd (trading as Supagas NSW) and others – In August 2012, the ACCC instituted civil proceedings against Renegade Gas Pty Ltd (trading as Supagas NSW) and Speed-E-Gas (NSW) Pty Ltd. The ACCC alleges that these companies, through their senior executives and sales staff, gave effect over a number of years to anti-competitive cartel arrangements which included not supplying liquid petroleum gas cylinders for forklifts to each other's customers. The ACCC also alleges that current and former senior executives of both Renegade Gas and Speed-E-Gas implemented the alleged cartel arrangement between Renegade Gas and Speed-E-Gas. These proceedings are ongoing.

33. Visa Inc and others - In February 2013, the ACCC commenced civil proceedings against Visa Inc and a number of related Visa entities, alleging misuse of market power for the purposes of preventing the

expansion of ‘dynamic currency conversion’ (DCC) services to new merchant outlets in Australia, such as retail stores. The ACCC also alleged that Visa engaged in exclusive dealing by supplying access to its payment network to Australian banks and, in turn, retailers on condition that they did not acquire DCC services from DCC suppliers. These proceedings are ongoing.

34. Yazaki Corporation and Australian Arrow Pty Ltd - In December 2012, the ACCC commenced civil proceedings against Yazaki Corporation and its wholly owned Australian subsidiary, Australian Arrow Pty Ltd, for alleged cartel conduct, market sharing and price fixing. The allegations relate to the supply of wire harnesses to Toyota Motor Corporation and its related businesses in Australia. Wire harnesses are electrical systems that distribute power and electrical signals to various components of a motor vehicle. These proceedings are ongoing.

### 3.1.2 *Proceedings concluded*

35. Air Cargo - During the 2012-13 financial year, the Federal Court imposed penalties of \$11.25 million, \$10 million, \$11.75 million and \$7.5 million on Cathay Pacific Airways Ltd, Emirates, Singapore Airlines Cargo Pte Ltd and Thai Airways International respectively for price fixing as a part of an air cargo cartel. This brings the total penalties imposed on cartel participants to almost \$100 million since the investigation into alleged cartel activity in relation to the supply of air cargo services began in 2006. The ACCC’s proceedings against Air New Zealand and P.T. Garuda Indonesia continue before the Federal Court. These are the only two airlines not to settle out of 15 airlines against which proceedings were commenced. The hearing in respect of these two airlines concluded in May 2013 after almost 60 days and judgment was reserved. The matter has produced court challenges on issues that are of fundamental importance to the ACCC, notably: the use of coercive powers to produce documents under s155 of the CCA and the meaning and scope of the term ‘market in Australia’. In respect of the latter the ACCC contended that the conduct of international airlines that occurred in the relevant countries (Indonesia and Hong Kong for Garuda, Indonesia and Singapore for Air New Zealand) constituted conduct that occurred in a market in Australia as required by s4E of the CCA. There were also significant questions relating to jurisdiction, including whether Garuda was entitled to claim foreign state immunity under the *Foreign States Immunities Act 1985*. This issue went on appeal to the High Court and by judgment of 7 September 2012 Garuda’s claim was unanimously dismissed. The High Court found that the proceedings concerned a ‘commercial transaction’ and accordingly came within an exception to the immunity which would otherwise be enjoyed by Garuda as a separate entity of Indonesia. Air New Zealand and P.T. Garuda Indonesia relied on various defences, including that the relevant conduct was mandated or authorised in certain countries. It is the ACCC’s position that the impugned conduct was not mandated or authorised at the time it occurred. The outcome of the cases against these two airlines may have ongoing significance for legal actions alleging price fixing arrangements, or possibly legal actions more broadly, which involve conduct occurring overseas pursuant to foreign laws.

36. Viscas Corporation - In April 2013, the Federal Court imposed on Viscas Corporation, a Japanese cable supplier, \$1.35 million in penalties for engaging in bid rigging and cartel conduct in relation to the allocation of projects involving the supply of high-voltage or extra high-voltage land or submarine cable, including supply to Australia. Viscas admitted that, in September 2003, it reached an anti-competitive arrangement with other Japanese and European suppliers of land cables in relation to an invitation to tender issued by Snowy Hydro Limited. The terms of the arrangement were that: of the parties to the arrangement who submitted a tender, the tenderer with the lowest price would be one of the European suppliers; and the European suppliers would decide between themselves who would submit the lowest price. Viscas acknowledged to the Court that this arrangement arose out of an overarching arrangement in relation to the allocation of projects involving those Japanese and European suppliers of land cables. In its judgment the Court stated: “Conduct of the kind which Viscas has agreed that it engaged in is difficult to detect and difficult to establish. When it is established, any penalty imposed should be significant so as to deter any

other corporation engaged in trade or commerce from engaging in the same conduct.” The court also made orders restraining Viscas from engaging in similar conduct for a period of three years and requiring it to pay a contribution of \$50,000 towards the ACCC’s costs. Although the proceedings against Viscas have been resolved, the proceedings are continuing against two foreign corporations, Prysmian Cavi e Sistemi Energia S.R.L, and Nexans SA.

### **3.2 Mergers and acquisitions**

37. Section 50 of the CCA prohibits mergers and acquisitions that would have, or are likely to have, the effect of substantially lessening competition in any market in Australia. Merger proposals are generally brought to the ACCC’s attention by merger parties who request an informal clearance. In addition, the ACCC monitors media daily for news of proposed or actual mergers to identify any transactions that may potentially raise competition issues. Information may also be obtained from other sources such as complaints and referrals from Australian and overseas regulators.

38. For each merger considered, the ACCC will make an initial assessment on the information available to determine whether a public review will be required. Where the ACCC is satisfied, based on the information provided, that there is a low risk of a merger substantially lessening competition, the ACCC may decide that it is not necessary to conduct a public review of that merger. These mergers are described as being ‘pre-assessed’. Both public and confidential mergers can be pre-assessed and this is done on the basis of the information provided without market inquiries.

39. This pre-assessment process enables the ACCC to respond quickly where no substantive competition concerns are raised. A significant proportion of the mergers assessed by the ACCC are pre-assessed. For matters that cannot be pre-assessed, the ACCC will conduct a public review or, in the case of confidential mergers, discuss with the merger parties whether they want to proceed to a confidential review.

40. In 2012-13 the ACCC considered 289 matters under section 50 of the CCA. Of these matters, 213 were pre-assessed as not requiring a public review. The ACCC conducted a public review of 64 mergers and a confidential review for 12 mergers.

41. Of the 76 matters reviewed, six mergers were publicly opposed; confidential opposition or concerns were expressed in five mergers; and two mergers were allowed to proceed after the acceptance of remedies to address competition concerns. In four cases either the parties withdrew their proposal before a decision could be made, or no view could be formed following a confidential review without conducting market inquiries. The ACCC unconditionally cleared 77 per cent of those mergers that underwent a public or confidential review and 94 per cent of all mergers (including pre-assessments) considered during the period.

**Table 1: Merger matters assessed and reviewed in 2012–13**

| <b>Financial Year 1 July 2012 – 30 June 2013</b>                       |            |
|--|------------|
| <b>TOTAL MATTERS ASSESSED AND REVIEWS UNDERTAKEN</b>                   | <b>289</b> |
| <b>Matters pre-assessed - no review required</b>                       | <b>213</b> |
| <b>Reviews undertaken</b>  | <b>76</b>  |
| <i>Total reviews can be broken down into the following categories:</i> |            |
| Not opposed  | 55         |
| Finished - no decision (including withdrawn)                           | 4          |
| Publicly opposed outright  | 6          |
| Confidential review – opposed or ACCC concerns expressed               | 5          |
| Resolved through undertakings  | 2          |
| Variation to undertaking accepted                                      | 4          |
| Variation to undertaking rejected                                      | 0          |

42. 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, emerging market dynamics as well as the timing of the various reviews.

43. The following two case studies provide examples of the ACCC's assessment of merger proposals during the period.

#### *3.2.1 Virgin Australia - proposed acquisition of 60 per cent of Tiger Airways Australia*

44. On 23 April 2013 the ACCC announced it would not oppose an acquisition by Virgin Australia Holdings Limited (together with its subsidiaries Virgin Australia) of 60 per cent of Tiger Airways Australia (Tiger Australia).

45. Virgin Australia is Australia's second largest domestic airline operator, behind the Qantas Group. Tiger Australia is a domestic airline that commenced operations in November 2007. At the time of the ACCC's decision, Tiger Australia serviced 16 domestic routes with 11 aircraft. Tiger Australia operated under a low cost carrier model which primarily focused on price sensitive leisure travellers.

46. Beginning in November 2012, the ACCC reviewed the impact of the acquisition on competition in the Australian market for domestic air passenger transport services.

47. The ACCC held concerns that the proposed acquisition may increase the likelihood of airlines coordinating their pricing, capacity or related commercial decisions by:

- reducing the number of airline groups within Australia from three to two (excluding regional airlines), and making those groups more similar (in that each would be comprised of a full service and a low cost domestic carrier);
- removing Tiger Australia as an independent low cost carrier, and instead aligning its incentives with those of Virgin Australia; and

- reducing the threat of entry by a new airline.

48. The ACCC was also concerned about eliminating direct competition between Tiger Australia and Virgin Australia. When controlled by Virgin Australia, Tiger Australia would take into account the effect of its decisions on Virgin Australia's profitability. This could impact Virgin Australia's and/or Tiger Australia's decisions as to fares, service quality, capacity and/or network.

49. However, it was put to the ACCC that if the acquisition was not allowed, Tiger Australia would exit the Australian market.

50. The ACCC tested the issue thoroughly and extensively. It ultimately accepted that Tiger Australia was highly unlikely to remain in the Australian market (under either current or potential new ownership) if the acquisition was opposed. Tiger Australia's assets, comprising 11 aircraft, would very likely have been redeployed into the Asian operations of its parent company (the Singapore-based Tiger Airways Holdings Limited). The ACCC had particular regard to Tiger Australia's history of poor financial and operational performance despite substantial investment and numerous changes of management and strategy over the years.

51. On the basis that Tiger Australia would have been highly likely to exit the relevant market if the proposed acquisition did not proceed, the ACCC formed the view that the proposed acquisition of Tiger Australia by Virgin Australia would not be likely to result in a substantial lessening of competition in the market for Australian domestic air passenger transport services in contravention of section 50 of the CCA. The ACCC therefore did not oppose the proposed acquisition.

### 3.2.2 ACCC opposed Carsales proposed acquisition of Trading Post

52. On 20 December 2012 the ACCC announced its decision to oppose Carsales.com Limited's proposed acquisition of assets associated with the Trading Post business from Telstra Corporation Limited.

53. Carsales and Trading Post both supply online general merchandise and automotive classified advertising. After extensive market consultation, the ACCC's concerns focused on the markets for the sale of online automotive classifieds to automotive dealers and private sellers. It concluded that the proposed acquisition was likely to substantially lessen competition in those markets.

54. Markets for online advertising have particular characteristics in that they serve two distinct customer groups – advertisers, and an audience of potential buyers of the product or service being advertised. Such markets are sometimes referred to as 'two-sided markets'. In order to succeed in such a market, a site must attract both advertisers and audience. A large audience attracts advertisers, and a large inventory of cars for sale attracts car buyers, creating a virtuous cycle or 'network effect'.

55. Carsales is the clear market leader in online automotive advertising, attracting more advertisements (inventory) and a larger audience than any competitor. Carsales is also vertically integrated in that it provides a range of advertising-related services to automotive dealers, including inventory distribution and management of 'leads' from prospective customers.

56. Trading Post is an established and high profile brand for automotive classifieds advertising in Australia. The ACCC found that it provides competitive tension in the market through its offering that is attractive to many advertisers and potential car buyers and differs in important ways from that of Carsales. For example, prior to the proposed transaction, Trading Post offered private advertisers a refund off the advertising fee if the car was not sold within four weeks.

57. The ACCC found competition from other providers of online automotive classified advertising was not sufficient to prevent a likely substantial lessening of competition as a result of the proposed acquisition. Further, the ACCC considered that the acquisition would enhance Carsales' leading inventory and audience position in the market, increasing the already high barriers to successful entry by new competitors and lessening the ability of other websites to impose a close competitive constraint on Carsales.

58. The ACCC concluded that the proposed acquisition would eliminate Trading Post as a significant competitor and significantly increase Carsales' market power, resulting in a loss of competitive tension between rivals and loss of choice to the detriment of advertisers.

### **3.3 Pricing matters**

#### **3.3.1 Airports**

59. 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 2011-12 monitoring report is available later in this paper under *Studies and Reports*.

60. Due to some concerns raised in the ACCC's 2008-09 monitoring report, the then Government announced that it 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 delivered its final inquiry report December 2011. In March 2012, the then 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 then 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).

61. The ACCC reviewed its quality of service monitoring program and released a revised guideline in June 2013. The revised guideline contains changes including the discontinuation of border agency surveys, consultation with landside operators, and changes to individual indicators such as check-in services and facilities and aerobridges. The revised guideline will take effect for data collected and reported on from 2013-14 onwards.

#### **3.3.2 Airservices Australia**

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

63. 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 terminal navigation, 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.

64. Under the LTPA, Airservices is required to approach the ACCC each year prior to increasing its prices. In May 2013 Airservices submitted the second of its subsequent annual price notifications to the ACCC, proposing prices for declared services from 1 July 2013 that were the same as those outlined in the

LTPA. In addition, Airservices included a new rescue and fire-fighting service at Port Hedland (Western Australia) and out-of-hours fees for ARFF and terminal navigation services.

65. In its assessment, the ACCC consulted with stakeholders to decide the extent to which Airservices had made reasonable progress on implementing its agreement commitments, specifically to improve consultation on capital expenditure and key performance indicators. Although stakeholders noted the scope for further improvement, they were supportive of progress to date and outlined a range of improvements that Airservices had made. They recognised that it would take time to find the right balance of information and consultation, and that Airservices was taking positive steps. The ACCC was satisfied that Airservices had made sufficient progress on implementing its commitments in the second period of the agreement to ensure that its prices reflect an efficient cost base and promote efficient provision and use of services. It noted that implementation of commitments would be important in the assessment of Airservices' future price notifications. On 12 June 2013, the ACCC decided to not object to Airservices' proposed price increases, which took effect from 1 July 2013.

### 3.3.3 *Australia Post*

66. The ACCC has had a 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 then Government undertook a Regulatory Impact Analysis, as a result of which it decided to limit the ACCC's prices surveillance of Australia Post's monopoly letter services to the basic postage rate and other ordinary letter services. Prior to 2011, all of Australia Post's monopoly letter services were subject to ACCC price surveillance.

67. 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. The ACCC issued its cross-subsidy report for 2011-12 on 24 April 2013. The report concluded that, as in previous years, the regulatory accounts did not show that Australia Post was cross-subsidising its competitive services with revenue from its monopoly services. Rather, the 2011-12 report found Australia Post's competitive services, as a whole, were a source of subsidy. While certain competitive services may have received a subsidy, the source of that subsidy appears to be Australia Post's other competitive services, rather than its monopoly services. Further information about the 2010-11 report is available in Part V of this document, under Australia Post.

### 3.3.4 *Petrol*

68. The ACCC performs a number of roles in the fuel industry, including monitoring prices, costs and profits, undertaking enforcement work, and informing the general public about the petrol industry. The ACCC has no role in setting fuel prices. Australian fuel prices are not regulated by the Government and companies are free to set prices in the market.

69. In December 2007 the 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. This direction was subsequently extended to 2013 and 2014. The ACCC has produced monitoring reports from 2008–2012. In February 2008, the Government asked the ACCC to have a renewed focus on diesel and automotive liquefied petroleum gas (LPG) prices. The ACCC has been informally monitoring diesel and LPG prices since this time and has reported on these fuels in its monitoring reports.

70. Further information on the ACCC's monitoring role can be found in its latest report *Monitoring of the Australian petroleum industry – Report of the ACCC into the prices, costs and profits of unleaded petrol in Australia 2012*.

71. The ACCC has sought to improve consumer understanding about fuel issues by providing information on its website including about petrol price cycles in the five largest cities (Sydney, Melbourne, Brisbane, Adelaide and Perth). The ACCC also provides consumers with information on the cheapest and most expensive days of the week to buy petrol. In addition, the ACCC 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 ACCC's 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 to assist consumers.

72. In regard to its enforcement role, during 2012 the ACCC announced two investigations, which are ongoing, in the Australian retail petrol industry:

- The ACCC commenced an investigation into price information sharing arrangements in the retail fuel industry. The ACCC is concerned that petrol price sharing arrangements may lessen price competition in petrol retailing to the detriment of consumers. The ACCC is concerned that such arrangements may breach the competition provisions of the CCA. For instance, the CCA prohibits contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition.
- The ACCC commenced an assessment into the tying of an offer of discounted fuel purchases at nominated fuel outlets to the purchase of a minimum amount of groceries from a particular supermarket, known in Australia as a shopper docket. The assessment concerns whether substantial foreclosure of competition is likely to arise from the size of the shopper docket discounts on the price of fuel offered by the major supermarket chains and the frequency and duration of these offers. Shopper docket discounts typically 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. The ACCC is working with industry participants to gather information to assist with assessing the effects of shopper docket discounts and whether competition issues arise.

### *3.3.5 Container stevedoring monitoring*

73. 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 2011-12 is available in Part V of this report under Container Stevedoring.

## **3.4 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. The ACCC did not join any matters in the Copyright Tribunal in 2012-13.

### **3.5 *Monitoring/enforcement of water charge and water market rules***

75. Under the *Water Act 2007* (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.

76. During 2012–13, the ACCC conducted targeted compliance reviews and received a number of complaints and inquiries from industry participants. The ACCC identified some minor concerns with the compliance of infrastructure operators under the rules. These compliance concerns resulted primarily from the operator’s misunderstanding of certain requirements of the rules and were resolved administratively. The ACCC continued to work with state departments and water authorities to achieve compliance with the water planning and management rules.

77. Throughout 2012-13, the ACCC engaged in a range of compliance activities to improve the stakeholder’s understanding of the water rules and to assist regulated entities to comply with them. The ACCC published guidance materials, provided targeted guidance to regulated entities, presented to infrastructure operators and other water specialists and published newspaper and journal articles.

78. In October 2012, the then Minister for Sustainability, Environment, Water, Population and Communities registered amendments to the *Water Market Rules 2009* and the *Water Charge (Termination Fees) Rules 2010*. The ACCC published a guideline explaining the purpose and effect of the amendments to assist stakeholders and promote compliance.

79. The Water Charge (Infrastructure) Rules enable the ACCC to make determinations (or accredit arrangements for a state regulator to make determinations) of regulated water charges for Tier 3 infrastructure operators in the basin. Tier 3 operators are non-member-owned operators providing services relating to more than 250 gigalitres of water entitlement. Regulated water charges are required to reflect prudent and efficient costs and contribute to achieving the Basin water charging objectives and principles established under the Water Act.

80. Assessment of regulated charges for Tier 3 operators started in Victoria in 2012–13 with the determination by the Essential Services Commission of Victoria (ESCV) of rural water infrastructure charges for the Victorian Tier 3 operators. The determination applies to Goulburn-Murray Water and Lower Murray Water (Rural) from 1 July 2013 to 30 June 2016 and 30 June 2018 respectively. The ESCV’s determination was under the rules and followed the ACCC’s accreditation of the ESCVs regulatory arrangements under rules in February 2012.

### **3.6 *Energy infrastructure regulation and energy market monitoring/enforcement***

81. The electricity and gas rules require the network businesses to periodically (usually every five years) submit regulatory proposals (electricity) and proposed access arrangements (gas) to the AER for approval. The AER must assess the regulatory proposals of network businesses and justify network pricing decisions with regard to the legislative criteria. The AER must also account for issues raised in consultation. Network businesses can appeal AER decisions on, for example, merit grounds at the

Australian Competition Tribunal (ACT). To determine network prices and allowable revenue, the AER must account for the network businesses' need to provide efficient and appropriate levels of transmission or distribution services. A business's total revenue must be sufficient to ensure it can cover at least the efficient costs that it incurs in providing services.

82. In 2012-13 the AER completed seven network pricing decisions and commenced another five. The AER made decisions for electricity transmission in South Australia and the interconnector between South Australia and Victoria. In addition, the AER commenced price review processes for electricity transmission services in Victoria, and distribution in New South Wales and the Australian Capital Territory. The AER also made decisions for the gas transmission and distribution networks in Victoria and transmission in Queensland.

83. Overall, the AER approved total revenue allowances of more than \$5.1 billion. Network charges will be mostly flat going forward for the network businesses covered by the above decisions. In particular, conditions in global financial markets meant the cost of capital factored into revenue allowances in the current regulatory cycle is significantly lower than that applied in previous regulatory periods.

84. The AER's role in network regulation extends beyond making price determinations and approving access arrangements. The AER monitors compliance with its decisions and network businesses' obligations, approves annual tariffs, assesses businesses' compliance with incentive schemes, develops and amends guidelines as required, and makes other decisions that impact on network businesses' charges. Further, the ACT can remit regulatory decisions back to the AER if a network business successfully appeals a decision. The AER carries out some elements of its energy regulation functions on a regular, predictable basis (such as tariff approvals), while others are more ad hoc (such as cost pass throughs).

85. The AER is responsible for monitoring and enforcement for wholesale electricity and gas markets in all jurisdictions except Western Australia and the Northern Territory. The markets of interest are the National Electricity Market (NEM) in eastern and southern Australia, and the spot markets for gas in market hubs in Adelaide, Sydney, Brisbane and Victoria.

86. The AER aims to promote more efficient, competitive, transparent and secure wholesale energy markets. To ensure market participants comply with the relevant legislation and rules, the AER:

- takes effective, targeted and timely enforcement action when necessary;
- promotes best practice through our compliance publications and audits;
- reports on day-to-day market activities and pricing outcomes;
- detects and report on market irregularities and manipulation; and
- provides policy advice to address market inefficiencies and improve competition (for example, via submissions and rule change proposals).

87. The AER also undertakes a small number of strategic compliance projects each year. These projects involve identifying a compliance problem, inefficiency, harm or risk within the energy wholesale markets and working to solve it or reduce its severity. The AER designs tailored metrics for the projects, to assess how successfully the AER, and industry, rectify the identified problem.

88. In terms of monitoring the markets, the AER publishes reports covering weekly wholesale electricity activity in the NEM, weekly activity in the Victorian gas market and gas short term trading

market (STTM) hubs in Adelaide, Sydney and Brisbane, electricity prices events above \$5000 per megawatt hour, as well as significant price variations in gas markets, and special or systemic issues in the market.

89. On 1 July 2012 the AER became responsible for regulating the retail electricity market in the Australian Capital Territory and Tasmania, and the retail gas market in the Australian Capital Territory, when the National Energy Retail Law commenced in those jurisdictions. In February 2013 this role extended into South Australia. It covers a range of functions, including overseeing retail market entry and exit, - monitoring and enforcing compliance (by retailers and distributors) with obligations in the Retail Law, Rules and Regulations, reporting on the performance of the market and energy businesses (including information on energy affordability), approving customer hardship policies that energy retailers must implement for customers who are facing financial hardship, and maintaining an energy price comparator website ([www.energymadeeasy.gov.au](http://www.energymadeeasy.gov.au)).

90. The AER does not have a role in setting retail energy prices. The AER guides and informs energy consumers so they understand the range of energy offers available, make better choices about those offers, and are aware of their rights and responsibilities when dealing with their energy provider. The AER's Energy Made Easy website is a key vehicle for providing this information. It includes:

- a price comparator that shows all generally available offers available to consumers where the Retail Law has commenced;
- an electricity use benchmarking tool that allows households to compare their energy use with that of similar sized households in their area; and
- information on the energy market, energy efficiency and consumer protections.

### **3.7 Access to infrastructure facilities**

91. 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 under Part IIIA of the now 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 the State and Territory level.

#### **3.7.1 Clearing and settlement in the Australian cash equities market**

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

93. The CFR presented its recommendations to the Treasurer on 19 December 2012. On 11 February 2013, the Treasurer adopted the recommendations and announced that a decision on any licence application from an equities clearing facility seeking to compete in the Australian market be deferred for two years, with the Australian Stock Exchange required to develop, in consultation with

stakeholders, a code of practice on clearing and settlement. The operation of the code would be reviewed after two years, with consideration also given to alternative regulatory options.

94. In late July 2013 the Australian Stock Exchange released the code of practice.

### 3.7.2 *Telecommunications*

95. In December 2012, the NBN Co lodged a special access undertaking for assessment by the ACCC. This replaced a similar one lodged in September 2012, which was a substantially revised version of the first undertaking lodged by NBN Co in December 2011. After extensive consultation, including publication of a consultation paper and presentation of an industry forum, the ACCC released its draft decision on the undertaking in April 2013. The draft decision stated that the ACCC was not satisfied that the undertaking met the legal criteria for acceptance. In such circumstances, the CCA allows the ACCC to give the company concerned a notice specifying variations to the undertaking which allows it to lodge an amended version. On 4 July 2013, the ACCC released a draft notice to vary. The draft notice to vary specified a range of variations aimed at reducing the complexity of the undertaking and clarifying its operation, and creating certainty about when and how NBN Co must comply with its obligations in relation to access determinations and binding rules of conduct made by the ACCC. At the time of publishing, the ACCC was continuing to consult on the draft notice to vary with a view to issuing a formal notice to vary in the first half of the 2013-14 financial year.

96. Telstra voluntarily submitted an undertaking to the ACCC in accordance with the legislative framework for structural reform introduced in November 2010. In addition, the ACCC accepted Telstra's migration plan. Together, these will implement the then government's chosen approach to structural reform of the telecommunications industry. Telstra's undertaking includes commitments to safeguard competition until the NBN is built and Telstra has migrated its fixed-line customers to the new network. In 2012-13, the ACCC accepted a small number of modifications to Telstra's structural separation undertaking and migration plan. The ACCC also monitored Telstra's compliance with its obligations under those instruments, and Telstra's remediation of breaches that occurred. The ACCC continues to oversee the Telecommunications Access Regime under Part XIC of the CCA. Part XIC of the CCA is a key part of the regulatory framework supporting the development of a competitive telecommunications industry. Part XIC allows services to be 'declared.' Once declared, the service must be supplied, on request, to other providers for use in their own services. This arrangement guarantees access to telecommunications services in the interest of the provision of competitive services to end-users.

97. The ACCC can set terms and conditions for access to declared services through final access determinations. In 2012-13, the ACCC issued such determinations for the local bitstream access service and wholesale asymmetric digital subscriber line service.

### 3.7.3 *Rail*

98. The ACCC has a role in assessing and monitoring compliance with Part IIIA access undertakings submitted by rail access providers in relation to rail track infrastructure ('below-rail' services). To date, only one rail infrastructure provider, the Australian Rail Track Corporation (ARTC), has submitted access undertakings under Part IIIA of the CCA. There are currently two access undertakings—one for ARTC's Hunter Valley rail network and one for its national interstate rail network.

99. The Hunter Valley Access Undertaking, accepted by the ACCC on 29 June 2011, covers 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.

100. 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.

101. The Interstate Access Undertaking was accepted by the ACCC on 30 July 2008. The undertaking was accepted for a period of ten years and sets out the principles and processes under which ARTC is obliged to negotiate with businesses seeking to run trains on the 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.

102. In 2012-13 the ACCC continued to monitor and administer relevant provisions of the undertakings for ARTC's interstate and Hunter Valley rail networks.

#### 3.7.4 *Bulk wheat port terminal services*

103. 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. Those undertakings were provided by GrainCorp Operations Ltd, Australian Bulk Alliance (now a wholly owned subsidiary of Emerald Group Australia), Co-operative Bulk Handling Limited (CBH) and Viterro Operations Limited. 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, allowing competing wheat exporters access to the ports, in order to be permitted to export bulk wheat.

104. 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 also provide recourse to arbitration in the event that access negotiations between port operators and wheat exporters fail.

105. In addition to approving new undertakings, the ACCC can approve variations to existing undertakings and also monitors compliance with undertakings. The ACCC also has a role approving changes to the capacity allocation systems used by exporters to allocate port capacity amongst exporters.

106. In 2012-13, the ACCC made assessments of a number of proposals put forward by port operators in relation to their undertakings, including in relation to Viterro's introduction of an auction system for allocating port terminal capacity, GrainCorp's proposal to offer long term port access agreements, CBH's proposed changes to its auction system and a new undertaking put forward by Emerald.

107. Changes to the legislation made in December 2012 allow, from 1 October 2014, for a change in the method of regulation of bulk wheat export. If the Minister for Agriculture approves a mandatory code of conduct for port access, and the Code is prescribed under the CCA, 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 mandatory code of conduct and by general competition law.

During 2011-12, the ACCC worked with other government agencies, along with industry, to develop a mandatory code.

### **3.8      *Adjudication***

108.      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.

#### **3.8.1      *Authorisations***

109.      The ACCC issued 32 final determinations on authorisation matters during 2012-13. The arrangements covered by the authorisations spanned a wide range of sectors including aviation, retail, primary production, automotive and medical. A major authorisation decision considered by the ACCC during 2012-13 was on the Qantas/Emirates alliance:

#### **3.8.2      *Authorisation of the Qantas/Emirates alliance***

110.      On 6 September 2012 Qantas Airways Limited and Emirates announced their intention to coordinate their air passenger and cargo transport services, pursuant to a Master Coordination Agreement.

111.      As the agreement involves (among other things) competing airlines jointly setting fares and schedules, Qantas and Emirates applied for ACCC authorisation of the arrangement.

112.      Qantas and Emirates submitted that the proposed alliance would be pro-competitive and enhance efficiency. They considered that the alliance would offer better connections between Australia and New Zealand, Europe (including the United Kingdom) the Middle East and Northern Africa.

113.      In order to assess the likely impact of the alliance the ACCC consulted extensively with the public, including inviting submissions from interested parties and consultations with key market participants. On 20 December 2012 a draft determination proposing to grant conditional authorisation was issued. The ACCC then sought further submissions and held a pre-decision conference on 1 February 2013 so that interested parties could present their views to a Commissioner of the ACCC.

114.      In its final determination issued on 27 March 2013, the ACCC concluded that the likely public benefits of the alliance would outweigh the likely detriments, subject to the conditions. The ACCC considered that the proposed conduct would result in material, but not substantial, public benefits, including enhanced product and service offerings and improved efficiency. The ACCC noted that the alliance was likely to result in public detriment being its effect on competition in regions where Qantas and Emirates previously offered competing services. However, in most of these regions, the ACCC identified other competitive constraints which meant that these detriments were likely to be minimal.

115.      The ACCC was, however, particularly concerned about the impact of the alliance on air transport between Australia and New Zealand, where the parties competed on four major routes. The alliance would potentially result in higher airfares as it has the incentive and ability to reduce or limit growth in seats on these routes. To remedy this concern, the ACCC imposed a condition which requires Qantas and Emirates to maintain at least the same number of seats they operated in the year before the alliance commenced. This in turn is subject to a review to consider whether increases in the minimum required capacity are warranted.

116. Subject to the Australia/New Zealand route conditions, the ACCC granted authorisation to the Qantas-Emirates alliance for five years. This alliance is likely to benefit consumers by providing increased access to a large number of destinations and improved connectivity and better scheduling of flights.

### 3.8.3 *Notifications*

117. Approximately 410 exclusive dealing notification matters were considered by the ACCC in 2012-13. The vast majority of these were allowed to stand. Most of these notifications related to “third line forcing” conduct, which is a per se breach of the CCA.

118. During the year the ACT issued a decision following an application to review the ACCC’s revocation of an (non-third line forcing) exclusive dealing notification lodged by CBH.

### 3.8.4 *Cooperative Bulk Handling Limited – exclusive dealing notification*

119. On 19 April 2013 the ACT issued a decision affirming the ACCC’s notice revoking an exclusive dealing notification lodged by. The notified conduct involved CBH requiring Western Australian grain growers who use CBH’s ‘up-country’ grain storage facilities to also use CBH’s transport services to move grain to port for export.

120. The ACT was not satisfied that the notified conduct does not, and is not likely to, have the effect of substantially lessening competition or that the conduct is likely to result in a benefit to the public that outweighs the detriment to the public constituted by any lessening of competition. In other words, the ACT considered the arrangements were not likely to result in a net public benefit and therefore the ACCC’s notice revoking the notification should stand.

121. In particular, the ACT considered that by denying growers and marketers opportunities to make their own transport arrangements, the notified conduct substantially lessened competition in the market for grain transport services in Western Australia. It also considered that the notified conduct is not necessary to realise the benefits of the bundled storage and transport service offered by CBH, known as Grain Express.

122. The ACCC decided to revoke the notification in June 2011. CBH sought review of the ACCC’s decision by the ACT and the ACT hearing took place in March and May 2012.

123. While many collective bargaining arrangements are considered under the authorisation provisions, collective bargaining arrangements can also be notified where the arrangements meet certain criteria. During 2012-13 the ACCC assessed 21 collective bargaining arrangements under either the authorisation or notification processes. The arrangements mainly involved small businesses negotiating with a large business customer or supplier in areas ranging from primary production, newsagents, owner driver contractors and freelance playwrights.

## **4. Resources of competition authorities**

124. The ACCC administers the functions of the AER. The total average number of staff employed by the ACCC for the year ended 30 June 2013 was 798 (down from 807 in 2011-12). It should be noted that in addition to competition matters, the ACCC has consumer protection, product safety and national infrastructure services regulatory functions, which account for more than half of the ACCC’s total average staff. 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. The AER consists of three full-time members.

125. The ACCC's total funding for 2012-13 was \$151.1 million, comprising the original appropriation of \$150.2 million and other revenue of \$0.9 million. The ACCC's total appropriation in 2013-14 is \$155.7 million.

126. The NCC had an average staff of 11 over 2012-13. The NCC's total funding was \$2.8 million in 2012-13.

127. 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*    |         |
|------|---------|---------|---------|---------|
|      | 2013-14 | 2012-13 | 2013-14 | 2012-13 |
|      | \$m     | \$m     | \$m     | \$m     |
| A\$  | 155.7   | 150.2   | 2.7     | 2.7     |
| US\$ | 144.4   | 139.3   | 2.5     | 2.5     |

## 5. Studies and reports

### 5.1 *Petroleum industry*

128. In December 2012, the ACCC published its fifth report, Monitoring of the Australian petroleum industry — Report of the ACCC into the prices, costs and profits of unleaded petrol in Australia 2012.

### 5.2 *Telecommunications sector*

129. 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 2011-12. The report was published in February 2013. In addition, the ACCC also published the Telecommunications Competitive Safeguards for 2011-12 report which highlighted key trends in telecommunications industry competition.

130. The ACCC published quarterly reports on imputation testing and non-price terms and conditions relating to the accounting separation of Telstra (June quarter 2012, September quarter 2012, December quarter 2012, March quarter 2013). The ACCC also published bi-annual reports on current cost accounting reports (for the second half and full year of 2011-12 and first half of 2012-13) relating to the same regime.

131. In February 2013, the ACCC reported on Telstra's compliance with the retail price control arrangements from 1 July 2011 to 30 June 2012, as per its statutory reporting obligations. The ACCC considered Telstra adequately complied with these arrangements, based on its review of an independently audited compliance report that Telstra supplied. The amendments to the determination in June 2012 necessitated some minor changes to the ACCC methodology for determining price movements for relevant groups of products. The ACCC published the updated methodology in January 2013.

132. Under the *Telecommunications Act 1997*, the ACCC must monitor and report each financial year on breaches by Telstra of its structural separation undertaking. The inaugural report was tabled by the then

\* Foreign exchange rate used for conversion purposes: 1A\$ = US\$0.9275

Minister for Broadband, Communications and the Digital Economy and published by the ACCC on 21 June 2013. The report identifies a number of breaches of the undertaking during the period from between 6 March 2012 and 30 June 2012.

133. The ACCC published the list of points of interconnection to the NBN as required by the CCA in November 2012. The CCA also requires the ACCC to review the policies and procedures relating to identification of listed points of interconnection to the NBN. On 19 February 2013, the ACCC released a consultation paper inviting submissions to the review on the policies and procedures relating to identification of points of interconnection, the extent of interconnection, and the impacts of the ACCC approach to identify point of interconnection locations. The ACCC's report of the review findings was sent to the then Minister for Broadband, Communications and the Digital Economy in July 2013.

134. On 4 July 2012, the ACCC published a discussion paper to examine whether the facilities access code (the code) needs to be updated following changes to the *Telecommunications Act 1997* and the CCA. The code sets out arrangements for carriers wishing to install their equipment on or in facilities owned by other carriers. On 1 May 2013, the ACCC published a Draft Decision to vary the code to remove obsolete references, reflect legislative changes, and align the code with Telstra's structural separation undertaking to ensure there is no inconsistency in relation to how eligible facilities are regulated.

### **5.3 Water sector**

135. The ACCC provided its third annual water monitoring report to the then Minister. The report provides data for the 2011-12 year and covers water trading activity, regulated water charges, transformation arrangements and compliance with the water market rules and water charge rules in the Murray Darling Basin. The report highlights the success of the water market reform process and related regulatory initiatives while recognising the value of further reform.

### **5.4 Airports**

136. The ACCC released its Airport Monitoring Report 2011-12: Price, financial performance and quality of service monitoring in April 2013. During 2012-13, the ACCC conducted a review of quality of service monitoring and recommended changes to the information which will be reported, to apply from 2013-14.

### **5.5 Australia Post**

137. 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.)

138. On April 2013 the ACCC released the 2011-12 cross subsidy report on Australia Post, which concluded that, as in previous years, Australia Post's regulatory accounts did not show that it was cross-subsidising its competitive services with revenue from its monopoly services. Rather, the 2011-12 report found Australia Post's competitive services, as a whole, were a source of subsidy. While certain competitive services may have received a subsidy, the source of that subsidy appears to be Australia Post's other competitive services, rather than its monopoly services.

## **5.6      *Container stevedoring***

139. In November 2012, the ACCC issued its container stevedoring monitoring report, for the 2011-12 year. The report, the fourteenth produced by the ACCC, highlighted some of the positive industry developments since the waterfront reforms of the late 1990s.

## **5.7      *Energy***

140. In addition to its regulatory, monitoring, reporting and enforcement activities, the AER published the State of the Energy Market 2012, 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, weekly electricity and gas market analysis reports, in addition to reports into circumstances where the spot price of electricity exceeded \$5000/MWh in 2012-13.

## **5.8      *Productivity Commission inquiries, reports and publications***

### **5.8.1      *Australian Government commissioned projects***

141. 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](http://www.pc.gov.au). Completed inquiries included:

- Barriers to Effective Climate Change Adaptation;
- Default Superannuation Funds in Modern Awards;
- Compulsory Licensing of Patents; and
- Electricity Network Regulatory Framework.

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

- Regulatory Impact Analysis Processes; and
- Trans-Tasman Economic Regulations.

143. 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***

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

- Deep and Persistent Disadvantage in Australia;
- Forms of Work in Australia; and
- Trends in the Distribution of Income in Australia.

5.8.3 *Current work program*

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

- Access to Justice Arrangements;
- Mineral and Energy Resource Exploration;
- The National Access Regime;
- Imports of Processed Fruit Products; and
- Imports of Processed Tomato Products.

146. The PC was also undertaking commissioned research studies into:

- Geographic Labour Mobility;
- Major Project Development Assessment Processes; and
- Regulator Engagement with Small Business.

## APPENDIX A

### **1. The role of competition authorities in the formulation and implementation of other policies**

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

#### ***1.1 The Treasury***

2. 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.

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

#### ***1.2 The Australian Competition and Consumer Commission***

4. The ACCC was formed in 1995 (with the amalgamation of the Australian Trade Practices Commission (TPC) and the Prices Surveillance Authority) and is an independent statutory authority that enforces the CCA. The CCA prohibitions of anti-competitive conduct apply to virtually all businesses in Australia.

5. The ACCC also has responsibilities under the Water Act to advise the Water Minister on water charge and market rules and monitor compliance with, and enforce those rules, and to advise the Murray-Darling Basin Authority on water trading rules.

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

#### ***1.3 The Australian Energy Regulator***

7. The AER is the economic regulator of the electricity transmission and distribution networks and is responsible for monitoring the wholesale electricity market and enforcing the National Electricity Law and National Electricity Rules in the NEM. The AER is also responsible for the economic regulation of gas transmission and distribution networks and enforcing the National Gas Law and National Gas Rules in all jurisdictions except Western Australia. The AER also regulates retail markets (other than retail pricing) in all states that have adopted the National Energy Customer Framework.

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

#### ***1.4 The National Competition Council***

9. 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 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.

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

### **1.5 *The Productivity Commission***

11. 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.

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

### **1.6 *The Australian Competition Tribunal***

13. The ACT is an independent statutory tribunal whose primary role is to review decisions of the ACCC, the AER and responsible Ministers under Part IIIA of the CCA. 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.

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

### **1.7 *The Office of Best Practice Regulation***

15. The Office of Best Practice Regulation (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.

16. More information can be found at <http://www.finance.gov.au/obpr/about/>.

### **1.8 *COAG Reform Council***

17. When requested by COAG, the COAG Reform Council (CRC) reports to the Prime Minister on:

- the progress of various reforms;
- nationally-comparable performance information for all jurisdictions using agreed performance indicators;
- independent assessments on predetermined milestones and performance benchmarks tied to reward payments under the National Partnership Agreements; and
- the monitoring of the aggregate pace of reform under COAG's agreed reform agenda.

18. More information can be found at <http://www.coagreformcouncil.gov.au/>.

### **1.9 *NBN Co***

19. NBN Co was created in 2009 and is a wholly-owned Commonwealth company that is prescribed as a Government Business Enterprise. NBN Co has been tasked with delivering Australia's national wholesale-only, open access broadband network.

20. More information can be found at <http://www.nbnco.com.au/>.

**1.10 Infrastructure Australia**

21. Infrastructure Australia is a statutory body that advises governments, investors and infrastructure owners on a wide range of issues including:

- Australia's current and future infrastructure needs;
- mechanisms for financing infrastructure investments; and
- policy, pricing and regulation and their impacts on investment and on the efficiency of the delivery, operation and use of national infrastructure networks.

22. More information can be found at <http://www.infrastructureaustralia.gov.au/>.

**GLOSSARY**

ACCC Australian Competition and Consumer Commission

ACT Australian Competition Tribunal

AEMC Australian Energy Market Commission

AER Australian Energy Regulator

ARFF Aviation rescue and fire-fighting

ARTC Australian Rail Track Corporation

CCA Competition and Consumer Act 2010

CCP Consumer Challenge Panel

CFR Council of Financial Regulators

COAG Council of Australian Governments

CPA Competition Principles Agreement

DCC Dynamic currency conversion

ESCV Essential Services Commission of Victoria

LTPA Long-term pricing agreement

NBN National Broadband Network

NCC National Competition Council

NCP National Competition Policy

NECA National Electricity Code Administrator

NECF National Energy Customer Framework

NEM National Electricity Market

NWC National Water Commission

NWI National Water Initiative

PC Productivity Commission

SCER Standing Council on Energy and Resources