Australian
Competition &
Consumer
Commission

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

BACKGROUND BRIEFING

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Background Briefing

ROLE AND STRUCTURE OF THE ACCC AND AER

ROLE

Background

In 1974 Parliament enacted the *Trade Practices Act 1974* (TPA) which introduced new competition and consumer protection laws, and created the ACCC's predecessor, the Trade Practices Commission. Following reforms agreed to by the Council of Australian Governments (COAG), the ACCC was established on 6 November 1995 as an independent Commonwealth statutory authority. The ACCC not only administered the TPA but also had regulatory functions in relation to areas such as electricity and gas. In 1997 telecommunications markets were opened to full competition and the ACCC became responsible for the competition and economic regulation of communications markets.

Further reforms by COAG resulted in the establishment under the TPA of the Australian Energy Regulator (AER) on 1 July 2005. The AER is Australia's independent national energy market regulator. It is an independent statutory authority and a constituent part of the ACCC.

Purpose

The ACCC aims to bring greater competitiveness and fair trading to the Australian economy, working on the fundamental principle that this benefits consumers, business and the wider community.

It promotes compliance with the Commonwealth competition, fair trading and consumer protection laws. The ACCC also regulates markets where competition is less effective, for example, the communications market.

Powers and functions

The ACCC is the peak national agency for promoting competition, fair trading and consumer protection. Its consumer protection role complements that of the State and Territory consumer affairs agencies.

The ACCC's powers and functions are wide ranging allowing it to:

- investigate possible breaches of the competition and consumer protection provisions of the TPA
- provide advice on whether proposed mergers or acquisitions are likely to breach the TPA
- institute court proceedings against those suspected of breaching the TPA
- seek redress for consumers who have been harmed by breaches of the TPA
- authorise certain anti-competitive conduct when it is considered to be in the public benefit
- determine the terms and conditions for access to some nationally significant infrastructure services, and
- monitor or approve prices in markets where there is limited competition.

The AER regulates the wholesale electricity market and is responsible for the economic regulation of the electricity transmission and distribution networks in the national electricity market. The AER is also responsible for the economic regulation of gas transmission and distribution networks and enforcing the national gas law and national gas rules in all jurisdictions except Western Australia.

In addition to administering the TPA, the ACCC has responsibilities under other legislation, including the:

Airports Act 1996

Australian Postal Corporation Act 1989

Broadcasting Services Act 1992

Copyright Act 1968

Radiocommunications Act 1992

Telecommunications Act 1997

Telecommunications (Consumer Protection and Service Standards) Act 1999

Trade Marks Act 1995

Water Act 2007

Wheat Export Marketing Act 2008.

The AER has responsibilities under the:

National Electricity Law 2005

National Electricity Rules

National Gas Law 2008

National Gas Rules.

MINISTERS' ROLES

The ACCC comes within Treasury Portfolio with the designated Minister having responsibility for the ACCC and the legislation it administers. This includes most parts of the TPA (except Parts X, XIB and XIC).

Ministerial directions

Section 29

Under section 29 of the TPA, the Minister may give the ACCC directions connected with the performance of its functions or the exercise of its powers under certain parts of the TPA. Directions under section 29 may not be given in relation to:

- Part IIIA — access to services
- Part IV — restrictive trade practices
- Part VII — authorisations, notifications and clearances
- Part VIIA — prices surveillance

- Part X — international liner cargo shipping
- Part XIB or XIC — anti-competitive conduct and access regime in the telecommunications industry
- Section 65J, 65K, 65M or 65N (provisions relating to product safety conferences requested by suppliers) in relation to individual cases.

Other directions

Under sections 95ZE, 95ZF and 95ZH of the TPA, the Minister may, subject to conditions, give the ACCC directions relating to prices surveillance. The Minster may:

- Give the ACCC a direction to monitor prices, costs and profits relating to the supply of goods or services by persons in a specified industry, and to give the Minister reports on the monitoring as directed (section 95ZE).
- Give the ACCC a direction to monitor prices, costs and profits relating to the supply of goods or services by a specified person, and to give the Minister reports on the monitoring as directed (section 95ZF).
- Direct the ACCC to give special consideration to a specified matter or matters in exercising its powers and performing its functions under Part VIIA (prices surveillance) of the TPA (section 95ZH).

Recent examples of the use of these directions include the ACCC's 2008 inquiry into the competitiveness of retail prices for standard groceries (conducted in accordance with a direction under 95ZH), and the ACCC's formal petrol monitoring activities (undertaken in accordance with a direction under section 95ZE).

Product safety

The Minister has a large role and a comprehensive range of powers in relation to product safety. The Minister is involved in issuing warning notices, making mandatory safety and information standards and banning unsafe products. The Minister also has reserve mandatory recall powers. The ACCC advises the Minister on the exercise of those powers. For further detail, see p. 25.

Declarations

Under Part IIIA of the TPA, the designated Minister can 'declare' facilities that the National Competition Council believes to be essential. If the facility is owned or operated by a State or Territory Government, the designated Minister is the responsible State/Territory Minister. Otherwise the designated Minister is the responsible Commonwealth Minister.

Ministers' decisions under Part IIIA are subject to appeal to the Australian Competition Tribunal. Once a service is declared, parties are free to negotiate terms and conditions of access, including by arbitration.

Roles of other Commonwealth Ministers

The Minister with responsibility for transport can 'declare' airport services under the provisions of the *Airports Act 1996*. The Minister is also responsible for Part X of the TPA. The Minister receives a needs-basis briefing from the ACCC on its work affecting transport, particularly airports, ports and rail.

As a major communications industry regulator, the ACCC keeps the Minister with responsibility for communications informed of its activities. The Minister also has formal responsibility for Parts XIB and XIC of the TPA.

Under the *Water Act 2007*, the ACCC has a role in providing policy advice to the Minister with responsibility for water policy and programs, as well as other relevant government agencies. The ACCC is also responsible for monitoring compliance with and enforcing the water market rules and water charge rules. For further detail of the ACCC's role in water, see p.37.

STRUCTURE

The ACCC

The Chairman of the ACCC is Graeme Samuel AC. The ACCC also has two Deputy Chairs (Peter Kell and Michael Schaper) and four other full-time members (Sarah Court, Joseph Dimasi, Jill Walker and Ed Willett). Andrew Reeves, Chairman of the AER, is an ex officio member of the Commission. Chris Chapman, Chair of the Australian Communications and Media Authority, is an Associate Member of the ACCC. Details about their terms of appointment are below:

Terms of appointment—current members

Position	Name	Appointed/reappointed on
Chairman	Graeme Samuel	1 August 2008 (three year term)
Deputy chairs	Michael Schaper	30 May 2008 (five year term)
	Peter Kell	1 August 2008 (five year term)
Members	Sarah Court	1 May 2008 (five year term)
	Ed Willett	30 May 2008 (five year term)
	Joe Dimasi	28 November 2008 (five year term)
	Jill Walker	12 August 2009 (five year term)
Associate members	Christopher Chapman	12 December 2007 (until 27 February 2011)
	Andrew Reeves	19 July 2010 (three year term)

The AER

Under the TPA, the AER is to consist of a Commonwealth member (who must be a member of the ACCC) and two State/Territory members.

Under the current Australian Energy Market Agreement, the State/Territory members are recommended for appointment by agreement of at least five State and Territory Ministers who are members of the Ministerial Council on Energy (excluding Western Australia). A member of the AER is recommended for appointment as AER Chair by agreement of the Commonwealth Minister and a majority of the State and Territory Ministers who are members of the Ministerial Council on Energy (excluding Western Australia).

Andrew Reeves was appointed Chairman of the AER for a three year term from 19 July 2010. Prior to this appointment, Mr Reeves was a part-time State/Territory Member of the AER (appointed in 2008). Ed Willett was appointed the full-time Commonwealth member (this appointment to be served concurrently with his ACCC appointment).

Position	Name	Appointed/reappointed on
Chairman	Andrew Reeves	19 July 2010 (three year term)
Members	Edward Willett	17 July 2008 (to be served concurrently with ACCC appointment)
	(vacant)	

ACCC MEMBER PROFILES

Graeme Samuel AC took up the position of Chairman of the ACCC in July 2003. Until then he was President of the National Competition Council, Chairman of the Melbourne & Olympic Parks Trust, a Commissioner of the Australian Football League, a member of the Board of the Docklands Authority, and a Director of Thakral Holdings Limited. He relinquished all these offices to assume his position with the ACCC.

Mr Samuel is also an Associate Member of the Australian Communications and Media Authority.

He is a past President of the Australian Chamber of Commerce and Industry, a past Chairman of Playbox Theatre Company and Opera Australia, a former Trustee of the Melbourne Cricket Ground Trust and former Chairman of the Inner & Eastern Health Care Network.

Until the early 1990s he pursued a professional career in law and investment banking, from which he retired to assume a number of roles in public service and company directorships.

Mr Samuel holds a Bachelor of Laws (Melbourne) and Master of Laws (Monash). In 1998 Mr Samuel was appointed an Officer in the General Division of the Order of Australia. In 2010 Mr Samuel was elevated to a Companion in the General Division of the Order of Australia.

Peter Kell was appointed a deputy chair of the ACCC for a five-year term commencing August 2008. Mr Kell chairs the Adjudication Committee and is a member of the Enforcement Committee. He serves on the Consumer Policy Committee of the Organisation for Economic Cooperation and Development and the International Consumer Protection and Enforcement Network. He is also a member of the Advisory Board of the federal government's Financial Literacy Foundation.

Before joining the ACCC, Mr Kell was chief executive of CHOICE (the Australian Consumers Association) and a board member of the global consumer organisation Consumers International. He has extensive experience in advancing consumer and market reform issues in Australia and internationally.

Mr Kell previously worked at the Australian Securities and Investments Commission (ASIC), which he joined in 1998 when it took on a significantly expanded role in consumer and investor protection in financial services. He served as ASIC's

executive director of consumer protection and as its New South Wales regional commissioner until 2004.

Earlier in his career Mr Kell was a policy adviser in the federal Department of Finance.

Mr Kell has a BA with Honours in Economics from the University of Sydney.

Michael Schaper was appointed a deputy chair of the ACCC on 30 May 2008 for five years.

Dr Schaper brings extensive experience in the area of small business through his previous roles as the Australian Capital Territory Small Business Commissioner, Dean of Murdoch University Business School in Western Australia and as President of the Small Enterprise Association of Australia and New Zealand. He has also been a member of the board of directors of the International Council for Small Business, served as head of the School of Business at Bond University and held the foundation professorial chair in entrepreneurship and small business at the University of Newcastle. Before this, he was employed as a senior lecturer at Curtin University, responsible for the university's entrepreneurship degree programs.

Between 2001 and 2003 Dr Schaper held several posts as visiting professor at the Ecole de Management in Lyon, France and at the University of St Gallen, Switzerland. In Australia he has served as an adjunct professor at both Curtin University and the University of Canberra.

In addition to his extensive academic career, Dr Schaper has worked as a professional small business advisor and as the owner of a number of new business start-ups.

The author or co-author of eight business management books, he has been a regular columnist in a number of national magazines, newspapers and journals on business issues. He has also worked as a policy advisor to government at both state and federal levels.

Dr Schaper is a member of the ACCC's enforcement and adjudication committees.

He holds a PhD and a Master of Commerce degree from Curtin University, as well as a Bachelor of Arts from the University of Western Australia.

Sarah Court was appointed a Commissioner of the ACCC in May 2008 for five years. She brings with her more than 10 years experience as a senior government lawyer specialising in federal litigation, including administrative law, employment law, workers compensation, freedom of information and trade practices enforcement litigation.

Ms Court oversees the ACCC's enforcement and litigation program; she is also chair of the Commission's Enforcement Committee.

Before joining the ACCC Ms Court was employed as a senior executive lawyer and director at the Australian Government Solicitor. Ms Court's roles at AGS included director of the Adelaide and Darwin AGS offices, director of the National Tax Practice and National Client Service Manager for the ACCC. Ms Court also practised extensively in trade practices law and litigation and has considerable experience conducting consumer protection enforcement litigation for the ACCC. This included advising on investigations, evidence-gathering, conducting formal interviews, working with counsel and developing case management and investigation strategies.

Ms Court has particular expertise in unconscionable conduct matters.

Ms Court holds a Bachelor of Arts (Jurisprudence) and Bachelor of Law from the University of Adelaide as well as a Graduate Diploma in Legal Practice from the ANU. She was admitted to legal practice (in the Australian Capital Territory) in 1996.

Joe Dimasi was appointed a commissioner of the ACCC in November 2008 for five years. Before his appointment, Joe Dimasi was the Executive General Manager of the Regulatory Affairs Division of the ACCC, a position he had occupied since 1996. Before that, he was an assistant commissioner of the Industry Commission (now the Productivity Commission).

Mr Dimasi has been a senior economist in a number of organisations, including the Victorian departments of the Treasury, Premier and Cabinet, and Business.

He has Bachelor and Masters Degrees in Economics.

Dr Walker was appointed in August 2009 for a five year term, and brings extensive experience in the fields of trade practices and antitrust economics. Before joining the ACCC, she was a member of the Australian Competition Tribunal and worked as an economic consultant for LECG Ltd. Dr Walker has also worked for the Network Economics Consulting Group and CRA International. Dr Walker has also been a member of the South Australian Government's panel of expert assessors assisting the District Court in hearing appeals under the *Essential Services Commission Act 2002* and the *Gas Pipelines Access (South Australia) Act 1997*.

Dr Walker has previously been employed as an economic adviser by the ACCC and its predecessors, the Prices Surveillance Authority and the Trade Practices Commission. During this time Dr Walker provided advice on significant cases, investigations, and authorisations.

Dr Walker holds a Bachelor of Arts and a PhD in Land Economy from the University of Cambridge. She also holds a Master's degree in Economics from the University of Massachusetts.

Edward Willett was re-appointed in May 2008 for a five-year term. Before his appointment to the ACCC, he was the inaugural executive director of the National Competition Council for seven years.

Before that he worked as an assistant commissioner with the Industry Commission and helped develop the federal Department of Industry, Science and Technology's role in business law and regulation, spent three years as deputy head of the Commonwealth Office of Regulation Review and was involved in other Industry Commission inquiry work and research.

He also spent three years with the New Zealand Ministry of External Relations and Trade as an adviser on international economics and trade and eight years as an economist with the Department of Defence. Mr Willett has degrees in law and economics and a postgraduate diploma in international law.

AER MEMBER PROFILES

Andrew Reeves was appointed as the part-time State/Territory Member of the AER for a five year term from 17 July 2008, and as Chair for three years from 19 July 2010. Andrew is also the Commissioner of the Northern Territory Utilities Commission. Prior to his AER appointment, Andrew was Commissioner of the Tasmanian Government Prices Oversight Commission and Regulator of the

Tasmanian electricity supply industry, responsible for technical and economic regulation including performance standards and prices for distribution services and retail tariffs.

Other responsibilities included the regulation of the Tasmanian natural gas industry and investigations of the pricing policies of water authorities, the public transport operator and the provider of motor vehicle accident personal injury insurance. The Commission also carried out occasional investigations of energy prices and analysis of proposed energy sector reforms at the request of Government.

Until 2005, Andrew Reeves was an Associate Commissioner in the Energy Division of the ACCC. His first professional discipline was engineering, with post graduate qualifications in economics.

Edward Willett – see ACCC member profiles. Mr Willett is the Commonwealth member of the AER, an appointment he serves concurrently with that of member of the ACCC. Part IIIAA of the TPA provides that one of the members of the AER must be a member of the ACCC.

DECISION MAKING STRUCTURE – ACCC AND AER

The ACCC's decisions are made at meetings of the Commission members held once a week and otherwise as necessary. The ACCC held 57 formal meetings during 2009–10 and considered 285 formal papers dealing with matters under investigation, litigation, mergers, access matters, adjudication decisions, submissions to inquiries, and compliance and education strategies. It also received recommendations from its committees.

The AER's decisions are made at meetings of its members, held once a fortnight and otherwise as necessary. The AER held 25 formal meetings during 2009-10.

The ACCC has five subject matter committees to streamline decision-making. These committees are represented in the following table.

ACCC committee system

Adjudication committee	Peter Kell (chair), Michael Schaper, Ed Willett, Sarah Court and Jill Walker – oversees and considers adjudication issues; meets weekly.
Communications Committee	Ed Willet (chair), Graeme Samuel, Joe Dimasi, and Peter Kell – oversees telecommunications issues; meets fortnightly.
Enforcement Committee –	Sarah Court (chair), Graeme Samuel, Peter Kell, Michael Schaper, Jill Walker. Oversees enforcement program and refers recommendations to the full commission for decision; meets weekly.
Mergers Review Committee	Jill Walker (chair), Graeme Samuel, Sarah Court, and Joe Dimasi – considers most merger matters and reports to the full commission; meets weekly.
Regulated Access and Price Monitoring Committee	Joe Dimasi (chair), Michael Schaper and Ed Willett – oversees access and price monitoring issues; meets fortnightly.

CORPORATE PLAN AND PRIORITIES

The ACCC has identified the following key focus areas in its 2010–11 corporate plan.

Promote vigorous, lawful competition and informed markets

- detect, pursue and stop anti-competitive conduct—including cartels—and misuse of market power
- promptly deliver authorisation and notification decisions, particularly on small business collective bargaining arrangements
- assess mergers promptly and efficiently across all industries, taking effective action to address substantial competition concerns arising from mergers.

Encourage fair trading protection of consumers and product safety

- identify and focus effectively on national and cross-border (including international) consumer protection issues
- pursue and achieve appropriate remedies for false and deceptive conduct, particularly conduct resulting in widespread detriment
- ensure that trading conditions between big and small firms are fair
- promote product safety through identification and regulation of emerging hazards, active engagement in recalls, and enforcement of standards and bans.

Regulate national infrastructure services and other markets where there is limited competition

- support and protect competition in markets that rely on networks with natural monopoly characteristics
- provide consistent and independent regulation of the energy sector, encouraging competition within and between the gas and electricity markets to benefit industry and consumers
- regulate and advise on industries where market structures are changing, including where the market structure impedes effective competition (for example water, transport and communications)
- monitor prices to assess and advise on the effect of market conditions (including deregulation) on the price levels of specified goods and services, including groceries, petrol, and a range of airport prices including car parking.

RESOURCES

The 2010–11 Budget allocated to the ACCC a total operating budget for 2010–11 of $140.8M, a decrease of $2.05M over the estimated actual income ($142.9M) in 2009–10. This decrease is partially due to a change in the funding framework for depreciation and amortisation expenses.

As part of the 2010–11 Budget, the ACCC has received additional appropriations for specific measures, including for the:

- new functions and responsibilities relating to the regulatory framework of NBNCo
- generation of compliance with the new unfair contract term provisions of the Australian Consumer Law, and for the ACCC to undertake consultation with industry and consumer stakeholders on the structure and content of the unfair contract term guidance
- continuation of functions relating to the formal monitoring of petrol prices.

These measures are outlined in the table below.

Measure	2009-10 $'000	2010-11 $'000	2011-12 $'000	2012-13 $'000	2013-14 $'000
NBN Co Ltd (Regulatory Framework)	3,367	5,832	5,851	4,483	4,513
Implementation of Unfair Contract Terms Provisions of the Australian Consumer Law	596	1,170	1,163	1,171	1,179
Petrol Commissioner and formal monitoring of petrol prices - continuation	-	2,070	2,082	-	-

STAFFING

The number of staff at the ACCC increased in 2009–10 in response to an increase in the functions and responsibilities of the ACCC. The ACCC's budgeted staff level for 2009–10 was 775.8 full-time equivalents. As at 30 June 2010, the total number of full-time equivalent staff employed, including seven full-time public office-holders (ACCC members) and one part-time office holder in the AER, was 774.01 (an increase of 45.11 on 2008–09).

The total actual number of staff employed (including ACCC and AER members, part-time employees and employees absent on leave and secondments) at 30 June 2010 was 813 (797 in June 2009). There were 73 commencements and 76 cessations during the year.

The ACCC's non SES staff are employed under a Certified Agreement made under section 327 of the *Workplace Relations Act 1996*. The nominal expiry date of the current agreement is 30 November 2010.

The employment arrangements of SES employees are set out in individual determinations made under section 24 of the *Public Service Act 1999*. No employee is covered by a common law contract or an Australian Workplace Agreement.

Commission members' terms and conditions are set by the Governor General and the Remuneration Tribunal.

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CONTACTS

ACCC Infocentre (for all business and consumer inquiries)

Infoline:	1300 302 502
Email:	infocentre@accc.gov.au
Small business helpline	1300 302 021
SCAMwatch complaint line	1300 795 995

Websites

ACCC	www.accc.gov.au
AER	www.aer.gov.au
SCAMwatch	www.scamwatch.gov.au
Product Safety Australia	www.productsafety.gov.au
Product Safety Recalls Australia	www.recalls.gov.au

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Executive Officer
Lisa Anne Ayres | (03) 9290 1980

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New South Wales – Geoff Williams (02) 9230 9131
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Product Safety Hazard Response Branch
Ruth Mackay | General Manager | (02) 6243 4962

Product Safety Compliance Operations Branch
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Regulatory Affairs Division

Mark Pearson | Executive General Manager | (02) 6243 1276

AER

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Markets Branch

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Network Regulation North Branch

Warwick Anderson | General Manager | (02) 6243 1240

Network Regulation South Branch

Chris Pattas | General Manager | (03) 9290 1845

Communications Group

Michael Cosgrave | Group General Manager | (03) 9290 1914

Access Operations and Pricing Branch

Robert Wright | General Manager | (03) 9290 1864

Convergence and Mobility Branch

Rob Nicholls | General Manager | (02) 9230 3854

NBN Engagement and Industry Compliance Branch

Sean Riordan | General Manager | (03) 9290 1889

Fuel Group

Matthew Schroder | Acting General Manager | (03) 9290 6924

Regulatory Development Branch

Anne Plympton | General Manager | (03) 9290 1845

Transport and General Prices Oversight Branch

Anthony Wing | General Manager | (03) 9290 1804

Water Branch

Sebastian Roberts | General Manager | (03) 9290 1435

Mergers and Acquisitions Group

Tim Grimwade | Executive General Manager | (02) 6243 1226

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Coordination and Strategy Branch

Suzie Copley | General Manager | (02) 9230 9112

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Elissa Keen | Assistant Deputy General Counsel | (02) 6243 1072

Offices

The ACCC maintains nine offices, one in each State and Territory capital and an additional office in Townsville.

City	Address	Contact details
ACT (National Office)	23 Marcus Clarke Street CANBERRA ACT 2601 PO Box 3131, CANBERRA ACT 2601	Tel: (02) 6243 1111 Fax: (02) 6243 1199
New South Wales	Level 7, 123 Pitt Street SYDNEY NSW 2000 GPO Box 3648, SYDNEY NSW 1044	Tel: (02) 9230 9133 Fax: (02) 9223 1092
Victoria	Level 35, The Tower 360 Elizabeth Street MELBOURNE VIC 3000 GPO Box 520, MELBOURNE VIC 3001	Tel: (03) 9290 1800 Fax: (03) 9663 3699
South Australia	Level 2. 19 Grenfell Street ADELAIDE SA 5000 GPO Box 922, ADELAIDE SA 5001	Tel: (08) 8213 3444 Fax: (08) 8410 4155
Queensland	Level 24, 400 George Street BRISBANE QLD 4000 PO Box 12241 George Street Post Shop BRISBANE QLD 4003	Tel: (07) 3835 4666 Fax: (07) 3835 4653
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Western Australia	3rd floor, East Point Plaza 233 Adelaide Terrace PERTH WA 6000 PO Box 6381, EAST PERTH WA 6892	Tel: (08) 9325 0600 Fax: (08) 9325 5976
Tasmania	3rd floor, AMP Building 86 Collins St HOBART TAS 7000 GPO Box 1210, HOBART TAS 7001	Tel: (03) 6215 9333 Fax: (03) 6234 7796
Northern Territory	Level 8, National Mutual Centre 9–11 Cavenagh Street DARWIN NT 0800 GPO Box 3056, DARWIN NT 0801	Tel: (08) 8946 9666 Fax: (08) 8946 9600

ENFORCEMENT AND COMPLIANCE

The ACCC is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcement of the TPA and the associated State/Territory competition codes.

The ACCC focuses its key enforcement and compliance work on promoting competition and fair trading. During 2009–10 the ACCC recorded in its national database nearly 83,000 complaints and inquiries, with over 3,000 matters escalated for assessment. In-depth investigations were conduced into 211 matters during the financial year. Court proceedings commenced in 31 matters across competition, fair trading and consumer protection, while 56 matters were settled by the ACCC accepting court enforceable undertakings under section 87B of the TPA (excluding remedy undertakings related to mergers and acquisitions). These undertakings are placed on the ACCC public register.

The ACCC maintains a strong litigation workload. As noted above, during 2009–10 the ACCC instituted 31 new cases matters across competition, fair trading and consumer protection. In the same period 30 cases were finalised—these consisted of both cases instituted during 2009–10 and cases instituted earlier. At the end of the 2009–10 financial year, 29 enforcement cases remained before the courts.

THE SCOPE OF OUR RESPONSIBILITIES

Anti-competitive conduct

Part IV of the TPA, the competition provisions cover:

- cartels, including price fixing, bid rigging and market sharing
- primary boycotts
- secondary boycotts
- misuse of market power
- horizontal and vertical agreements that substantially lessen competition
- resale price maintenance.

Part IV also applies to mergers and acquisitions that may substantially lessen competition.

The Competition Code Agreement extends the application of Part IV to all sectors of the economy.

Consumer protection

The consumer protection provisions of the TPA apply to corporations, or to unincorporated entities where other constitutional heads of power, such as the post and telecommunications power apply. However, mirror consumer protection legislation in each state and territory that is administered in those jurisdictions covers unincorporated entities generally, including sole traders.

The ACCC's consumer protection roles are provided for in:

- Part IVA — consumer unconscionable conduct
- Part IVB — legislative framework for industry codes of conduct
- Part V — including misleading and deceptive conduct, product safety and product information, country of origin claims and conditions and warranties in consumer transactions
- Part VA — liability of manufacturers and importers for defective goods
- Part VC — largely mirrors Part V but provides criminal sanctions for conduct.

The consumer protection provisions of the TPA apply to all sectors of the economy, with the exception of the financial services sector. Provisions equivalent to those in Parts IVA and V (and VC) of the TPA have been included in the *Australian Securities and Investments Commission Act 2001* (the ASIC Act).

Small business

The TPA contains provisions that address issues that are of particular relevance to small business.

- Part IVA — which deals with unconscionable conduct in business transactions
- Part IVB — which provides a legislative framework for industry codes of conduct (there are currently three mandatory codes of conduct: the Franchising Code, the Horticulture Code and the Oil Code).

The consumer protection and restrictive trade practices provisions create rights and responsibilities for small businesses.

STRATEGIES FOR ACHIEVING COMPLIANCE

The ACCC uses three main strategies to achieve compliance:

- enforcement of the law
- education about rights and responsibilities under the TPA, providing information and encouraging voluntary compliance
- working with other agencies to implement these strategies, particularly where their action can assist in meeting the ACCC's goals.

1. Enforcement

Experience shows that enforcement is the mechanism that most effectively drives compliance with the TPA. In enforcing the provisions of the TPA, the ACCC has as its primary goals:

- stop the unlawful conduct
- deter future offending conduct
- undo the harm caused by the contravening conduct (for example by corrective advertising or restitution for consumers and businesses adversely affected)
- encourage the effective use of compliance systems

- where warranted, punish the wrongdoer by the imposition of penalties or fines.

The ACCC's enforcement strategy is implemented through:

- strategic case selection focusing on priority areas
- professional and efficient investigation and assessment of potential breaches
- the use of measured enforcement response to relevant conduct;
- strategic assessment of priority areas
- liaison and cooperation with other relevant law enforcement agencies.

Factors relevant to the determination of priority areas include:

- conduct of significant public interest or concern
- conduct resulting in a significant consumer detriment
- conduct demonstrating a blatant disregard for the law
- conduct involving national or international issues
- conduct detrimentally affecting disadvantaged or vulnerable consumer groups
- conduct involving a significant new or emerging market issue
- conduct that is industry-wide or is likely to become widespread if the ACCC does not intervene
- whether ACCC action is likely to have a worthwhile educative or deterrent effect, and/or
- the person, business or industry has a history of previous contraventions of trade practices law.

2. Encouraging voluntary compliance and the provision of education

The ACCC believes that the preventative strategy of educating business and consumers about their rights and responsibilities in relation to the TPA is preferable to enforcement action after the conduct has occurred.

Compliance is encouraged through a variety of mechanisms:

- promoting understanding of how to achieve internal compliance
- encouraging appropriate self-regulatory responses to systemic problems (codes of conduct)
- emphasising the commercial value of compliance
- development of practical guidance on how to comply with the TPA
- liaison and cooperation with relevant industry and consumer stakeholders
- effective and extensive information and education campaigns to improve consumers' understanding of their rights and to educate business about their

obligations under the law. Such information also assists consumers in seeking their own redress from businesses as provided for in the TPA; and

- enforcement action when necessary.

Other mechanisms used by the ACCC to encourage compliance include targeted use of the media, especially in enforcement matters, and contributing to reviews of self-regulatory mechanisms.

3. Strategic prioritisation and working with other agencies

The ACCC is strategic in its response to new market issues and inquiries that arise from consumers and business. It is neither efficient nor appropriate for the ACCC to exhaustively pursue all complaints.

The ACCC is increasingly giving priority to matters of national significance that adversely affect large numbers of people (State and Territory agencies concentrate on local issues) and to matters which are international and cross national borders.

The ACCC recognises that some consumer protection issues may be more effectively resolved through changes to market structures or amendments to other laws.

Current compliance and enforcement priorities

Restrictive trade practices	• Hard core cartels, including international cartels, in the context of the immunity policy • Support and protect competition in recently deregulated markets
Consumer protection	• Misleading and deceptive conduct • Scams that result in significant consumer detriment • Advertising in the telecommunications industry • Green claims The focus will be mostly on national and interstate issues and emerging markets and new technology. However the ACCC will also act at local or regional levels when there are wider public interest implications.
Small business, rural & regional services	• Unconscionable conduct in business transactions • Vertical relationships between producers and processors, wholesalers and retailers
Mandatory Industry Codes of Conduct	Ensuring compliance with mandatory prescribed industry codes of conduct (ie. Franchising Code, Horticulture Code and Oilcode)

Other agencies and private action

The ACCC cannot pursue all matters referred to it and many do not fall under the TPA or are better handled by other agencies.

Responsibility for consumer protection in Australia is shared by a range of Commonwealth agencies (for example the Australian Securities and Investments Commission, Food Standards Australia New Zealand and State and Territory agencies. High level and operational liaison occurs between these agencies and the

ACCC, including pursuant to memoranda of understanding. State and Territory consumer protection agencies all administer their own fair-trading laws. These laws have consumer protection provisions that mirror the TPA.

Consumers and business can also use the TPA to seek private action through the courts as well as a range of industry and alternative dispute resolution mechanisms.

SPECIFIC WORK PROGRAMS

International

The ACCC is progressively facing more challenges related to cross-border and complex enforcement issues. These include international cartels, mergers involving multinational corporations and international consumer fraud particularly involving the internet. Accordingly, the ACCC is liaising to a greater degree with its international counterparts through the sharing of information and experiences and in some instances formally cooperating on enforcement action. The ACCC facilitates its international work through a number of initiatives, which are outlined below.

Formal cooperation arrangements

The ACCC has formalised its relations with a number of its counterpart agencies in the US, UK, EC, Canada, Korea, New Zealand, Papua New Guinea and Taiwan. These agreements foster and facilitate information sharing and enforcement and regulatory cooperation. Where appropriate, the ACCC will seek to enter into similar arrangements in the future.

Involvement in international fora

The ACCC participates in a range of multilateral government fora which discuss competition and consumer protection issues. These include:

- Organisation for Economic Cooperation and Development (OECD) – through the Competition Committee and Committee on Consumer Policy; and
- Asia Pacific Economic Cooperation (APEC) – through the Group on Competition Policy and Deregulation and the E-Commerce Steering Group.

The ACCC is also a member of two enforcement agency networks:

- International Competition Network (ICN) – The ICN is a project-oriented, consensus-based, informal network of competition enforcement authorities that focuses on addressing practical competition law enforcement issues and improving cross-border cooperation.
- International Consumer Protection and Enforcement Network (ICPEN) – ICPEN is a network of consumer protection agencies that seeks to improve international cooperation and share information about cross-border commercial activities that may affect consumer interests. The ACCC held the Presidency of ICPEN between August 2009 and August 2010. One of ICPEN's main activities has been to conduct international internet sweeps, many of which have been coordinated by the ACCC.

Providing technical assistance to competition authorities in other countries

Enhancing the competence of competition authorities in developing countries increases the likelihood that these agencies can cooperate effectively with the ACCC

on international investigations. Moreover, strong competition authorities play a key role in supporting economic growth (and therefore regional stability) and so ACCC support to these agencies is in Australia's broader national interest.

Accordingly, the ACCC has an active technical assistance program under which it makes available its resources and expertise to countries with less developed regimes. These activities include hosting regulatory officials on study visits and also participating in and delivering workshops and seminars in Australia and overseas on relevant issues. Funding for substantive technical assistance derives from the Australian Government's overseas aid program, managed through AusAID.

Infocentre

The ACCC's Infocentre is a national telephone and email information and complaints centre for business and consumers. The Infocentre responded to 105 744 contacts in 2009–10.

Infocentre staff are the initial point of contact between the public and the ACCC. They provide basic information and answer inquiries about the rights and obligations of consumers and business and about the role and functions of the ACCC. More complex inquiries are escalated to more experienced staff. Substantive complaints are either directly escalated for investigation by regional office staff or flagged for review. Infocentre staff also accept and log complaints about possible breaches of the TPA to, among other things, allow for future analysis of patterns of conduct.

Law Reform and Research

The ACCC works closely with Treasury's Competition and Consumer Policy Division, and with other departments when necessary, in relation to proposed amendments to the TPA. The ACCC also plays an important role in contributing to reviews by government agencies and other bodies that are relevant to its role as the national competition and consumer protection agency. For example, during 2009–10 the ACCC provided a submission and supplementary submission to the Productivity Commission's inquiry into Australia's anti-dumping and countervailing system.

The ACCC's Information, Research and Analysis Branch coordinates these activities. The branch also plays an important policy role, providing a valuable research capacity to the ACCC to ensure it maintains an informed position in relation to significant market developments affecting its national role.

The ACCC is an active participant in the MCCA (Ministerial Council of Consumer Affairs) process and its subsidiary activities:

- Standing Committee of Officials of Consumer Affairs (SCOCA)
- Fair Trading Operations Advisory Committee (FTOAC)
- Consumer Products Advisory Committee (CPAC), and
- National Education and Information Advisory Taskforce.

The ACCC provides assistance to parliamentary inquiries and government agencies to ensure that policies and processes are developed that are consistent with competition, fair trading and consumer protection laws.

These processes involve working with ACMA, ASIC, Treasury and State and Territory Fair Trading regulators, Ombudsman schemes as well as counterparts from New Zealand on consumer protection regulation. Participation in such cross-

government fora assists in developing a coordinated approach with other domestic regulators in relation to consumer protection and competition matters.

Product Safety

The ACCC administers and enforces a range of product safety provisions under the TPA that aim to protect consumers from unsafe products. Part V Division 1A of the TPA provides the Minister responsible for consumer affairs with a comprehensive range of powers of market intervention, including a requirement for the notification of voluntary recalls, warning notices, mandatory safety and information standards, product bans and reserve mandatory recall powers. The ACCC advises the Minister on the exercise of those powers.

Minister's role

Under the TPA, the Minister is involved in the following aspects of product safety:

- *Notifications of Voluntary Recalls:* requires corporations which undertake voluntary recalls on the grounds of safety to notify the Minister of the recall within two days of taking recall action. The supplier must also notify all overseas buyers and lodge a copy of the notification with the Minister within ten days. ACCC staff enter recalls on the Product Recalls Australia (PRA) at www.recalls.gov.au (section 65R).

- *Warning Notices:* The Minister can issue public warning notices stating that safety aspects of particular goods are under investigation and/or warning of possible risks associated with their use (section 65B).

- *Mandatory consumer product safety and information standards for products:* are made either by regulation or declared by the Minister through the Federal Register of Legislative Instruments (FRLI). Compliance with standards is enforced by the ACCC.

- *Product bans:* The Minister may ban the supply of unsafe goods for an initial period of 18 months, after which time the banning order may be allowed to expire or can be made permanent.

- *Compulsory Product Recall Orders:* The Minister may order suppliers to recall goods in a specified manner if "...it appears to the Minister that the goods are goods of kind which will or may cause injury to any person", or goods which have been supplied in breach of existing consumer product safety standards or bans, AND "...it appears to the Minister that the supplier has not taken satisfactory action to prevent the goods causing injury to any person".

- *Power to Obtain Information, Documents and Evidence:* The Minister and authorised officers have the power to obtain information, documentation and other evidence in relation to the administration of the product safety and product information provisions of the TPA (section 65Q).

Product safety and the Australian Consumer Law

In 2006 the Productivity Commission handed down a number of recommendations for streamlining the product safety system. Most of the resulting reform initiatives have now been completed. Under the Australian Consumer Law, from 1 January 2011 Australia will have a streamlined set of product safety regulations. In order to prepare for this, the ACCC worked with the State and Territory consumer product safety agencies to rationalise 177 different standards and bans into a single set of

regulations. As a result there are now 57 Commonwealth product safety regulations that will form the basis of the new national framework commencing on 1 January 2011. The ACCC and State and Territory regulators will all enforce this single law. For further background on the Australian Consumer Law, please refer to p. 37.

Industry Codes of Conduct

The primary role of the ACCC in relation to industry codes of conduct is to:

- promote compliance with prescribed industry codes of conduct under the TPA
- assist industry to develop and administer their own effective non-prescribed voluntary industry codes of conduct.

1. Prescribed industry codes of conduct

In relation to mandatory industry codes of conduct such as the Franchising Code, Horticulture Code and Oilcode, the ACCC:

- assists and advises the Australian Government during the development and review of prescribed industry codes of conduct
- develops and distributes guidance material on the operation of the code and works with industry to educate stakeholders
- monitors compliance with prescribed industry codes of conduct and works with industry to address issues of non-compliance, and
- engages in enforcement action, where necessary, upon a failure by industry to comply with a prescribed industry code of conduct.

2. Voluntary industry codes of conduct

In relation to voluntary industry codes of conduct the ACCC:

- assists industry to identify and analyse systemic industry specific issues and provide guidance to stakeholders in the development and review of voluntary codes of conduct to ensure that these codes are relevant, effective and efficient for the industry; and
- promotes awareness and understanding of the aims, scope and provisions of voluntary industry codes of conduct among industry, consumers and other stakeholders.

Scams

The ACCC uses a multifaceted approach to disrupt scams, including through education, intelligence and, where appropriate, enforcement. In particular, the ACCC participates in campaigns such as Fraud Awareness Week, and maintains strong liaison with its international counterpart agencies.

The ACCC maintains the SCAMwatch website (www.scamwatch.gov.au) and issues online 'SCAMwatch radar' alerts in response to intelligence from a number of sources, including investigations, complaints data and liaison with other agencies. The SCAMwatch website now attracts around 36 000 visitors per month. In 2009–10 nearly 15 000 emails were received via the SCAMwatch "report a scam" online complaint form.

E-commerce

As an expanding area of commercial activity, the ACCC has assigned a priority to identifying and responding to consumer and competition concerns in e-commerce and related industries such as mobile commerce (m-commerce). Issues include:

- identifying trade practices issues in e-commerce and related industries
- producing information materials for business and consumers
- coordinating international 'sweeps' of the internet to promote compliance by online traders and to educate consumers to recognise and avoid unscrupulous online behaviour. The sweeps are conducted with consumer protection and other relevant agencies in over 30 countries
- liaising with international and domestic regulatory bodies to develop understanding of issues, improving global co-operation, and in enforcement activities
- acquiring, analysing and presenting electronic evidence.

Franchising and Small Business

The ACCC's franchising and small business program actively works with business, and industry associations in identifying emerging industry issues and developing compliance strategies to address them.

In addition to its strong enforcement actions, the ACCC recognises the importance of education in achieving compliance. Educating small businesses as to their rights and obligations is a high priority for the ACCC. This work complements both the ACCC's ongoing liaison with the small business sector, and its regular information service to national and state industry bodies and business service providers about trade practices issues.

Of particular note, in 2010 the ACCC began funding a free online education program, administered by Griffith University, aimed at helping prospective franchisees make an informed decision when looking to buy a franchise. A number of franchise-specific issues, including franchise fees, royalties, operations manuals, marketing funds and site selection, as well as general business concepts such as cashflow and working capital are covered.

Outreach and Information

The Outreach and Information program enables the ACCC to keep businesses and consumers in rural and regional areas informed about their rights and obligations under the TPA. The Outreach program is delivered through a Communication Strategies arm and the Rural and Regional outreach program.

Communications Strategies

Communications strategies include regular and specialised communication initiatives, the development and management of educational campaigns and the production of a wide range of publications for both small business and consumer audiences.

Rural and Regional program

The Rural and Regional program provides trade practices information to rural and regional areas and provides an opportunity for small businesses and consumers in those outlying areas to voice their concerns about business and consumer issues.

Regional Supporters

The ACCC has developed a network of Regional Supporters throughout Australia to improve business and community access to trade practices information and ACCC services. Local organisations involved include rural transaction centres, local governments, area consultative committees, business enterprise centres and chambers of commerce.

Regional Outreach Managers

The ACCC has established a dedicated outreach team to work with regional communities to foster improved regional trade practices outcomes. The outreach staff travel extensively within their area to provide trade practices information for people in regional communities and respond to inquiries and concerns as they are raised. The outreach staff also provide hands-on support for Regional Supporters. Staff also attend local trade shows and rural field days giving them further opportunities to meet and provide assistance to business operators in rural communities.

Staff work closely with indigenous communities and organisations to inform indigenous businesses and consumers about their rights and obligations under the TPA.

Consultative Committees

The ACCC and the AER have a number of external consultative committees which meet on a regular basis. These committees create an opportunity for dialogue between the ACCC and key organisations and the discussion of relevant trade practices issues. The current consultative committees are as follows:

- Consumer Consultative Committee
- Franchising Consultative Committee
- Health Sector Consultative Committee
- Infrastructure Consultative Committee
- Small Business Consultative Committee
- Fuel Consultative Committee
- AER Customer Consultative Group.

Competing Fairly Forums

The ACCC regularly produces a Competing Fairly Forum available in DVD and web format on a different topic for small business operators in rural and regional towns throughout Australia. The Forums are presented to regional communities, with an ACCC officer available to answer any questions or concerns that people in regional areas may have on topics of particular relevance to them.

Disadvantaged and Vulnerable Program

A priority area for the ACCC is protecting disadvantaged and vulnerable consumers.

The ACCC is developing targeted information and education strategies for a range of consumers with reference to the following indicia of disadvantage and vulnerability:

- elderly
- physical disability
- financial hardship or low income
- non-english speaking background
- intellectual disability
- indigenous
- situational
- youth.

COURT ACTIONS

As at 2 September 2010 the ACCC is involved in 36 pieces of enforcement related litigation. More significant current court matters include:

Cabcharge

In June 2009 the ACCC instituted proceedings against Cabcharge Australia Ltd. The ACCC alleged that Cabcharge contravened sections 45 and 46 of the TPA by:

- Using its market power in the provision of non-cash taxi fare payment processing services and taxi specific payment products to refuse to enter into agreements with competing suppliers of processing services that would have allowed Cabcharge's payment products to be processed through alternative EFTPOS terminals.
- Using its market power to supply a significant number of taxi meters and fare schedule updates either free of charge or below cost for anti-competitive purposes in relation to taxi meters and processing services.
- Entering into an arrangement with Townsville Taxis to acquire their charge account business and approximately 130 rival EFTPOS terminals then in use by the taxi network and replace them with Cabcharge EFTPOS terminals.

A four week trial is scheduled to be held in October 2010.

Cement Australia

This matter involves allegations of anti competitive agreements and misuse of market power by Cement Australia and Pozzolanic in unprocessed and processed flyash markets in Queensland. The ACCC instituted proceedings in September 2008.

Flyash is a by-product of burning black coal at power stations. As a waste product, the disposal of flyash creates storage and environmental issues for power stations. However with some processing, flyash is a partial (and potentially much cheaper) substitute for cement in the making of pre-mix concrete. It is alleged that Cement Australia entered into contracts with power stations located in south east Queensland for the supply of flyash preventing others from competing in the market.

The original trial dates were vacated after the court granted leave for the ACCC to amend its statement of claim to add an alternative product market. Cement Australia subsequently sought leave to appeal this interlocutory decision to the Full Federal Court—the Full Court's judgement refusing leave was delivered on 18 August 2010.

New trial dates have been set for six weeks commencing 27 September 2010

Air cargo

Following receipt of an immunity application, the ACCC commenced investigations in 2006 into allegations that a large number of international airlines colluded on fuel surcharges for air cargo services between 2000 and 2006.

It is alleged that rather than making free market price adjustments in response to rising oil prices, airlines colluded in the use of an index to adjust their prices. The ACCC alleges that this amounts to a contravening agreement between competitors on price or a component of price. In some cases, potential allegations also relate to general rates in relation to specific routes and/ or types of cargo; and security surcharges imposed following the events of September 11 2001.

To date, 15 airlines have been subject to ACCC proceedings. Proceedings against six airlines—Qantas, British Airways, Air France and KLM, Cargolux and Martinair—have been concluded with joint submissions to the Federal Court resulting in penalties totalling $41 million.

ANZ

The ACCC instituted proceedings in August 2007 the Federal Court against the Australian and New Zealand Banking Group Limited.

The ACCC alleges that the ANZ Bank, in seeking to limit the level of refunds Mortgage Refunds could provide to customers in respect of ANZ home loans, has breached section 45 of the TPA.

Mortgage Refunds was a mortgage broker which refunded to its customers a part of the commission it received from lending institutions. The ACCC alleges that the ANZ Bank sought to reach an agreement with Mortgage Refunds to limit its refunds to customers as a condition of it continuing to deal with the bank.

The latest development in this litigation was a directions hearing held in July 2010. The matter has been set down for trial from 6–20 June 2011.

Trading post and Google

In July 2007, the ACCC instituted proceedings in the Federal Court against Trading Post Australia Pty Ltd, Google Inc, Google Ireland Limited and Google Australia Pty Ltd alleging misleading and deceptive conduct in relation to sponsored links that appeared on the Google website.

The ACCC is alleging that Trading Post contravened sections 52 and 53(d) of the TPA in 2005 when the business names "Kloster Ford" and "Charlestown Toyota" appeared in the title of Google sponsored links to Trading Post's website. Kloster Ford and Charlestown Toyota are Newcastle car dealerships who compete against Trading Post in automotive sales.

The ACCC is also alleging that Google, by causing the Kloster Ford and Charlestown Toyota links to be published on its website, engaged in misleading and deceptive conduct in breach of section 52 of the Act.

Further, the ACCC is alleging that Google, by failing to adequately distinguish sponsored links from "organic" search results, has engaged and continues to engage in misleading and deceptive conduct in breach of section 52 of the TPA.

This is the first action of its type globally. Whilst Google has faced court action overseas, particularly in the United States, France and Belgium, this generally has been in relation to trademark use. Although the US anti-trust authority the Federal Trade Commission has examined similar issues, the ACCC understands that it is the first regulatory body to seek legal clarification of Google's conduct from a trade practices perspective.

The latest development was a four week hearing, which was held in March 2010.

REGULATORY ACTIVITIES

The ACCC and the AER have roles in promoting competition in network industries: communications, energy, post and transport. The ACCC is also involved in monitoring prices of selected goods and services. The products and sectors monitored are diverse.

Prices oversight and regulatory arrangements to secure third–party access to 'essential' services are necessary to curb the market power of monopoly infrastructure. Administering access regimes for monopoly infrastructure assets is a major area of regulation.

Depending on the infrastructure industry and the nature of the specific regime, access regulation can involve: determining which services should be subject to access regulation; determining conditions of access; considering access undertakings; and/or arbitrating terms and conditions in access disputes.

Access regulation is used as a means to an end—to promote competition and to encourage new entrants into what is the contestable part of the market (for example, freight services over the rail track and telephone services over the copper wires). To be sustainable, the access regime must credibly satisfy the demands of both consumers and investors and be procedurally fair while at the same time providing incentives for efficiency.

Under Part IIIA of the TPA the ACCC regulates third party access to some essential facilities. The ACCC also administers Part XIB of the TPA which deals with anti-competitive conduct in the telecommunication industry and, Part XIC, which sets out the rules and procedures for guaranteeing access to network services for telecommunication carriers and providers.

Part VIIA of the TPA (which deals with price monitoring and surveillance) is also administered by the ACCC.

The most substantial recent change to the framework of infrastructure regulation has been the creation of the AER. The AER, Australia's independent national energy market regulator, commenced operations on 1 July 2005 after being established under Part IIIAA of the TPA as part of the ACCC. The subsequent changes to energy regulation which are still in progress are set-out in detail in the following pages.

Also, since 2006 there have been a number of developments in the ACCC's role with regard to water regulation. This is a new area of activity for the ACCC. Initially this involvement was on the basis of existing powers but most recently the ACCC has been provided with new roles and functions under the *Water Act 2007*. A detailed description of the functions of the ACCC under this new legislation is outlined in this section.

ENERGY

Energy market reform

In December 2003 the Ministerial Council on Energy (MCE) made a range of recommendations to the Council of Australian Governments (COAG) for energy market reforms. Following COAG's endorsement of the Australian Energy Market Agreement, energy regulatory functions were conferred onto the newly created AER in 2005. Also in 2005, rule-making and market development functions were conferred on the Australian Energy Market Commission.

In 2009 further reforms saw the consolidation of energy market operations into a single body—the Australian Energy Market Operator (AEMO). AEMO operates the gas and electricity markets in southern and eastern Australia and coordinates high level national transmission planning. These functions were previously undertaken by the National Energy Market Management Company (commonly known as NEMMCO), the Victorian Energy Networks Corporation (VENCorp), the NSW and ACT Gas Market Company, South Australia's Electricity Supply Industry Planning Council and the Retail Energy Market Company.

The National Electricity Law and National Electricity Rules regime commenced on 1 July 2005. The National Gas Law and National Gas Rules commenced in 2008. The electricity and gas legislation reflects a co-operative legislative scheme, with South Australia as the lead legislator. It is proposed that the new National Energy Retail Law and National Energy Retail Rules will commence in July 2011.

Australian Energy Regulator

The AER is an independent body and part of the ACCC. The AER is responsible for:

- monitoring the wholesale National Electricity Market (NEM) and gas markets
- compliance with national energy market legislation and legislative instruments—including the National Electricity Law, the National Electricity Rules, the National Gas Law and the National Gas Rules
- bringing enforcement proceedings against market participants for breaches of the law or rules
- determining the revenues of electricity transmission and distribution network businesses in the NEM
- approving access arrangements and tariffs for covered natural gas pipelines in all jurisdictions except Western Australia
- developing and applying service incentive regimes and ring-fencing policies, undertaking annual compliance reviews, and other functions associated with economic regulation
- certain regulatory roles under the Victorian energy distribution regulatory framework, including setting distribution tariffs and enforcing licence conditions (the AER may also be given roles in other states).

The AER also assists the ACCC with energy-related issues arising under the TPA and produces a wide range of publications. The AER will also have significant new functions from July 2011 under the proposed National Energy Retail Law and Rules.

AER's future retail functions

The AER is preparing for the proposed new roles under the National Energy Retail Law and Rules (part of the National Energy Customer Framework). The new framework will transfer non-price distribution and retail regulatory functions from State and Territory jurisdictions to the AER (except in Western Australia and the Northern Territory in respect of electricity). Effective transfer of these functions is likely to occur on an incremental basis from July 2011.

The AER's responsibilities under the new law and rules will include, but not be limited to:

- providing for retailer authorisations and exemptions
- approving retailer customer hardship policies
- compliance and performance monitoring and reporting
- administering a retailer of last resort scheme
- responsibility for electricity and gas retail prices is to remain with state and territory jurisdictions. Some jurisdictions may exclude gas from the new framework.

The AER has already commenced preliminary consultation in relation to many of its expected new roles. As of July 2010 the AER has published:

- an issues paper on the proposed retail pricing information guidelines (which will specify how energy offers must be presented)
- a draft retailer authorisation guideline
- a national hardship indicators issues paper (the national hardship indicators will measure the effectiveness of energy retailers' hardship programs that are to assist customers struggling to pay energy bills)
- issues papers on the AER's approaches to compliance and enforcement, monitoring of retailer performance and retail exemptions.

The AER has also held (and will continue to hold) stakeholder working group meetings with retailers and customer groups from all states and territories (other than Western Australia and Northern Territory which are not proposing to be part of the framework at this stage).

AER's expanded gas market functions

New short-term gas trading markets are due to commence in Adelaide in Sydney this year. The AER will have enforcement, monitoring and compliance functions in these markets. The role is similar to the roles that the AER has in the Victorian wholesale gas market and the NEM.

The AER is ready to monitor these new gas markets and will be preparing weekly monitoring reports and undertaking compliance work as soon as the markets commence operation. As for other wholesale energy markets, the AER will obtain some confidential market data from AEMO.

Due to uncertainties surrounding market design in the new short-term gas trading markets, state governments have emphasised the importance of the AER's roles and their high expectations for the AER. The Queensland Government has also flagged its intention to implement a Brisbane short-term gas trading market in 2011.

Compliance and enforcement

The AER released an updated statement of approach to compliance and enforcement in June 2009. The statement of approach is based on a comprehensive risk assessment of the probability and impact of non-compliance with the national energy framework. The AER's approach to compliance is based on a risk assessment of the impact and probability of breaches of particular obligations. The risk assessment will be used to determine the type of monitoring tool for particular

obligations and the intensity of compliance monitoring that will be applied. It will also be used as a factor in determining the appropriate enforcement response when breaches are detected.

Major enforcement action

The AER has now instituted its first legal proceedings for alleged contraventions of the national energy market legislation and legislative instruments it enforces. In July 2009 and following an extensive investigation, the AER instituted proceedings in the Federal Court against Stanwell Corporation Limited for alleged contraventions of clause 3.8.22A of the Electricity Rules. Clause 3.8.22A requires generators to make offers to generate electricity in 'good faith'. The AER alleges that several of the offers made by Stanwell to generate electricity on 22 and 23 February 2008 were not made in good faith.

The AER is seeking orders including declarations, civil penalties, a compliance program and costs. The trial was conducted during June 2010.

COMMUNICATIONS

Context

Changes were made to the TPA in 1997 to introduce a telecommunications-specific access and competitive safeguards regime. The amendments provided for the introduction of open competition, in accordance with national competition policy principles. Industry-specific regimes governing anti-competitive conduct and access were inserted as new Parts XIB and XIC of the TPA respectively.

The administration and enforcement of the competition provisions were entrusted to the ACCC in recognition of the need to align the regulation of the telecommunications market as closely as possible with the application of general competition provisions under the TPA and with the regulation of other markets, such as gas and electricity.

Following the commencement of the regime, the Government fine tuned the legislation. The most recent set of amendments were introduced with the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005*. These reforms, while significant, have not altered the regulatory philosophy underpinning the 1997 amendments.

Telecommunications competitive safeguards – Part XIB

The ACCC is responsible for administering an industry-specific regime established by Part XIB of the TPA, which empowers the ACCC to deal with anti-competitive conduct in the telecommunications markets and obtain information to help monitor competition in the telecommunications industry.

The ACCC's responsibilities under Part XIB include:

- Investigating allegations of anti-competitive conduct, breaches of standard access obligations and non-compliance with Telstra's operational separation plan under the *Telecommunications Act 1997*.
- Considering applications for exemption from anti-competitive conduct.
- Industry monitoring, including the regulatory accounting framework, retail tariff filings and bundling of residential services.

The competition notice regime in Part XIB was inserted into the TPA as a means to regulate anti-competitive conduct in the telecommunications industry. It was considered that total reliance on Part IV of the TPA to restrain anti-competitive conduct in the industry would have been ineffective given the state of competition at that time. It was noted in Parliament that Part XIB:

> *...relies on an effects-based test,* ***in recognition that damage can be inflicted on competition regardless of the purpose*** *motivating that behaviour. In an industry where competition is in many areas still in its developmental stages, requiring proof of purpose may unduly delay regulatory action to stop anti-competitive conduct ...*
>
> *Therefore, as well as Part IV of the act applying fully to telecommunications, the amendments made by this bill will supplement Part IV by* ***increasing the ability of the ACCC to respond swiftly*** *where anti-competitive conduct is evident* (our emphasis)

Anti-competitive conduct

Under Part XIB of the TPA, the ACCC has the power to issue competition notices for contraventions of section 151AK (the competition rule). Where the ACCC has reason to believe that a carrier or carriage service provider has contravened the competition rule, which is defined as engaging in anti-competitive conduct in telecommunications markets, the ACCC has discretion as to whether to issue a competition notice. Competition notices are enforceable in the Federal Court.

For the period that a competition notice is in force, service providers are able to seek damages and the ACCC is able to seek maximum pecuniary penalties through the Federal Court of:

- if the contravention continued for more than 21 days, the sum of $31 million and $3 million for each day in excess of the 21 days that the contravention continued
- otherwise, the sum of $10 million and $1 million for each day that the contravention continued.

In 2009–10 the ACCC conducted seven major investigations into alleged anti-competitive conduct in contravention of Part XIB of the TPA by the telecommunications industry. In six of the investigations the ACCC did not form the requisite 'reason to believe' that the carrier or carriage service provider had engaged or was engaging in anti-competitive conduct. One investigation is continuing.

Record Keeping Rules

The ACCC has the power to mandate specified Record Keeping Rules (RKRs) on selected carriers and carriage service providers to assist with its competition and access responsibilities. Section 151BU of Part XIB of the TPA gives the ACCC power to make rules requiring one or more carriers or carriage service providers to retain records to assist the ACCC discharge a range of competition and access functions under the TPA. Such rules can be used to implement an accounting separation of an operator's various activities.

Telecommunications access regime – Part XIC

Part XIC of the TPA establishes a telecommunications-specific regime for facilitating access to networks of competing carriers, based on the general access provisions found in Part IIIA of the TPA, but with certain refinements to take into account the specific characteristics of telecommunications networks.

The ACCC is responsible for:

- conducting declaration inquiries into the regulation of telecommunications services
- formulating access pricing principles for regulated services and examining access undertakings (which propose the terms on which regulated services would be supplied to access seekers) submitted by access providers
- assessing applications for exemption lodged by access providers from standard access obligations
- arbitrating over disputes between service providers and access seekers over the terms of regulated access.

Part XIC provides the ACCC with the power to, taking account of relevant criteria, determine which telecommunications services should be 'declared' or brought within the regulatory framework. Once the ACCC declares certain services, the owners must provide access to other businesses on reasonable commercial terms.

A provider of declared services must comply with the standard access obligations, which create an immediate right of access for access seekers. These address issues such as technical and operational standards, fault detection and rectification.

The standard access obligations do not specify either the price or many other key terms and conditions for the supply of a declared service. These may be determined by three means: i) commercial negotiation; ii) where an access provider may offer to the ACCC an access undertaking specifying the terms and conditions upon which it will provide access to a declared service; and iii) where negotiations have failed and no relevant undertaking is in place, either party may notify the ACCC of an access dispute (price or non-price access terms) and request arbitration.

Currently declared services

On 15 July 2009 the ACCC published its final decision to extend the declarations of six fixed line services (the ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR services). The declarations for these services were to expire on 31 July 2009. The ACCC decided to extend the declarations for a further five years until 31 July 2014. The extension of the declarations provides that standard access obligations (SAOs) remain in place for those services, thereby obliging an access provider to provide access to the service upon request. Access to these services allows companies to compete in providing both wholesale and retail telecommunication services.

Services which are currently subject to declaration include:

- Unconditioned Local Loop Service (ULLS) – The ULLS enables access to the unconditioned (copper) communications wire between the customer's premises and the local exchange. The ULLS is used by access seekers to provide high bandwidth xDSL carriage services and telephony services to end-users. Telstra is the predominant supplier of the ULLS, owning the predominant copper customer access network located throughout Australia.
- Line Sharing Service (LSS) – The LSS enables the copper communications wire between the customer's premises and the local exchange to be split in a spectral sense so that two separate carriers are able to provide two separate services to the end-user. This enables one service provider to provide the voice services over the line in question while another provides the high-speed data services through its own xDSL technology.

- Wholesale Line Rental (WLR) – The WLR is used by access seekers in conjunction with the LCS to provide basic local telephony services. Other infrastructure or access services (such as PSTN OTA) are required for service providers to be able to provide a full voice telephony service. The WLR as defined is a service which allows an end-user to connect to a public-switched telephone network, and provides the end user with an ability to make and receive voice-bandwidth calls, and a telephone number. It is not available as a declared service in the CBD areas of Sydney, Melbourne, Brisbane, Adelaide and Perth.

- Local Carriage Service (LCS) – The LCS is used by access seekers to re-supply Telstra's local calls to end-users. The re-supply of local calls continues to be the main form of competition in the local telephony market, with Telstra supplying the vast majority of directly connected fixed-line customers. Further, Telstra and Optus combined account for around 99 per cent of these services.

- Public Switched Telecommunications Network Originating and Terminating Access (PSTN OTA) – To supply long-distance, fixed to mobile and mobile to fixed call services, service providers often acquire input services from Telstra known as PSTN Originating and Terminating Access services. These services involve the carriage of calls between an end-users premises and a point of interconnection, at which point another carrier becomes involved in carrying the call.

- Domestic Transmission Capacity Service (DTCS) – To provide end-to-end telecommunications services, carriers may require access to transmission capacity available on the telecommunications networks of other carriers in certain circumstances. This service requires that access to domestic (i.e. within Australia) transmission capacity between the majority of locations be provided to access seekers on request. It is not available as a declared service between capital cities, and between certain capital cities and related regional centres due to the existence of competitive transmission infrastructure.

- Mobile Terminating Access Service (MTAS) – The MTAS is used to terminate calls to mobile subscribers. Essentially it enables mobile subscribers to receive calls from end-users connected to other networks. The service can be used to supply fixed-to-mobile calls or mobile-to-mobile calls.

Pricing principles and indicative pricing

Following the declaration of a service, the ACCC is required to issue pricing principles as soon as practicable, and may include indicative price terms and conditions when doing so.

The ACCC is currently undertaking a review into the access pricing principles for fixed line services. The ACCC's current approach was developed in 1997—the review is being undertaken in recognition of the evolution of the telecommunications sector since this time.

In the discussion paper the ACCC indicated that it was considering the adoption of a 'building block' approach (also known as a 'regulated asset base' approach), as commonly applied in regulating utilities in other industries. There was general support in submissions for the adoption of this approach. The Australian Competition Tribunal has also recently expressed support for "a simpler and more appropriate pricing methodology" such as the building block approach (as stated in its 10 May 2010 decision affirming the ACCC's rejection of Telstra's ULLS undertaking).

Exemptions from declaration

In addition to requiring end-dates for the declaration of services, Part XIC of the TPA provides mechanisms via which carriers or carriage service providers can be exempted from any or all of the standard access obligations imposed by declaration. Carriers or carriage service providers may apply to the ACCC for a written order exempting it from any or all of the standard access obligations that apply to a declared service, at any time prior to the expiry of a declaration. If the ACCC is of the opinion that an order made in respect of an application for an individual exemption is likely to have material effect on the interests of a person, the ACCC must publish the application and invite submissions on whether the application should be accepted.

Part XIC also provides that:

- a carrier or carriage service provider may apply to the ACCC for an anticipatory exemption from the standard access obligations. That is, in the event that the service may become a declared service in the future, carriers can apply for exemptions from the standard access obligations in anticipation of future declaration.

- the ACCC may on its own initiative determine that specified classes of carriers or carriage service providers are exempt from any or all of the standard access obligations imposed on currently declared services, or any services which may become active declared services in future.

In 2007 Telstra submitted exemption applications for the WLR and LCS in certain areas and exemption applications for the PSTN OA in CBDs and certain metropolitan area. The ACCC issued decisions granting the exemptions, subject to conditions and limitations, in 2008. These decisions were appealed to the Australian Competition Tribunal. The Tribunal handed down its orders in 2009.

As a result of the Tribunal's decision, Telstra will be exempted from the standard access obligations for the provision of the declared WLR, LCS and PSTN OA services in the exemption exchange service areas (ESAs). The ACCC subsequently released a final decision to vary the class exemptions for the WLR, LCS and PSTN OA services to ensure the class exemptions are consistent with the individual exemption orders handed down by the Tribunal, and released a list of 129 exchange service areas (ESAs) which satisfy the relevant criteria to be Exemption ESAs. However, the list of Exemption ESAs must be read in conjunction with the various conditions and limitations imposed by the Tribunal.

Arbitration and access disputes

Where agreement on access cannot otherwise be reached between the parties and there is no applicable access undertaking in force relating to the terms and conditions of access (see below), the terms and conditions of access may be determined by the ACCC acting as arbitrator. At the beginning of 2009–10, the ACCC was actively considering 39 access disputes. Over the course of the financial year, two MTAS, one WLR and three LSS access disputes were notified, twelve access disputes were withdrawn and final determinations were issued in 19 access disputes. At the end of 2009–10, 13 disputes remained under active consideration.

The ACCC's experience is that the level of disputation within the telecommunications industry, and consequently the number of disputes brought before the ACCC for arbitration, is cyclical in nature. The ACCC has been required to arbitrate a substantive number of disputes in recent years.

Approval of access undertakings

Part XIC of the TPA includes a mechanism allowing access providers to give voluntary access undertakings. There are two types of undertakings:

- ordinary access undertakings—which are lodged in relation to current declared services and set out the terms and conditions upon which the access provider undertakes to comply with the particular standard access obligations

- special access undertakings—which relate to services that are either not yet declared, or that the carrier does not yet supply, and bind the access provider to supply the service in accordance with the standard access obligations set out in section 152AR, and set out the terms and conditions of supply of the service under those obligations.

The ACCC must accept or reject undertakings in their entirety, it cannot vary or partially accept them. This lack of flexibility has the effect of requiring that the ACCC reject undertakings in their entirety, where the overall undertaking is found to be unreasonable but where parts of the undertaking are considered reasonable. Further, where a party is genuinely seeking acceptance of an undertaking, it cannot vary that undertaking in response to identified concerns, without resubmitting the undertaking in its entirety, and consequently restarting the statutory assessment process.

In the event of arbitration, the ACCC cannot make a decision that is inconsistent with an accepted undertaking.

The ACCC is currently conducting pre-lodgement discussions with NBNCo—the operator of the National Broadband Network—regarding NBNCo's intention to provide a special access undertaking (SAU) to the ACCC. If a SAU is lodged with the ACCC it will then be subject to a period of public consultation. If accepted, a SAU will establish a regulatory framework for NBNCo in providing access to service providers.

Enforcement

A notable enforcement outcome was the recent $18.55 million penalty imposed on Telstra by the Federal Court for denying competitors access to infrastructure in contravention of its carrier licence.

In March 2009 the ACCC instituted proceedings against Telstra alleging contraventions of its standard access obligations under Part XIC of the TPA and its facilities access obligations under the Telecommunications Act, and for misleading and deceptive conduct in contravention of Part V of the TPA. The allegations related to Telstra refusing access seeker requests for equipment interconnection at certain key metropolitan telephone exchanges on the basis that the exchanges were 'capped'. In particular, Telstra claimed that there was no capacity on the main distribution frames available for access seekers to interconnect their equipment to the copper wires running to customer homes. The ACCC alleged that there was capacity available, or that could have been made available, on Telstra's main distribution frames.

Telstra admitted to the majority of the pleaded contraventions in July 2009, and a contested hearing regarding the appropriate sanctions for the conduct was held in mid-2010. The ACCC had put a penalty of $40 million to the court while Telstra submitted that the appropriate penalty was in the order of $3–5 million. The total penalty imposed by the court was $26.5 million, however Justice Middleton gave

Telstra a 30 per cent discount for cooperation, acceptance of responsibility and for implementing a compliance program.

Telstra carrier charges – price control arrangements

Under the current price control arrangements, Telstra is required to comply with price caps that apply to 'baskets' of its services. These comprise of:

- Basket 1: a price cap of CPI – CPI per cent on a basket of local calls, trunk (which includes national long distance and fixed-to-mobile (FTM)) calls, international calls and line rentals.
- Basket 2: a price cap of CPI – 0 per cent on a basket of Telstra's most basic line rental product offered to residential consumers.
- Basket 3: a price cap of CPI – 0 per cent on a basket of Telstra's most basic line rental product offered to business consumers.
- Basket 4: a price cap of CPI – 0 on a basket of connection services.

Under these arrangements, the ACCC is required to report to the Minister for Broadband, Communications and the Digital Economy on the adequacy of Telstra's compliance at the end of each financial year. The ACCC also has a role in assessing increases in residential line rental rates before they occur, however it has little discretion for the purposes of consenting to any increases.

On 23 December 2009 the Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy, issued a direction requiring the ACCC to hold a public inquiry into the retail price control arrangements that should apply to Telstra after the expiration of the current retail price control arrangements – Telstra Carrier Charges – Price Control Arrangements, Notifications and Disallowance Determination No. 1 of 2005 (Amendment No.1 of 2009) on 30 June 2010. The ACCC was directed to have regard to the intention that the price controls will remain in place for a further two years.

The ACCC provided its report to the Minister in March 2010, and released it in June 2010. The report included specific recommendations on the structure of the retail price control arrangements, and their levels.

The ACCC also made the following recommendations in relation to the parts of the current arrangements that might benefit from clarification or streamlining:

- The requirement placed on Telstra to offer line rentals to schools at a price at, or below, the standard line rental offered to residential customers should be removed.
- The requirement for ACCC to periodically check Telstra's compliance with its licence condition regarding maintaining a low income package should be removed, as other effective compliance measures already exist.
- The requirement to obtain ministerial consent to increase the charge for directory assistance – apart from the separate directory assistance service Telstra provides to customers with a disability – should be removed with these calls instead being subject to a specified price cap.

- Consideration be given to removing the price control arrangements as they apply to "extended zones"[1] if these requirements merely replicate contractual arrangements Telstra has with government.

Annual telecommunications reports

Under the TPA, the ACCC is required to annually review and report on:

- competitive safeguards within the Australian telecommunications industry;
- changes in prices paid by consumers for telecommunications services; and
- Telstra's compliance with the price control arrangements.

The most recently prepared reports cover the 2008–09 financial year—however the reports relating to telecommunications competitive safeguards and changes in the prices paid for telecommunications services for 2008–09 have not yet been tabled by the Minister for Broadband, Communications and the Digital Economy.

Communications Alliance

The ACCC is an active participant in the Communications Alliance (previously the Australian Communications Industry Forum (ACIF)), which is the industry self-regulatory body for telecommunications companies. Communications Alliance committees comprise representatives of the communications sector, consumer groups and government regulators (such as the ACCC, the Australian Communications and Media Authority (ACMA) and the Telecommunications Industry Ombudsman (TIO). A number of codes and issues are currently being progressed by the Communications Alliance.

TRANSPORT AND PRICES OVERSIGHT

Aviation

Airports overview

Following a review of airport regulation during 2006, the Australian Government accepted the Productivity Commission's recommendation that Sydney, Melbourne, Brisbane, Perth and Adelaide airports be subject to price monitoring under Part VIIA of the TPA. These arrangements took effect from 1 July 2007 and an independent review will be carried out in 2012, or earlier if there is clear evidence of unjustifiable increases or other misuse of market power across the price monitored airports. Under the current arrangements the Government has reserved the right to re-impose price controls if airport operators are found to be:

- misusing their market power by unjustifiably raising pries and/or
- imposing non-price conditions on access to aeronautical services and facilities in a manner inconsistent with the Government's aeronautical pricing principles.

Airports are no longer required to notify the ACCC prior to increasing aeronautical prices, with the exception of pricing increases to airlines providing regional air services proposed by Sydney Airport. In May 2010 the Minister for Competition

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[1] Extended zones arrangements require Telstra to charge regional calls that extend across adjacent call collection areas as though they are local calls

Policy and Consumer Affairs signed Declaration No. 92 under the TPA extending these arrangements for a further three years to 30 June 2013.

Airports monitoring

The ACCC, under a direction from the Australian Government pursuant to Part VIIA of the TPA, monitors prices, costs and profits relating to the supply of aeronautical services at Adelaide, Brisbane, Melbourne (Tullamarine), Perth and Sydney (Kingsford Smith) airports. The ACCC, under Parts 7 and 8 of the *Airports Act 1996*, also has financial account reporting and quality of service monitoring responsibilities for those airports.

On 7 April 2008 the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs directed the ACCC (through Direction No. 31 under the TPA) to monitor prices, costs and profits of car parking services at Adelaide, Brisbane, Melbourne (Tullamarine), Perth and Sydney (Kingsford Smith) airports.

The ACCC released its 2008–09 airport monitoring report on 11 March 2010.

Airservices Australia

Airservices Australia (Airservices) has a statutory right to be the sole provider of air traffic control, air navigation support, and aviation rescue and fire fighting in Australia. The supply of these services by Airservices is subject to the price notification provisions under Part VIIA of the TPA. These provisions oblige Airservices to notify the ACCC of an intention to increase the price of these services, and enable the ACCC to either not object to the proposed price increase or not object to a price increase of a lower amount.

In 2009 the ACCC decided to not object to a price notification from Airservices Australia which proposed to establish a price for terminal navigation services at Avalon airport.

Shipping and Container Stevedoring Monitoring

Part X of the TPA allows exemptions from some of the prohibitions on anti-competitive conduct to international cargo shipping lines. The ACCC's main function is to investigate complaints in relation to conference agreements registered under Part X of the TPA. A conference is an unincorporated association of two or more ocean carriers carrying on two or more businesses each of which includes the provision of liner cargo shipping services. The ACCC has an investigation function under Part X to ensure that Australian shippers have access to efficient liner shipping services at internationally competitive rates.

The ACCC is also required to monitor prices, costs and profits of container terminal operator companies at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney by a direction from Treasurer Peter Costello in December 2009 under Part VIIA of the TPA.

The ACCC issued its 11th container stevedoring monitoring report (for the 2008–09 financial year) on 10 November 2009.

The report found that industry performance in 2008–09 was largely affected by lower demand for stevedoring services associated with the global economic slowdown. Revenues fell while costs increased, resulting in lower profits than previous years.

Rail

The ACCC has certain rail functions, most notably in relation to the National Access Regime as set out in Part IIIA of the TPA. This work includes:

- assessing Part IIIA codes or undertakings submitted by rail access providers in relation to rail (track) infrastructure
- arbitrating access disputes between train operators and rail infrastructure providers
- providing economic analysis and assistance to other areas of the ACCC, related to mergers, authorisations and other regulatory matters associated with the Australian rail industry.

To date only one rail infrastructure provider, Australia Rail Track Corporation (ARTC), has submitted an undertaking under Part IIIA.

On 20 December 2007 ARTC submitted an access undertaking under Part IIIA of the TPA, replacing an earlier undertaking accepted in 2002. The undertaking extends to the additional tracks on the interstate network in NSW, as well as to tracks on the interstate network in VIC and SA leased after the acceptance of the 2002 undertaking. The 2007 undertaking was accepted by the ACCC on 30 July 2008 and applies for a ten year term.

During 2009–10 the ACCC provided guidance to the ARTC, industry and stakeholders to assist in the ARTC's development of a proposed voluntary access undertaking for access to the Hunter Valley Rail Network. In March 2010 the ACCC issued a draft decision indicating its preliminary view that the undertaking was not likely to be appropriate in its current form and providing extensive guidance on how the undertaking could be amended to be appropriate. In April 2010 the ARTC withdrew the undertaking and advised that it would shortly lodge a revised undertaking.

The ACCC expects that an acceptable undertaking from the ARTC will promote economically efficient use of and investment in infrastructure and promote effective competition in upstream and downstream markets in accordance with the objectives of Part IIIA of the TPA.

The ACCC also continues to monitor and administer relevant provisions of the ARTC interstate undertaking accepted in 2008, which facilitates competition by providing access to services on the interstate rail network.

Post

The ACCC's primary roles in the regulation of post are:

- assessing price notifications for Australia Post's reserved services
- inquiring into disputes about the terms and conditions on which Australia Post provides bulk mail services
- monitoring for cross-subsidy between reserved and non-reserved services.

Price notifications

The ACCC has responsibility for assessing Australia Post's price notifications under Part VIIA of the TPA, including for wholesale services provided to other businesses

who provide mail services. The ACCC must assess a proposed price and decide whether or not to object.

In making its notification decisions, the ACCC seeks to promote economically efficient investment and employment throughout the economy. The ACCC assesses the extent to which the prices were forecast to recover the efficient costs of providing monopoly letter services, including an appropriate return on capital.

Australia Post notified the ACCC of a proposed increase in July 2009, including an increase in the price of basic postage from 55 to 60 cents. In December the ACCC objected to Australia Post's proposal to increase postage prices, stating that it was concerned that Australia Post's costs were not falling in response to declining letter volumes. Early in 2010 Australia Post again notified the ACCC of a proposed increase, which the ACCC decided not to object to after Australia Post identified significant reductions in operating expenses and improved the quality of information submitted, allowing the ACCC to undertake an informed assessment of the proposals.

While the ACCC considers there need not be further price changes for the period 2009–10 to 2011–12, there is significant pressure on Australia Post's 'reserved service' revenue streams, such as basic postage. Even with the proposed increases and annual operating-costs reductions, Australia Post still faces an average annual loss of at least $86.9 million (in real terms) over 2009–10 to 2011–12. Further volume declines will raise questions about the appropriate approach to the pricing of Australia Post's reserved services.

Inquiring into disputes

Regulations made under section 32B of the Australian Postal Corporation Act allow the ACCC to inquire into disputes about the terms and conditions including price of access to Australia Post's bulk mail services.

The intent of these provisions, as stated in the explanatory memorandum to the Postal Services Legislation Amendment Bill 2003, is to ensure that 'persons who use bulk mail services receive fair and reasonable terms and conditions in relation to the supply of those services'.

No dispute about access to Australia Post's bulk mail services has ever been notified to the ACCC.

Monitoring for cross-subsidies

The ACCC has the ability to require Australia Post to keep records (and, on request, provide them to the ACCC) that are relevant to the ACCC's regulatory functions with respect to postal services. Subsection 50H(2) of the Australian Postal Corporation Act requires that the ACCC issue a record–keeping rule that would enable the ACCC to scrutinise whether or not Australia Post is cross-subsidising from the reserved services to the services it provides in competition with others.

One of the purposes of introducing the record keeping rule powers was to address allegations raised by some competitors of Australia Post that it is unfairly competing by using revenue from its reserved services to cross-subsidise the services it provides in competition with other businesses.

Each year the ACCC issues a report of its analysis of Australia Post's regulatory accounts for the preceding year, to determine whether Australia Post 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).

The ACCC releases annual reports outlining its analysis of Australia Post's regulatory accounts. The ACCC has not found any evidence of Australia Post cross-subsidising from its reserved services to the services it provides in competition with others. The findings of the 2008–09 report indicate that Australia Post's logistics services continue to be subsidised, however, the source of that subsidy appears to be Australia Post's other competitive services, rather than its monopoly services.

WATER

Historically the ACCC has not been involved in water regulation. Since 2006 however there have been a number of developments in the ACCC's role, initially on the basis of existing powers under Part IIIA of the TPA and most recently with new roles provided to the ACCC under the *Water Act 2007*.

Arbitration of access disputes under Part IIIA

Part IIIA of the TPA establishes a regime for facilitating third-party access to declared services—that is, access to services which are considered critical to competition in related markets and are provided by facilities that are uneconomic to duplicate. It establishes a negotiate/arbitrate framework to be used to resolve disputes regarding the arrangements for access to declared services. In situations where the parties are unable to agree on access arrangements, the ACCC can be requested to arbitrate the dispute.

ACCC's powers under the Water Act

The Water Act gives effect to the National Plan for Water Security announced by Prime Minister John Howard in January 2007. The Water Act created new institutional and governance arrangements to address the sustainability and management of water resources in the Murray–Darling Basin (MDB).The Water Act also created a number of new bodies and conferred new roles and functions to existing bodies including the ACCC. To fulfil its new roles and functions the ACCC established a Water Branch.

Part IV of the Water Act creates new functions and roles for the ACCC. It establishes new roles for the ACCC to develop, monitor and enforce water charge rules and water market rules in the Basin. The ACCC is also required to provide advice to the Murray Darling Basin Authority (MDBA) on water trading rules.

Part VIII of the Water Act contains enforcement mechanisms to support compliance with its provisions. These include injunctions, enforceable undertakings, civil penalties and enforcement notices. The ACCC is responsible for enforcing water charge and market rules.

The Water (Consequential Amendments) Act 2007 amended section 155 of the TPA, enabling the ACCC to issue section 155 notices in relation to designated water matters. The amended section states that a designated water matter refers to the performance of a function or the exercise of a power conferred on the ACCC.

Policy advice

The Water Act gives the Minister for Climate Change, Energy Efficiency and Water (Water Minister) the role of making water charge rules and water market rules. These rules are intended to facilitate the efficient functioning of water markets and to

increase the efficiency and sustainable use of water resources and of the infrastructure used to provide water resources. The ACCC's role under the Water Act is to advise the Minister on the making of water charge rules and water market rules, to monitor and to enforce compliance with the rules.

The ACCC provided the Water Minister with advice on:

- water market rules—final advice provided in December 2008
- water charge rules for termination fees—final advice provided in December 2008
- water charge rules for infrastructure operators—final advices provided in June 2009 and February 2010
- water charge rules for water planning and management charges—final advice provided in July 2009.

To date the Water Minister has made:

- the Water Market Rules 2009, which took full effect on 1 January 2010
- the Water Charge (Termination Fees) Rules 2009, which took full effect on 1 September 2009

and is considering the:

- Water Charge (Infrastructure) Rules
- Water Charge (Planning and Management Information) Rules.

Under the Water Act, the ACCC is also required to provide advice to the MDBA on water trading rules. The water trading rules will form a component of the Basin Plan and will be enforced by the MDBA. The ACCC provided its advice to the MDBA in March 2010. The MDBA will consider the ACCC's advice on trading rules in formulating the Basin Plan.

Water market rules

The Water Market Rules 2009 (WMR) are designed to free up trade that might otherwise be prevented by irrigation infrastructure operators (IIOs). IIOs hold water access entitlements collectively on behalf of their members and their cooperation is required if an irrigator wants to trade their water. The WMR enable irrigators to 'transform' their share of the water access entitlements held on their behalf by an IIO (an 'irrigation right') into a separately held (statutory) water access entitlement.

The WMR impacts primarily on IIOs (and their irrigators) that operate in SA & NSW. Irrigators in Victoria and Queensland generally already hold statutory water access entitlements.

Water charge (termination fees) rules

The Water Charge (Termination Fees) Rules 2009 (WCTFR) deal with the charges imposed by IIOs on irrigators wanting to terminate their access to the irrigation network. These charges, referred to as termination fees, provide a contribution from exiting irrigators for the unavoidable ongoing costs of maintaining irrigation infrastructure. Termination fees are often levied by an IIO when a right of access for delivery of water to an irrigation network is terminated.

The WCTFR caps termination fees at 10x total network access charge (TNAC) or a lesser amount as provided for in a contract and defines the TNAC as the total amount payable to an IIO by the holder of a right of access in the financial year written notice of termination was given.

Water charge (infrastructure) rules

The proposed water charge (infrastructure) rules relate to charges imposed by infrastructure operators for the provision of storage, delivery and drainage services. The purpose of the rules is to cap price where there is significant market power and to provide transparency about the performance of infrastructure operators.

The proposed rules involve a three tiered approach to price regulation ranging from transparency requirements to direct regulatory control of charges:

- Tier 1 rules require all infrastructure operators in the MDB to publish water charges and include a non-discriminatory pricing requirement for member-owned infrastructure operators.
- Tier 2 rules require infrastructure operators to develop network service plans outlining the processes for determining charges, including approaches to asset management, every five years. Tier 2 infrastructure operators include larger member-owned infrastructure operators and medium-sized non–member owned infrastructure operators not captured under tier 3:
    - Murray Irrigation Limited
    - Murrumbidgee Irrigation Limited
    - Coleambally Irrigation Cooperative Limited
    - SunWater
    - Central Irrigation Trust.
- Tier 3 rules address the potential misuse of market power by larger non-member owned infrastructure operators—Goulburn–Murray Water and Lower Murray Water in Victoria and State Water in NSW. These operators are required to have their regulated water charges approved or determined by an independent economic regulator.

Water charge (planning and management information) rules

The proposed water charge (planning and management information) rules deal with charges for water planning and water management activities. These activities refer to a broad range of functions undertaken by government departments and agencies aimed at supporting sustainable water use. In practice, these activities include the administration of water entitlements, the development of water resource plans and other activities to address the impacts of water use.

The rules will require that wherever a Basin state (NSW, Victoria, Queensland, SA and ACT) government or agency sets a charge to recover the costs of water planning and management activities, the government or agency must publish detailed information about the charge, and disclose the process and basis for setting the charge.

On 2 June 2010 the Water Minister, Senator the Hon Penny Wong, announced her intention to make these rules.

Water trading rules

The water trading rules aim to facilitate the operation of efficient water markets and increase opportunities for trading. The water trading rules may deal with issues including the following:

- the terms on, and processes by, which water can be traded
- the imposition or removal of restrictions on and barriers to water trade
- the availability of information, and the reporting of information, to enable water trading.

The ACCC provided its final advice to the MDBA about WTR in March 2010. The ACCC's advice recommended rules in relation to information requirements, the administrative processes of state government trade approval authorities, and restrictions on trade, particularly restrictions imposed by state governments.

The Basin Plan is due to commence in July 2011. The MDBA is responsible for the enforcement of the Basin Plan (including the water trading rules).

Monitoring and enforcement

The ACCC is required under the Water Act to monitor:

- regulated water charges
- transformation arrangements
- compliance with the water market and water charge rules.

The ACCC is also required to provide results of its monitoring to the Water Minister in accordance with the agreement between the Water Minister and the ACCC. The agreement states that the ACCC will undertake to:

- provide monitoring reports to the Water Minister for public release at least once a year with the first report to be provided no later than March 2011
- publish the monitoring reports no sooner than three weeks after they are provided to the Water Minister
- provide monitoring updates to the Water Minister during 2009-10 and 2010–11 as required.

PETROL MONITORING

Prior to 1 August 1998 the ACCC was responsible for prices surveillance of petrol and diesel under the then *Prices Surveillance Act 1983*. It was required to endorse maximum wholesale prices for the oil majors and establish freight differentials. Since then, wholesalers of petrol and distillate have been free to set their own prices based on market conditions.

Following deregulation, the ACCC has had a price monitoring role. The ACCC has the same role with respect to automotive LPG prices (which were deregulated in 1991). The ACCC currently monitors:

- Retail prices of unleaded petrol (including regular and premium unleaded petrol and E10 petrol), diesel and automotive liquefied petroleum gas (LPG) in all capital cities and 150 regional centres and country towns.

- Movements in: the international benchmark prices for these fuels; international crude oil prices; terminal gate (i.e. published wholesale) prices; the price differential between E10 petrol and regular unleaded petrol; and the price differential between capital cities and regional centres and country towns.

These monitoring activities enable the ACCC to keep abreast of developments in the market and to provide briefings and advice to the Government and the public.

2007 Petrol Inquiry

On 15 June 2007 the then Treasurer approved the holding of a price inquiry by the ACCC into the price of unleaded petrol, pursuant to section 95H(2) of Part VIIA of the TPA. In December 2007 the ACCC provided the report to the Minister for Competition Policy and Consumer Affairs.

Matters considered by the inquiry included:

- the structure of the industry

- the extent of competition at the refinery, wholesale and retail levels, including the role of imports

- the determination of prices at each of these levels, including the methodology for determining wholesale prices

- impediments to efficient petrol pricing and possible methods to address them.

The inquiry found:

- no obvious evidence of price fixing or collusion between the major participants in the industry

- pricing of petrol is dictated fundamentally by international factors

- major refiners have established 'a comfortable oligopoly', with the Australian industry being relatively concentrated

- significant impediments to the large-scale importing of petrol by parties other than refiner-marketers, resulting in little independent importing

- buy-sell arrangements may have had the effect of lessening competition in wholesale petrol markets

- well-defined price cycles in the retail unleaded petrol markets in Australia's major metropolitan cities, the cause of which is not clear (particularly their persistence and regularity).

In December 2007 the Australian Government directed the ACCC to monitor prices, costs and profits relating to the supply of unleaded petroleum products under the price monitoring provisions of the TPA for a period of three years. On 21 May 2010, the Minister directed the ACCC to undertake formal monitoring for a further 12 months (up to December 2011).

The ACCC provided its monitoring reports for the 2007–08 and 2008–09 financial years to the Minster in December 2008 and 2009 respectively.

In accordance with an additional request from the Minister in December 2009, the ACCC also prepared a confidential report on coordinated activity among major oil companies. This report was provided to the Minister within the month.

ACCC website

The ACCC provides a significant amount of petrol-related information on its website. This includes a consumer awareness initiative on petrol price cycles.

The site provides information for consumers on how to take advantage of petrol price cycles in the five largest metropolitan cities (i.e. Sydney, Melbourne, Brisbane, Adelaide and Perth). Data is not provided for Canberra, Hobart or Darwin as petrol prices in those cities do not exhibit regular price cycles. Information for each city is available on:

- the days of the week when prices were at the bottom or top of the price cycles in the previous four months
- average retail petrol prices over the past 30 days
- the length of price cycles (in terms of the number of days from trough to the next trough) in the previous four months.

There is also a chart showing petrol price movements. The chart shows how movements in retail unleaded petrol prices in Australia compare with movements in an international benchmark price—the spot price of Singapore Mogas 95 Unleaded—over the last three months. The chart is updated weekly.

Recent issues associated with ethanol–blended petrol

In its 2009 *Monitoring of the Australian petroleum industry* report, the ACCC noted a substantial increase in the use of ethanol–blended petrol (EBP) in the past few years. To a large extent this increase has been driven by the NSW Government's ethanol mandate and the Queensland Government's proposal to introduce a mandate in 2010.

The ACCC is concerned that the move towards a greater reliance on ethanol that will arise under the mandates presents significant risks for motorists. The primary risks arising are:

- regular unleaded petrol will effectively be removed from sale in NSW and will become more difficult to obtain in Queensland
- a significant proportion of motorists will be unable to use EBP because it is unsuitable for their vehicles
- motorists who cannot use EBP (or choose not to use EBP) will be forced to use premium unleaded petrol (PULP) which is significantly more expensive than regular unleaded petrol
- current production capacity is not sufficient to meet demand under the mandates and there is potential for shortages of ethanol and EBP
- there are obstacles to the importation of ethanol which reduce the effectiveness of imports in constraining price increases

- there is potential for the price of EBP to increase relative to regular unleaded petrol and PULP.

In March 2010 the ACCC wrote to the Premiers of NSW and Queensland, and relevant Commonwealth Minister, to relay these concerns.

INVOLVEMENT IN PROCEEDINGS BEFORE THE COPYRIGHT TRIBUNAL OF AUSTRALIA

Sections 157A and 157B of the *Copyright Act 1968* provide that:

- the Copyright Tribunal must have regard to guidelines (if any) issued by the ACCC
- the Copyright Tribunal may make the ACCC a party to certain proceedings before the Tribunal (if the ACCC applies and the Copyright Tribunal considers it appropriate).

This role arose out of recommendations from the Ergas Committee's Review of intellectual property legislation under the Competition Principles Agreement.

The ACCC was a party to two matters decided by the Copyright Tribunal in 2009–10. The ACCC's role as a party to each matter helped the Copyright Tribunal make decisions reflecting efficient pricing principles.

MERGERS AND ACQUISITIONS

Merger and acquisition analysis is a prominent part of the ACCC's workload. The ACCC's role in mergers and acquisitions arises from section 50 of the TPA, which prohibits an acquisition if that acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market (the SLC test). The current section 50 was inserted in 1993 and followed one that prohibited acquisitions that were likely to create or strengthen dominance in a market.

The market referred to in section 50 means a market in Australia that is a substantial market. The TPA also includes "regional markets" in the definition of a market.

In considering a merger or acquisition the ACCC will define the relevant market in which to assess the merger or acquisition and determine whether a substantial lessening of competition would be likely to occur post acquisition. In doing so the ACCC takes into account the following factors in evaluating the effect or likely effect of the acquisition:

- actual and potential level of import competition in the market
- the height of barriers to entry to the market
- the level of concentration in the market
- the degree of countervailing power in the market
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins
- the extent to which substitutes are available in the market or are likely to be available in the market
- the dynamic characteristics of the market, including growth, innovation and product differentiation
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor
- the nature and extent of vertical integration in the market.

Merger parties have three avenues available to have a merger considered and assessed:

- the ACCC assesses the merger on an informal basis
- the ACCC assesses an application for formal clearance of a merger
- the Australian Competition Tribunal (the Tribunal) assesses an application for authorisation of a merger.

These three avenues available to parties to have a merger considered and assessed are discussed below.

INFORMAL CLEARANCE

The informal clearance process enables merger parties to seek the ACCC's view on whether it will seek an injunction under section 50 to stop a merger from proceeding. Information on the procedural aspects of informal clearances can be found in the ACCC's Merger review process guidelines. If the ACCC forms the view that a merger proposal is likely to contravene section 50, the merger parties may decide either:

- not to proceed with the merger
- to provide a court enforceable undertaking to address ACCC concerns, or
- to proceed and defend court action under section 50.

If the merger parties seek to proceed with the proposal, the ACCC can apply to the Federal Court for an injunction to prevent the merger from proceeding, as well as divestiture or penalties.

As merger parties are not legally required to notify the ACCC of a merger, they also have the option of proceeding with the merger without seeking any regulatory consideration. However, this will not prevent the ACCC from subsequently investigating the merger, including making public inquiries to assist its investigation and, if necessary, taking legal action. Proceeding without regulatory approval may put merger parties at risk of the ACCC or other interested parties taking legal action on the basis that the merger would have the effect, or be likely to have the effect, of substantially lessening competition in one or more substantial markets in contravention of section 50.

However, over the years a widespread practice has developed within the business community where parties have sought informal clearance from the ACCC before a merger proceeds. By providing views on prospective mergers, the ACCC is able to provide the parties with greater certainty and predictability in respect of its merger review role.

Additionally, on request from merger parties the ACCC is able to conduct an informal review confidentially or publicly. A confidential informal review would involve the ACCC reaching a preliminary view based on the information provided by the parties. A public informal review involves the ACCC reaching a conclusion on possible competition concerns through consulting market participants and potentially affected consumers in addition to the information provided by the parties.

Consideration of merger proposals on an informal basis allows the ACCC to provide the merger parties with the ACCC's informal view on whether a particular proposal is likely to breach section 50 and whether the ACCC would challenge the merger in the Federal Court. The vast majority of mergers that are considered on an informal basis by the ACCC are notified by the merger parties in advance. Alternatively the ACCC may initiate informal reviews in response to information from other sources including from complainants, Australian and overseas regulators and media reports.

An informal view by the ACCC not to oppose a merger or acquisition does not provide merger parties with protection from legal action by the ACCC or other parties under section 50. However in practice, if the ACCC grants clearance to parties, it is almost unheard of for a third party to take action against the merging parties independently. While the informal system provides no review mechanism to the merger parties or third parties to appeal the ACCC's informal decision, recent refinements in the process of informal review have sought to give greater opportunity to merger parties and interested parties to provide responses to a preliminary view,

and a transparent mechanism where concerns are proposed to be resolved through administrative means (through publication and a consultation process where undertakings are being considered).

A key aspect of the informal merger review process is transparency in the ACCC's decision-making process.

If the ACCC comes to a preliminary view that a proposed merger raises competition concerns that require further investigation, it may release a statement of issues outlining the basis and facts on which the ACCC has reached this view. This process is aimed at increasing the transparency of the informal review process and allows for obtaining further information that may either alleviate or reinforce the concerns of the ACCC and/or provide an opportunity to consider any undertakings submitted by the merger parties to resolve competition concerns This practice is consistent with the International Competition Network's guiding principles for transparency and procedural fairness.

When a final view has been reached by the ACCC, to improve the handling of matters and provide an enhanced level of transparency and procedural fairness in its decision-making process, the ACCC issues a public competition assessment in certain matters. A public competition assessment will be issued when:

- a merger is rejected
- a merger is subject to enforceable undertakings
- the merger parties seek such disclosure
- a merger is cleared but raises important issues that the ACCC considers should be made public.

Public competition assessments aim to provide the market with a better understanding of the ACCC's analysis of various markets and associated merger and competition issues. It will also alert the market if the ACCC's assessment of the competitive conditions in particular markets is changing, or is likely to change, because of developments—for example—in technology or previous mergers in those particular markets.

If the ACCC considers a merger or acquisition would have the effect or likely effect of substantially lessening competition, the merger may still proceed if:

- the merger parties apply for authorisation to the Australian Competition Tribunal (Tribunal) demonstrating that there are public benefits associated with the proposal that offset the competition concerns; or
- the merger parties offer legally enforceable undertakings, pursuant to section 87B of the TPA, designed to overcome the anti-competitive effects. It should be noted that the ACCC favours structural undertakings that replicate the competitive dynamics otherwise lost by the merger.

Should the ACCC consider that a proposed acquisition is likely to substantially lessen competition and the merger parties intend to proceed regardless, the ACCC may apply to the Federal Court for an injunction stopping the acquisition. In the event that the acquisition has already taken place the ACCC may seek an order from the Court for the divestiture of shares or assets or a declaration that a share transaction is void.

FORMAL CLEARANCE

On 1 January 2007 amendments to the TPA, including a new formal review process came into force. The effect of the amendments were to provide parties with the opportunity to apply for a formal clearance in relation to an acquisition. A formal clearance for an acquisition confers protection to the person to whom clearance was granted from the application of section 50 of the TPA. This protection means that neither the ACCC nor any other party may initiate legal action on the basis of an alleged contravention of section 50 of the TPA for an acquisition which has been granted clearance, so long as the acquisition takes place in accordance with the clearance.

Formal clearance for an acquisition is subject to the following conditions:

- parties must apply to the ACCC prior to the acquisition, providing certain prescribed information and an application fee
- the ACCC is not able to grant clearance to an acquisition that has already taken place
- applicants who apply for formal clearance will be required to give an undertaking under section 87B of the TPA to the ACCC that they will not proceed with the acquisition while the ACCC is considering the application.

Clearance may be granted by the ACCC with conditions (usually in the form of a court enforceable undertaking). Should clearance be rejected by the ACCC, section 50 will apply to the acquisition and the merger parties may apply to the Tribunal for review of the ACCC's decision or face the same options available following an adverse informal review. To date the ACCC has not yet received any applications for formal clearance

MERGER AUTHORISATION

On 1 January 2007 amendments to the TPA also came into force in relation to the process for parties seeking authorisations for mergers and acquisitions. Merger parties are now required to apply directly to the Australian Competition Tribunal (Tribunal) for authorisation. The granting of authorisation would give merger parties legal protection from court action under section 50.

The TPA provides that the Tribunal must not grant an authorisation in relation to a proposed acquisition of shares or assets unless it is satisfied in all the circumstances that the proposed acquisition would result, or would be likely to result, in such a benefit to the public that the acquisition should be allowed to occur.

Additionally, the TPA states that the Tribunal must require the ACCC to give a report to the Tribunal on the matters specified by the presiding member within the period specified by that member. The ACCC may also include in that report any matter it considers relevant to the application.

As at 30 June 2010 no authorisation applications to the Tribunal have been made.

MERGER ACTIVITY

In 2009–10 the ACCC considered 321 matters for compliance with section 50 of the Act. Of these, 153 were pre-assessed as not requiring review and 168 underwent a

public or confidential review (46 were conducted confidentially and 122 were public reviews). Of the 168 matters reviewed:

- 78 per cent were cleared unconditionally
- eight matters were publicly opposed
- confidential opposition or concerns were expressed in six
- four were allowed to proceed after the acceptance of undertakings to address competition concerns
- 16 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.

The timeframes in which the ACCC conducts merger reviews are considerably shorter than many other jurisdictions. Of the 168 reviews conducted, 87 per cent were concluded in less than eight weeks, and 51 per cent of reviews in less than four weeks. Almost all of the 153 matters assessed as not requiring review were dealt with in less than two weeks.

Recent trends

In general, there has been a significant increase in the volume of mergers work carried out by the ACCC in recent years. The table below outlines the numbers of matters finalised in the past five financial years.

Comparison of merger matters assessed and reviewed in the last five financial years

Financial Year	2009–10	2008–09	2007–08	2006–07	2005–06
Total mergers assessed[1]	321	412	397	272	189
Not opposed[2]	302	397	380	261	178
Opposed or concerns expressed confidentially[3]	15	10	11	5	2
Cleared with undertakings	4	5	6	6	9

Notes:

1. Includes confidential matters.
2. Includes reviews that were not opposed, matters in which a review was not considered necessary, matters withdrawn before a decision was made, reviews in which no view could be formed on a confidential basis, and reviews of variations to undertakings.
3. Includes reviews that were publicly opposed, where the ACCC expressed opposition or concerns on a confidential basis, and rejected variations to undertakings.

The increasing level of mergers work may be attributed to a number of factors, including increasing merger and acquisitions activity; the ongoing impact of deregulation, government privatisations and asset sales; a more liberal international trading sphere and increased adoption of the ACCC's new informal clearance process.

Areas such as energy, media, health services and finance continue as important sectors of activity for the ACCC's mergers work, and it is expected that this trend will continue.

While the total mergers assessed in 2009–10 fell from the previous year, a number of complex and high profile merger reviews where the ACCC has taken a position of opposition were conducted.

Selection of merger reviews publicly opposed in 2009–10

Caltex Australia Ltd proposed acquisition of the retail assets of Mobil Oil Australia Pty Ltd	On 27 May 2009 it was publicly announced that Caltex Australia Ltd proposed to buy from Mobil Oil Australia Pty Ltd 302 service station sites in metropolitan areas in South Australia, Queensland, New South Wales, Victoria and the Australian Capital Territory, subject to ACCC clearance. Caltex was also to obtain some fuel and storage services from Mobil-linked fuel terminals. On 2 December 2009 the ACCC announced it would oppose the sale. The ACCC identified 53 Mobil sites where competition in local retail markets was likely to be lessened substantially if Caltex bought them. The ACCC also had broader concerns about the consequences for possible price coordination between Australia's major fuel retailers should the sale proceed. Related to this assessment, in July 2010 the ACCC announced it does not propose to intervene in the sale of Mobil's retail assets to 7-Eleven and the on-sale of the South Australian assets to Peregrine Corporation, conditional on receiving undertakings from each acquirer to divest certain assets. The ACCC is in ongoing discussions with 7-Eleven and Peregrine regarding the undertakings that each has agreed to provide.
Cargill Australia Ltd—proposed acquisition of Goodman Fielder's commercial fats and oils	On 10 December 2009 the ACCC commenced a public review of Cargill Australia Ltd's proposed acquisition of Goodman Fielder's commercial edible fats and oils business. The proposed acquisition included four refining facilities for fats and oils, and a long term supply agreement under which Cargill would supply refined fats and oils products to Goodman Fielder. The ACCC concluded that the proposed acquisition would lead to a significant concentration of refining assets in Australia and remove one of only a small number of competing refiners that offer a wide range of fats and oils products. The ACCC also concluded that any potential competitors face significant difficulties in viably obtaining certain inputs necessary to supply a number of edible fats and oils products, limiting their ability to provide an effective competitive constraint post-acquisition. The findings led the ACCC to conclude that the proposed acquisition would likely result in a substantial lessening of competition in markets for the supply of certain refined oil products, in particular those products used by industrial food manufacturers to make a range of food products.
GUD Holdings Ltd—proposed acquisition of Breville	GUD, an Australian manufacturing and marketing company selling electrical appliances under such brands as Sunbeam, proposed buying appliance wholesaler and marketer Breville. Breville's brands included Breville, Kambrook and Philips. On 9 October 2009 the ACCC began a review of the proposed sale. In its review, the ACCC found that the proposed transaction would be likely to result in a substantial lessening of competition in national wholesale markets for beverage makers, cooking equipment, food preparation equipment and home appliances. On 16 December 2009 the ACCC announced that it opposed the transaction.

Link Market Services Ltd—proposed acquisition of Newreg Pty Ltd	On 22 December 2009 the ACCC commenced a public review of Link Market Services Limited's proposed acquisition of Newreg Pty Limited. The ACCC concluded that the acquisition of Newreg (including Registries Limited) by Link would be likely to substantially lessen competition in the national market for securities registration and related services to listed companies and other entities with similar requirements. This would lead to higher prices and reduced quality of service that shareholders would ultimately bear. In addition, the ACCC's inquiries revealed that Registries currently plays an important role in the market, aggressively marketing and discounting its services to attract new clients.
National Australia Bank Ltd–proposed acquisition of AXA Asia Pacific Holdings Ltd	On 19 January 2010 the ACCC commenced a public review of National Australia Bank Limited's (NAB) proposed acquisition of AXA Asia Pacific Holdings Limited's Australian and New Zealand businesses. The ACCC found that NAB is a significant competitor in the provision of retail investment platforms for investors with complex needs. The ACCC also found that AXA is on the cusp of delivering an innovative platform that is likely to provide aggressive competition for investors with complex investment requirements. As a result, the ACCC considered that a merger of NAB and AXA would remove competitive tension. In the absence of the proposed acquisition by NAB, AXA on its own or an AMP-owned AXA would continue to drive innovation, particularly with respect to platform functionality, and deliver the benefits that flow in the form of enhanced services to financial advisers and their clients. As described above, the ACCC is aware that AXA is advanced in the implementation of a strategy to develop a low cost full function retail investment platform. The ACCC considers that this evidence increases the likelihood of AXA, or a merged AMP and AXA, competing strongly in the future. In the absence of competitive pressure from AXA's platform, the ACCC considered that existing platform providers were either unlikely to have the incentive to drive innovation in the foreseeable future, or lacked the capacity to do so. New entrants were also unlikely to emerge because of the high barriers to entry.

ADJUDICATION

Under Part VII of the TPA, protection may be afforded to arrangements or conduct that might otherwise breach the competition provisions of the TPA where those arrangements or that conduct is demonstrated to be in the public interest. This protection is granted by way of *authorisation* or *notification*.

In addition to its adjudication functions under Part VII of the TPA, the ACCC has roles and functions in relation to the assessment of *certified trade mark* applications and the receipt of *export agreements*.

AUTHORISATION

Parties who lodge an application for authorisation are required under the TPA to submit a form and pay a lodgement fee. Following legislative amendments, from 1 January 2007, the ACCC may waive or reduce the standard fee of $7500 where that fee would impose an unduly onerous burden on an applicant.

The ACCC's statutory function in considering an application for authorisation is to apply one of two tests, depending on the conduct in question. Generally speaking, the ACCC may only authorise arrangements where the benefit to the public would outweigh any detriment.

The ACCC is required to keep a public register of documents relating to an authorisation decision but may exclude certain material such as commercially sensitive information.

The ACCC must publish a draft determination and provide the opportunity for a conference of interested parties, before making a final decision on whether to grant authorisation. An interested party may seek a review of authorisation decisions by applying to the Australian Competition Tribunal.

Following concerns over the timeliness of the authorisation process, legislative amendments effective from 1 January 2007 generally require that the ACCC consider authorisation applications within six months. The majority of applications are now considered within four to five months.

The ACCC has the power to revoke or review an authorisation if it believes that the original authorisation was granted on the basis of false or misleading information, contains conditions that have not been complied with, or there has been a material change of circumstances since the authorisation was granted.

The ACCC issued 37 authorisation determinations in 2009–10. These arrangements spanned a wide range of industries, including collective bargaining by vegetable growers in Tasmania, joint marketing of gas produced by the Gorgon gas project, a long-term solution to the capacity constraints in the Hunter Valley coal chain, a joint venture between Virgin Blue and Delta Air Lines, and a liquor accord in the Northern Territory.

EXCLUSIVE DEALING NOTIFICATIONS

The exclusive dealing notification process, is procedurally different to the authorisation process. The process is available only for conduct of a kind described in section 47 (exclusive dealing). The protection provided by a notification starts

automatically from the date it is lodged with the ACCC (or 14 days later in the case of third line forcing).

The ACCC is required to keep a public register of documents relating to a notification but may exclude certain material such as commercially sensitive information.

The ACCC has the power to revoke a notification if it considers that the public detriments flowing from the notified conduct are not outweighed by the public benefits (and in cases other than third line forcing that the conduct would substantially lessen competition).

If the ACCC decides to revoke a notification it must first issue a draft notice of revocation and give the applicant an opportunity to call a conference.

Any interested party may seek a review of a decision by the ACCC to revoke a notification by applying to the Australian Competition Tribunal.

In 2009–10 the ACCC received approximately 309 exclusive dealing notifications.

COLLECTIVE BARGAINING NOTIFICATIONS

Collective bargaining refers to an arrangement where two or more competitors in an industry come together to negotiate terms and conditions (including price) with a supplier or an acquirer of goods or services (the 'target' or 'counterparty').

Businesses in the past have been able to obtain protection from legal action for collective bargaining arrangements through the authorisation process. However, amendments which commenced in January 2007 have provided small businesses with a more streamlined process for obtaining protection from legal action under the TPA by lodging a collective bargaining notification.

Protection afforded by the notification commences 28 days from the date the notification is lodged unless the ACCC objects in that period. In most cases the ACCC may object to a collective bargaining notification if it concludes that the public benefits likely to result from the collective bargaining arrangement will not outweigh the anti-competitive detriments.

The immunity provided by a collective bargaining notification will expire three years from the date the notification is lodged.

In 2009–10 the ACCC assessed 74 collective bargaining notifications.

CERTIFICATION TRADE MARKS

The ACCC is also responsible for assessing the rules for the use of certification trade marks (CTMs) under the *Trade Marks Act 1995*. A CTM indicates to consumers that a product or service is of a particular standard; for example, with regard to quality, origin, material or mode of manufacture. In assessing CTMs, the ACCC must be satisfied in relation to the competence of the certifiers to certify that the goods or services in question meet the required standard and that the rules governing the use of the CTM:

- would not be to the detriment of the public; and
- are satisfactory having regard to the principles relating to: restrictive trade practices in Part IV of the TPA; unconscionable conduct in Part IVA; and unfair practices and product safety information in Part V.

In 2009–10 the ACCC received 38 CTM applications.

EXPORT AGREEMENTS

Section 51(2)(g) of the TPA sets out the exemption for 'export agreements' for particular breaches of most sections of Part IV of the TPA. In particular provisions of export agreements are exempt if their full and accurate particulars are furnished to the ACCC within 14 days of the export agreement being made.

Under section 166(1) of the TPA, where a party applies to the ACCC, the ACCC is obliged to supply a certificate signed by a member of the ACCC to that party specifying the particulars so furnished and the date on which the particulars were so furnished.

In this regard, the ACCC's role is simply to receive and certify receipt. Section 166(3) of the TPA provides that particulars or provisions of contracts furnished to the ACCC under section 51(2)(g) are not open for public inspection.

RECENT LEGISLATIVE CHANGES

AUSTRALIAN CONSUMER LAW

The Australian Consumer Law (ACL) is a single, national law concerning consumer protection and fair trading, which applies in the same way nationally and in each State and Territory.

The ACL is the culmination of a process of cooperation between the Australian Government and the States and Territories through the Ministerial Council on Consumer Affairs (MCCA). It draws on the conclusions of the 2008 Productivity Commission Review of Australia's consumer policy framework and best practice in existing State and Territory laws, and the consultations that have been undertaken over the past two years.

The ACL:

- replaces a wide range of existing national and State and Territory consumer laws and will clarify understanding of the law for both Australian consumers and businesses
- is a schedule to the *Competition and Consumer Act 2010*, which will be the new name of the TPA
- is applied as a law of the Commonwealth. Each State and Territory will also make the ACL a law of its jurisdiction so that the same provisions will apply across Australia
- is enforced by all Australian courts and tribunals, including the courts and tribunals of the States and Territories
- is administered by the ACCC and each State and Territory's consumer law agency; and
- is generally reflected in similar provisions in the *Australian Securities and Investments Commission Act 2001* (ASIC Act), so that financial products and services are treated in the same way.

The main changes being implemented in the ACL are:

- a single set of definitions and interpretive provisions, some of which differ from those currently used in the TPA
- a new, national law on unfair contract terms
- a single set of provisions about unfair practices and fair trading, including amendments and additions which reflect existing provisions in State and Territory consumer laws
- new national consumer guarantees provisions, which will replace statutory implied conditions and warranties
- a new national regime for unsolicited consumer agreements, which will replace existing State and Territory laws on door-to-door sales and other direct marketing
- simple national rules for lay-by agreements

- a new, national product safety legislative regime; and
- new, national provisions on information standards which apply to services as well as goods.

The two Commonwealth pieces of legislation implementing the ACL received the Royal Assent in April and July 2010. Among other things, the first Act introduced additional enforcement powers and remedies for the ACCC, and provisions relating to unfair contract terms. These provisions are now in effect. There will be no significant change to the ACCC's approach to enforcement and compliance—the ACCC will continue to prioritise those areas that pose the greatest risk of detriment for consumers or threaten disadvantaged or vulnerable consumers.

The remainder of the ACL will commence on 1 January 2010 and, in accordance with the National Partnership Agreement to Deliver a Seamless National Economy, the governments of the States and Territories are now preparing legislation to apply the ACL as laws of their jurisdictions from 1 January 2011.

CRIMINALISATION OF CARTEL CONDUCT

The *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* received the Royal Assent on 26 June 2009, and came into effect on 24 July 2009. The Act significantly amends Part IV of the TPA by introducing parallel civil and criminal sanctions for cartel conduct. Criminalising cartel conduct was proposed in the 2003 report of the Trade Practice Act Review Committee, chaired by Sir Daryl Dawson (Dawson Review), and its enactment brings Australia into line with many other OECD countries.

The elements of the civil and criminal cartel offences are drafted in similar terms, with the only differences between them being:

- the criminal cartel offence must be proven beyond a reasonable doubt, whilst a civil cartel contravention need only be proven on the balance of probabilities, and
- to establish a criminal cartel offence, it is also necessary to prove the requisite fault elements, which are:
    - that the relevant contract, arrangement or understanding was made, or given effect to, intentionally, and
    - that the accused knew or believed that the relevant contract arrangement or understanding contained a cartel provision.

Penalties for engaging in cartel conduct

Under the criminal provisions, individuals face up to ten years imprisonment and pecuniary penalties up to $220 000. Civil pecuniary penalties can reach up to $500 000. Individuals can also be banned from managing corporations for such period as the court thinks fit.

Under amendments to the TPA that came into effect in January 2007, if corporations are found to have engaged in cartel conduct the maximum penalty that can be imposed is the greatest of:

- $10 million, or

- three times the total value of benefit 'obtained by one or more persons' from the cartel, or
- when the value of the illegal benefit cannot be ascertained, 10 per cent of the turnover of the corporate entity (including related corporate bodies) in the preceding 12 months.

LIMITED MERITS REVIEW

The *Trade Practices Amendment (Infrastructure Access) Act 2010* received the Royal Assent on 13 July 2010. The Act amends the TPA to introduce limited merits review of decisions made under the Part IIIA of the TPA. In such a review, the Australian Competition Tribunal would be limited primarily to the information that was before the original decision-maker.

Additional information could be sought:

- for the purposes of clarifying information that was before the original decision-maker, and
- from the ACCC in relation to an ACCC decision or determination.

OTHER AMENDING LEGISLATION

The list above captures the major amendments to the TPA. Below is a list of other legislation passed by Parliament since 1 July 2008 introducing amendments to the TPA, which are not referred to above:

- *Australian Energy Market Amendment (AEMO and Other Measures) Act 2009;* commenced 27 March 2009
- *Australian Energy Market Amendment (Minor Amendments) Act 2008;* commenced 1 July 2008
- *Crimes Legislation Amendment (Serious and Organised Crime) Act (No.2) 2010*; commenced 20 February 2010
- *Fair Work (State Referral and Consequential and Other Amendments) Act 2009*; commenced 1 July 2009
- *Offshore Petroleum Amendment (Greenhouse Gas Storage) Act 2008;* commenced 22 November 2008
- *Statute Stocktake (Regulatory and Other Laws) Act 2009*; commenced 17 November 2009
- *Statute Law Revision Act 2010*; commenced 1 March 2010
- *Trade Practices Amendment (Clarity in Pricing) Act 2008*; commenced 26 November 2008 (schedule 2) and 25 May 2009 (schedule 1)
- *Trade Practices Legislation Amendment Act 2008*; commenced 22 November 2008
- *Water Amendment Act 2008*; commenced 15 December 2008.