

Part 3

Report on Performance



Performance reporting framework

This part reports on the ACCC's and the AER's performance for 2012-13, based on the performance reporting framework provided in the 2012-13 Treasury portfolio budget statements (PBS). The ACCC and the AER jointly report against one program and one outcome, as shown in table 3.1.

Table 3.1: Performance reporting framework

Drivers	<i>Competition and Consumer Act 2010</i> Portfolio budget statements ACCC and AER corporate and business plans
Program 1	Australian Competition and Consumer Commission
Outcome 1	Lawful competition, consumer protection, and regulated national infrastructure markets and services through regulation, including enforcement, education, price monitoring and determining the terms of access to infrastructure services
Goals*	<ol style="list-style-type: none"> 1. Promote vigorous, lawful competition and informed markets 2. Encourage fair trading, protection of consumers and product safety 3. Regulate bottleneck monopoly industries to promote efficiency and infrastructure investment, increase competition in markets depending on that infrastructure and promote the interests of end-users 4. Increase our engagement with the broad range of groups affected by what we do** 5. Increase our effectiveness as an organisation through a commitment to our people, planning and systems**

* The ACCC and AER has re-phrased these goals to better align with our organisational objectives and will be using the phrasing of these goals as published in our *Corporate Plan 2012-13*. These goals appear in the 2013-14 portfolio budget statements and we report against them in the quarterly ACCCount publication.

** Although not listed in the PBS, the ACCC is reporting against these goals to provide greater transparency in its performance reporting consistent with its corporate plan and the 2013-14 portfolio budget statements, providing a basis for comparison in the future.

Goals and strategies

Below are the goals the ACCC uses to achieve its outcome and the strategies used to deliver on each goal. Each strategy has its own measures. The measures are listed under each strategy of this section of the report. Goal 5 is reported against in part 4 of this report. The tables of targets and results (described in the portfolio budget statements as Key Performance Indicators) are listed at the end of the sections.

Goal 1: Maintain and promote competition and remedy market failure

Strategies

- 1.1 Deliver outcomes to address harm to consumer welfare through anti-competitive conduct and improve competition under the priority areas identified in the ACCC's Compliance and Enforcement Policy
- 1.2 Direct our staffing and streamline our supporting work practices to enable us to deliver results under our annually reviewed Compliance and Enforcement Policy
- 1.3 Assess and review mergers with a focus on concentrated markets such as supermarkets, liquor, financial markets and energy to prevent structural changes that substantially lessen competition
- 1.4 Update our merger review and authorisation processes to improve efficiency and give clear guidance to merger parties, authorisation applicants and market participants
- 1.5 Support the AER to promote competitive arrangements in wholesale energy markets

Goal 2: Protect the interests and safety of consumers and support fair trading in markets

Strategies

- 2.1 Deliver outcomes under the priority areas identified in the ACCC's Compliance and Enforcement Policy to improve compliance with the Australian Consumer Law (ACL)
- 2.2 Multiply the effectiveness of our compliance and enforcement initiatives through an active program of stronger and managed partnerships with ACL regulators and law enforcement agencies
- 2.3 Identify and implement nationally integrated approaches to minimise the risk of injury and death from safety hazards in consumer products
- 2.4 Support a vibrant small business sector, deter anti-competitive and unconscionable conduct targeted at small business and facilitate collective conduct by small business operators where that conduct is assessed to provide a net public benefit
- 2.5 Support the AER to foster customer confidence and engagement through the new retail energy functions

Goal 3: Promote the economically efficient operation of, use of and investment in monopoly infrastructure

Strategies

- 3.1 Refresh the rationale for why we regulate in particular markets to inform the policy debate
- 3.2 Improve our regulatory practices and processes by further developing our thinking on how we regulate
- 3.3 Build relationships with international regulatory agencies to leverage their experience in the regulation of infrastructure industries
- 3.4 Deliver network regulation to promote competition and meet the long-term interests of end-users
- 3.5 Support the AER in promoting energy network regulation that meets the long-term interests of energy consumers
- 3.6 Improve the workability of emerging markets by enforcing market rules and monitoring market outcomes
- 3.7 Respond to government requests to provide monitoring reports on industries in highly concentrated and newly de-regulated markets

Goal 4: Increase our engagement with the broad range of groups affected by what we do

Strategies

- 4.1 Implement a comprehensive strategy to ensure effective communication with our diverse audiences that supports our goals
- 4.2 Undertake an active program of stronger and managed partnerships with a broad range of organisations that can assist us deliver outcomes that impact favourably on consumer welfare



Goal 1: Maintain and promote competition and remedy market failure

Significant outcomes in 2012-13

- A further four companies were ordered to pay penalties for price fixing as part of an air cargo cartel. The Cathay Pacific Airways Ltd (\$11.25 million), Emirates (\$10 million), Singapore Airlines Cargo Pte Ltd (\$11.75 million) and Thai Airways International (\$7.5 million) penalties brings the total for this cartel to a record \$98.5 million to date.
- Viscas Corporation was penalised \$1.35 million for its role in bid rigging and price fixing conduct in the supply of land cables.
- The ACCC instituted important cases to protect competition including against Renegade Gas and Speed-E-Gas, Yazaki Corporation and Visa Inc.
- The ACCC cleared a merger, subject to negotiated undertakings, to protect competition in infant and baby food markets in Australia.
- The ACCC opposed acquisitions which would have substantially lessened competition in local hardware, supermarkets and premium sports TV content.

Goal 1: Measures

<div><div></div></div>	Timely and effective identification, investigation and action responses to address instances of anti-competitive conduct
<div><div></div></div>	Effective remedies achieved through court action
<div><div></div></div>	Effective remedies through non-court action
<div><div></div></div>	Effective education and communication about anti-competitive conduct
<div><div></div></div>	Enhanced use of data analysis and intelligence to inform our regulatory approaches and interventions
<div><div></div></div>	Mergers assessed within statutory and organisational timeframes
<div><div></div></div>	Action taken to address competition issues as a result of public or confidential merger reviews
<div><div></div></div>	Media and industry monitoring identifies relevant merger intelligence activity
<div><div></div></div>	Authorisation and notification decisions made within statutory timeframes
<div><div></div></div>	Collective bargaining notification decisions made within statutory timeframes

The ACCC's role and powers in promoting competition

Competitive markets lead to lower prices, better quality, greater efficiency and more choice, all of which enhance the welfare of consumers. As Australia's only competition regulator, the ACCC works to enhance the welfare of Australians by:

- maintaining and promoting competition, and
- addressing market failures.

The ACCC does this by taking action under Part IV of the *Competition and Consumer Act 2010* (the Act) in relation to:

- cartels and other anti-competitive agreements
- misuse of market power
- exclusive dealing and resale price maintenance
- mergers which substantially lessen competition.

The ACCC assesses proposed mergers to provide a view on whether or not the merger will, or is likely to, substantially lessen competition. Where a merger potentially raises competition issues, the ACCC will undertake a review, which can be either public or confidential. Information about public merger reviews is provided on a public register to inform the public, businesses and their advisers about the merger review process.

The ACCC may grant protection from legal action for certain types of anti-competitive conduct where the public benefit outweighs the public detriment, including from any lessening of competition. The authorisation and notification provisions of the Act recognise that, in certain circumstances, allowing conduct that might restrict competition in order to enhance efficiency and welfare may be in the public interest. The types of conduct that have been allowed by the ACCC on public benefit grounds include collective bargaining, codes of conduct and joint ventures or alliances.

ACCC's compliance and enforcement tools

Court cases

The ACCC takes legal action through the court where, considering all the circumstances, the ACCC decides litigation is the most appropriate way to achieve its enforcement and compliance objectives, for example, where a business breaks the law, causing significant detriment. The ACCC will also take court action to protect competition, for example, where a proposed merger is likely to substantially lessen competition.

Enforceable undertakings

The ACCC often resolves alleged breaches of the Competition and Consumer Act by accepting court-enforceable undertakings from the business involved. If the business later breaches the undertaking, the ACCC will seek to have it enforced in the Federal Court of Australia. All undertakings are recorded on a public register. In these undertakings, which are on the public record, individuals or businesses usually undertake to:

- remedy the harm they have caused
- accept responsibility for their actions
- establish or review and improve their compliance programs and culture.

The ACCC may also use court-enforceable undertakings where there are competition concerns with a proposed merger or acquisition. Actions agreed in the undertaking, which are also on the public record, can address the ACCC's concerns about a substantial lessening of competition, allowing the merger or acquisition to proceed.

Administrative resolution

In some cases—for example, where the ACCC assesses the potential risk flowing from conduct as low—the ACCC may accept an administrative resolution. Administrative resolutions generally involve a company or trader agreeing to stop the conduct and compensate those who suffered a detriment because of it, and to take other measures necessary to ensure that the conduct does not recur.

Education and advice

The ACCC uses educational campaigns to inform and advise businesses about their rights and obligations under the Act, and to encourage compliance with the Act. It believes that preventing a breach of the Act is preferable to taking action after a breach has occurred. It also seeks to ensure that big and small businesses are fully aware of both their rights and responsibilities under the Act.

The ACCC disseminates targeted and general information, including tips and tools, to help encourage businesses to comply with the Act via a wide range of channels. It liaises extensively with business, consumer and government agencies about the Act and the ACCC's role in its administration.

1.1 Stopping anti-competitive conduct

2012–13 Strategy:

Deliver outcomes to address harm to consumer welfare through anti-competitive conduct and improve competition under the priority areas identified in the ACCC's Compliance and Enforcement Policy

Measures:

- Timely and effective identification, investigation and action responses to address instances of anti-competitive conduct.
- Effective remedies achieved through court action.
- Effective remedies achieved through non-court action.
- Effective education and communication about anti-competitive conduct.
- Enhanced use of data analysis and intelligence to inform our regulatory approaches and interventions.

2013 compliance and enforcement priorities

The ACCC's *Compliance and Enforcement Policy* sets out the ACCC's competition priorities. In February 2013, the ACCC released a revised policy, which articulated that some types of anti-competitive business conduct are so harmful to consumer welfare and competition that the ACCC will always assess them as a priority, irrespective of the economic sector in which the conduct occurred. These are **cartel conduct**, **agreements which substantially lessen competition**, and the **misuse of market power**.

In addition to these ongoing competition priority areas, the ACCC has identified the following further areas of focus:

- competition and consumer issues arising in **highly concentrated sectors**, especially the supermarket and fuel sectors
- **online competition issues**, including conduct which may impede emerging competition between online traders or limit the ability of small businesses to compete online.

Cartel conduct

A Cartel is a type of anti-competitive arrangement that occurs when businesses agree with their competitors to fix prices, rig bids, share markets or restrict outputs. By conspiring to control markets in these ways, a cartel protects and rewards their inefficient members while penalising honest, innovative and well-run companies.

The ACCC has extensive powers to investigate cartels. It can compel anyone to provide information about a suspected breach of the law, and can seek search warrants from a magistrate and execute these on company offices and the premises of company officers.

The ACCC relies on companies and individuals to alert it to cartel activity, including cartel participants. These people can ask for immunity from civil and criminal proceedings by self-reporting their involvement to the ACCC under its *Immunity Policy for Cartel Conduct*.

The ACCC also undertakes intelligence assessments of industries that may be susceptible to collusion or in which anomalies are observed that may indicate the presence of cartel conduct. One such assessment was used to inform a current in-depth investigation.

Effective remedies through court action

The following cases were finalised in 2012–13:

- **Air cargo.** The ACCC began an investigation into alleged cartel activity in air cargo services in 2006. It took legal action against 15 airlines. All except three have admitted to anti-competitive conduct and paid penalties. In 2012–13 Cathay Pacific Airways Ltd, Emirates, Singapore Airlines Cargo Pte Ltd and Thai Airways International were ordered to pay \$11.25 million, \$10 million, \$11.75 million and \$7.5 million respectively in respect of anti-competitive conduct including price fixing surcharges relating to international freight carriage. This brings the total penalties imposed to \$98.5 million. The ACCC's case against the last three airlines remains before the court and judgement has been reserved.
- **Viscas Corporation.** This Japanese cable supplier was ordered to pay \$1.35 million for bid rigging and price fixing conduct. The penalty followed Viscas's admission that, in September 2003, it reached an anti-competitive arrangement with other Japanese and European suppliers of land cables in relation to a tender invitation from Snowy Hydro Ltd. The Federal Court also ordered that Viscas not engage in a similar conduct for three years and to contribute to the ACCC's legal costs.
- **Proceedings continue against two foreign corporations,** Prysmian Cavi e Sistemi Energia SRL and Nexans SA in relation to the anti-competitive conduct alleged against them.

In August 2012, the ACCC instituted proceedings against **Renegade Gas Pty Ltd** (trading as Supagas NSW) and **Speed-E-Gas (NSW) Pty Ltd**. The ACCC alleges that these companies, through their senior executives and sales staff, gave effect over a number of years to anti-competitive cartel arrangements, which included not supplying liquid petroleum gas cylinders for forklifts to each other's customers.

In December 2012, the ACCC began proceedings against **Yazaki Corporation** and its wholly owned Australian subsidiary, **Australian Arrow Pty Ltd**, for alleged cartel conduct, market sharing and price fixing. The allegations relate to the supply of wire harnesses to Toyota Motor Corporation and its related businesses in Australia. Wire harnesses are electrical systems that distribute power and electrical signals to various components of a motor vehicle. The case is ongoing, with the ACCC seeking penalties, declarations, injunctions and costs.

At year's end, the ACCC had five proceedings still before the courts alleging cartel conduct. (see appendix 10 on page 334).

Effective remedies through non-court action

In February 2013, the ACCC accepted a court-enforceable undertaking from **All Homes Pty Ltd** following concerns that All Homes may have attempted to induce real estate agents to agree on their fees. ACCC concerns arose following an email sent by All Homes to over 1000 real estate agents in the ACT and Queanbeyan region.

All Homes agreed that it would not, over the next three years, send a communication to registered real estate agents about suggested fees for agent services in particular areas. The company further agreed to send a letter to each agent who originally received the email advising that they were free to set their service prices, and to implement an internal compliance program.

Effective education and communication

In August 2012, the ACCC released *The Marker*, a short film on the devastating effects involvement in a cartel can have on individuals and businesses. It shows how cartel activity can ruin relationships, careers, reputations and long-term financial security, and may ultimately land the guilty in jail.

The film was one aspect of the ACCC's cartel awareness raising campaign inspired, in part, by University of Melbourne research showing gaps in business awareness of the illegality of cartel conduct. It was supported by a video news release featuring the ACCC Chairman Rod Sims, Qantas Chief Executive Officer Alan Joyce and University of Melbourne Associate Professor Caron Beaton-Wells. The ACCC distributed the film to the chief executive officers of 300 of Australia's largest companies, urging them to show it to employees at all levels of their business. The film is also available on YouTube and has been viewed more than 10 000 times.

The ACCC shares intelligence and collaborates with its international counterparts. For example, in 2012–13, the ACCC continued its engagement with the International Competition Network (ICN), presenting at ICN conferences and co-chairing the ICN Cartels Working Group. See *International partnerships and collaboration* on page 190 for further information.

Anti-competitive agreements

The Act prohibits contracts, arrangements or understandings between two or more parties which aim to, or are likely to, substantially lessen competition in a market, even if that conduct does not meet the stricter definitions of other anti-competitive conduct such as cartels. In line with its published priorities, the ACCC is focusing on competition in concentrated market sectors. The ACCC has announced that it is reviewing agreements in the fuel sector relating to sharing of price information and in relation to the provision by major supermarket chains of fuel discount 'shopper dockets'. At the year's end, the ACCC had two proceedings before the courts concerning alleged anti-competitive agreements.

Effective remedies through court action

In October 2012, the ACCC's proceedings against **Flight Centre Ltd** were heard by the Federal Court, with judgment reserved. The ACCC commenced proceedings against Flight Centre Ltd in March 2012, alleging that Flight Centre attempted to induce competitors to enter into price fixing arrangements with it. The ACCC has sought declarations, injunctions, pecuniary penalties and costs.

The ACCC is also awaiting Federal Court judgment in proceedings against **ANZ Banking Corporation Ltd**.

Information sharing—fuel companies

On 3 May 2012, the ACCC announced it had commenced an investigation into price information sharing in the retail petrol sector because of concerns that such arrangements may be in breach of the Act.

The petrol price sharing arrangements allow the private and very frequent exchange of comprehensive retail price information between the major petrol companies. The ACCC is concerned that this allows petrol price retailers to signal price movements, monitor competitors' responses, and react to them, resulting in a substantial lessening of price competition in petrol retailing to the detriment of consumers. The investigation continues.

Shopper dockets

The ACCC is considering the competition implications of the trend of larger and longer fuel shopper docket offers. The ACCC is reviewing whether competition issues arise from shopper docket discount fuel schemes, given the increased proliferation of shopper docket discount offers in recent years, and the extended frequency, duration and quantum of shopper docket fuel discounts offered by major supermarket chains. These investigations are continuing.

Misuse of market power

A business with substantial power in a market is not allowed to use this power for the purpose of eliminating or substantially damaging a competitor, to prevent a business from entering a market, or to deter or prevent a business from engaging in competitive conduct in any market. Such behaviour is termed 'misuse of market power' and is prohibited under section 46 of the Act.

Effective remedies through court action

In February 2013, the ACCC commenced proceedings against **Visa Inc** and a number of related companies in the Visa Group alleging misuse of market power in the supply of dynamic currency conversion services. The ACCC alleges that Visa, operator of the world's largest retail electronic payments processing network, misused its market power for the purposes of preventing the expansion of currency conversion services to new merchant outlets in Australia. It also alleged that the company prevented businesses here from supplying currency conversion services on ATMs in competition with Visa. In both cases the ACCC alleges that a substantial purpose of Visa was to protect the substantial revenue it derived from use of the Visa currency conversion service. The case is ongoing and the ACCC is seeking penalties, declarations and costs.

In September 2008, the ACCC instituted proceedings against **Cement Australia Pty Ltd**, Pozzolan Enterprises Pty Ltd, and two related companies in the Federal Court for alleged misuse of market power. The ACCC alleges that Cement Australia and Pozzolan Enterprises misused their market power in entering into and amending a contract to acquire flyash from Millmerran Power Station. Flyash is a by-product of burning black coal at electricity power stations and, when of suitable quality, it can be used as a cheap partial substitute for cement in ready-mix concrete. The ACCC alleges that Pozzolan and Cement Australia had no commercial need for the contracted flyash from Millmerran Power Station, and by contracting for the flyash, took advantage of their market power for the purpose of preventing entry and competitive conduct in the relevant concrete-grade flyash market. The ACCC's case is awaiting judgment.

Online markets

Australian businesses and consumers are making increasing use of the internet to buy and sell goods and services. The value of goods and services purchased online grew from \$40 billion in 2004-05 to \$237.1 billion in 2011-12 (*Summary of IT Use and Innovation in Australian Business, 2011-12 ABS Catalogue No. 8166.0*). With this rapid growth in e-commerce presenting many challenges and opportunities for business and consumers, the ACCC has prioritised competition and consumer protection in online markets.

In addition to traditional markets, the ACCC is seeking to ensure fair and competitive markets operate in the developing online trading environment. The ACCC has identified online markets as a priority, particularly where anti-competitive conduct exists in the supply chain. This includes exclusive dealing that substantially lessens competition, misuse of market power, and resale price maintenance.

The ACCC has conducted market research and liaised with industry groups, experts and businesses to identify where systemic impediments are restricting businesses from being competitive and innovative. The ACCC is particularly concerned about conduct that inhibits smaller retailers from being competitive, such as through measures to prevent retailers selling online, using popular online third party retail channels such as eBay, or inhibiting otherwise discounted prices.

The key areas of concern are whether:

- traditional (bricks and mortar) retailers are pressuring suppliers and manufacturers to stop supplying online retailers
- suppliers and manufacturers are requiring that online retailers agree to restrictive terms and conditions (for example to charge higher prices) before they will deal with them
- there are exclusive dealing arrangements that have the potential to substantially lessen competition in a market.

The ACCC intends to release guidance which will identify areas in which the market is not operating efficiently, and provide consumers and businesses with steps to take when faced with barriers to effective online trading.

In some cases there may be market arrangements and impediments that might be unfavourable to consumers or have an impact on competition but nevertheless may not amount to a contravention of the anti-competitive provisions of the Act. Two key issues for consumers are currently geo-blocking and possible price discrimination. The issue of price discrimination is also being considered on a broader level through the House Standing Committee on Infrastructure and Communications' Inquiry into IT Pricing, which is examining whether Australian consumers pay substantially more for IT hardware and software products than consumers in other countries.

The ACCC is considering alternative strategies that may facilitate best practice approaches by businesses to reduce impediments in the supply chain.

This work will assist the ACCC to prioritise its enforcement and compliance activities to facilitate competitive markets, innovation and overall consumer welfare. It will also ensure that access to new online markets is open to all, particularly small businesses.

Concentrated markets

The Australian economy is characterised by a handful of sectors where the number of suppliers is relatively small. These highly concentrated markets have the potential for arrangements that substantially lessen competition, and carry the risk of potential for misuse of market power which prevents or damages competition, and therefore requires close scrutiny. As a specific area of focus, the ACCC has placed priority on competition issues arising in highly concentrated sectors—in particular, the supermarkets and fuel sectors (see anti-competitive agreements on page 36).

Supermarkets

On 13 February 2013, ACCC Chairman Rod Sims tabled a statement at a hearing of the Senate Economics Committee, updating the Committee on the ACCC's investigation into supermarket supplier issues.¹ In the statement, the chair outlined the allegations raised with the ACCC, which included allegations of some conduct that does not conform with acceptable business practice and may be unconscionable or a misuse of market power, including in their supply of house brand products.

The ACCC's investigation into supermarket supplier issues is continuing.

¹ The Chairman's statement dated 13 February 2013, tabled at an Additional Budget Estimates hearing of the Senate Economics Committee is available online at http://www.apb.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=economics_ctte/estimates/add_1213/index.htm

Other work promoting competition

Resale price maintenance

A supplier may recommend that resellers charge an appropriate price for particular goods or services but cannot stop resellers charging or advertising below that price. It is illegal for suppliers to pressure resellers to charge their recommended retail price or any other set price, for example, by threatening to stop supplying to the reseller, or stop resellers from advertising, displaying or selling the goods below a specified price. It is also illegal for resellers to ask their suppliers to use recommended price lists to stop competitors from discounting. In most cases, a supplier may, however, specify a maximum price for retail.

Resale price maintenance restricts the ability of businesses to compete on price, which is deemed to be anti-competitive regardless of its impact on competition. Resale price maintenance is specifically prohibited by section 48 of the Act. Businesses that propose to engage in resale price maintenance can apply for authorisation from the ACCC if the conduct is likely to result in public benefit (see section 1.4 on page 47).

Effective remedies through non-court action

The ACCC accepted three undertakings from companies that had engaged in resale price maintenance:

- In September 2012, the ACCC received a court-enforceable undertaking from **Valiant Enterprises Pty Ltd** on resale price maintenance. Valiant Enterprises, a distributor of baby products, attempted to induce an online retailer not to advertise the AngelCare AC 1100 baby monitor at a price less than that specified by Valiant. Valiant has undertaken that it will not engage in similar conduct in the future, will write to its retail clients to alert them to the undertaking, place a corrective notice on its website and implement a trade practices compliance program.
- In October 2012, the ACCC received a court-enforceable undertaking from **Chemical Formulators Pty Ltd** (Chemform) after admitting that it was likely to have engaged in resale price maintenance in supplying commercial cleaning products in Australia. Chemform undertook not to attempt resale price maintenance in future, delete from its distributor agreement a clause preventing distributors from price discounting, send the revised agreement to distributors and advise them that they are free to set the minimum resale price. Chemform will also implement a competition and consumer law compliance program.
- In December 2012, the ACCC accepted a court-enforceable undertaking from hearing aid wholesaler and retailer **Oticon Australia**, which acknowledged that it engaged in resale price maintenance in supplying hearing aids to retailers in Australia. Oticon agreed to stop such conduct in the future and maintain and continue to implement a compliance program.

1.2 Delivering our priorities

2012–13 Strategy: *Direct our staffing and streamline our supporting work practices to enable us to deliver results under our 2012 Compliance and Enforcement Policy*

Focusing our resources on priorities

In February 2012, the ACCC released its *Compliance and Enforcement Policy*, which outlines the ACCC's priority areas for the year and sets out factors to be taken into account (see *ACCC's role in consumer protection* on page 62) when deciding whether to pursue matters.

In 2012, the ACCC reviewed its pipeline of investigations to assess them against its priorities both in relation to anti-competitive conduct (see Goal 1.1) and conduct harmful to consumer welfare (see Goal 2). The assessment found that over 50 per cent of the ACCC's enforcement and compliance work sat well within the main priority areas, and that almost all matters pursued were aligned with the priority factors set out in the *Compliance and Enforcement Policy* (see the ACCC's role in consumer protection on page 62). This indicates the ACCC is delivering on its priority areas, while also allocating resources to deal with other types of detrimental conduct.

1.3 Assessing mergers to maintain competition

2012–13 Strategy: *Assess and review mergers with a focus on concentrated markets such as supermarkets, liquor, financial markets and energy to prevent structural changes that substantially lessen competition*

Measures:

- Mergers assessed within statutory and organisational timeframes.
- Action taken to address competition issues as a result of public or confidential merger reviews.
- Media and industry monitoring identifies relevant merger intelligence activity.

Informal clearance and pre-assessments

Section 50 of the *Competition and Consumer Act 2010* prohibits mergers and acquisitions that have, or would be likely to have, the effect of substantially lessening competition in any market in Australia. In assessing a proposed merger under the Act, the ACCC advises the merger parties on whether, in its view, the proposal is likely to have this effect—a process generally known as an ‘informal clearance’. Businesses may also apply to the ACCC for formal clearance of mergers.

The ACCC considers those mergers it becomes aware of that have the potential to raise concerns under section 50. Such mergers are generally brought to the ACCC’s attention by merger parties who request an informal clearance.

In addition, the ACCC monitors media daily for news of proposed or actual mergers to identify any transactions that may potentially raise competition issues. Information may also be obtained from other sources such as complaints and referrals from Australian and overseas regulators. Where it identifies proposals in the media or from other sources that have not yet been notified to the ACCC, the ACCC may decide to conduct a public review once the merger is in the public domain.

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

This pre-assessment process enables the ACCC to respond quickly where there are no substantive competition concerns raised. A significant proportion of the mergers assessed by the ACCC are pre-assessed.

For matters that cannot be pre-assessed, the ACCC will conduct a public review or, in the case of confidential mergers, discuss with the merger parties whether they want to proceed to a confidential review.

Merger reviews

The ACCC considered 289 matters under section 50 of the Act in 2012–13. Of these, 213 were assessed as not requiring a public review (pre-assessed), a decrease of 15 per cent on the 250 pre-assessments in 2011–12. The ACCC held a public review of 64 mergers and a confidential review of 12, a decrease of 16 per cent on the 74 public reviews and 25 per cent on the 16 confidential reviews in 2011–12.

In reviewing mergers, the ACCC aims to work efficiently, transparently and effectively, having regard to the commercial imperatives of the parties involved. The ACCC also seeks to inform the public, businesses and their advisers about its merger review process. Indicative timelines for mergers under public consideration are placed on the ACCC’s online mergers register, except for mergers which are pre-assessed or subject to a confidential review.

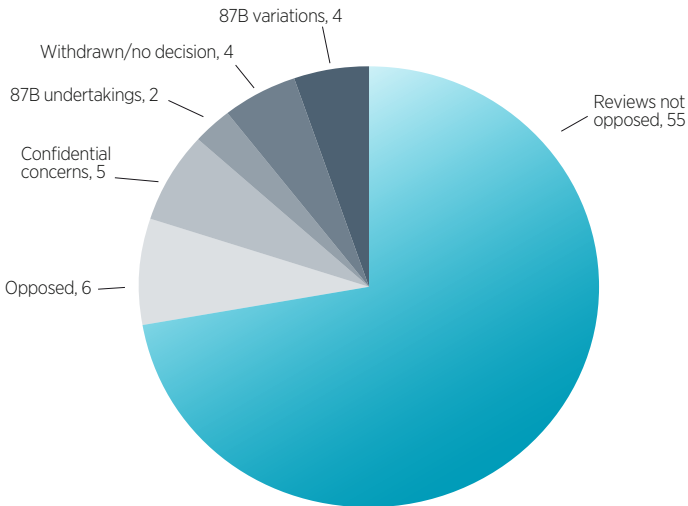
Of the 76 public and confidential reviews conducted in 2012–13:

- six mergers were publicly opposed by the ACCC
- confidential opposition or concerns were expressed in five mergers
- two mergers were allowed to proceed after the ACCC accepted court-enforceable undertakings under section 87B of the Competition and Consumer Act to address competition concerns

- four merger reviews were either withdrawn by the parties before a decision could be made, or were confidential matters where no view could be formed without market inquiries
- 55 mergers were not opposed and no undertakings were sought
- variations to existing undertakings were accepted in relation to four mergers.

The ACCC unconditionally cleared 77 per cent of those mergers that underwent a public or confidential review and 94 per cent of all mergers (including pre-assessments). In nine matters the ACCC used its formal information-gathering powers under section 155.

Figure 3.1: Merger reviews assessed in 2012-13



Most of the 213 mergers pre-assessed were dealt with in less than two weeks. Of the 76 mergers that underwent a public or confidential review, 38 were completed in less than eight weeks and 20 took more than eight weeks. The review time is not reported for the remaining 18 on the basis that the ACCC did not reach a final decision (such as where the parties decided not to pursue the transaction before the ACCC concluded its review or where the reviews involved completed acquisitions and variations to existing undertakings).

Significant merger matters assessed and reviewed in 2012-13 appear in appendix 13, page 351.

Statements of issues

The ACCC releases a 'statement of issues' when it reaches a preliminary view that a proposed merger raises competition concerns requiring further investigation. This process aims to increase the transparency of the informal review process and allow the ACCC to obtain further information. With additional information, the ACCC may decide its concerns are either alleviated or reinforced and, where competition concerns remain, may consider any undertakings submitted by the merger parties to resolve them. In 2012-13, the ACCC issued statements of issues in 10 mergers.

Case study

Virgin Australia—proposed acquisition of 60 per cent of Tiger Airways Australia

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

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

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

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

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

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

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

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

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

Public competition assessments

The ACCC helps the public to understand its analysis of the competition issues involved in certain merger reviews by issuing a 'public competition assessment' with a detailed summary of the issues it considered in reaching its view on whether the proposed merger would, or be likely to, substantially lessen competition in a market. These assessments are generally published when:

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

In 2012–13, the ACCC issued public competition assessments in five mergers. Two of these concerned mergers that the ACCC had rejected—the **Carsales.com.au** proposed acquisition of **Trading Post** and the **Seven Group's** proposed acquisition of the remaining shares in **Consolidated Media Holdings Limited**. Public competition assessments were also issued for **Nestlé's** proposed acquisition of **Pfizer Nutrition** and **APA Group's** proposed acquisition of **Hastings Diversified Utilities Fund** following acceptance of section 87B undertakings. One assessment published during the year for a merger that was cleared concerned **AGL Energy Limited's** proposed acquisition of **Great Energy Alliance Corporation Pty Ltd** (owner of the Loy Yang A power station). In this case, the ACCC considered that the acquisition raised important issues that should be made public.

Section 87B undertakings

The ACCC accepted two section 87B undertakings to address competition concerns that it had identified in relation to Nestlé's proposed acquisition of Pfizer Nutrition and APA Group's proposed acquisition of Hastings Diversified Utilities Fund, allowing these mergers to be cleared.

Using an undertaking to resolve competition concerns

Nestlé proposed acquisition of Pfizer Nutrition. The ACCC had significant concerns that the proposed global acquisition would result in a significant increase in concentration in already concentrated markets for the supply of infant nutrition products in Australia, where barriers to entry and expansion are high. However, the ACCC decided not to oppose the merger after accepting an undertaking from Nestlé which contained a number of interesting behavioural and quasi-structural elements. Nestlé agreed to license Pfizer's Australian infant nutrition brands exclusively to an ACCC approved licensee for 10 years. The following 10 years was a 'black out' period in which Nestlé was prohibited from using any of Pfizer's brands in Australia. The ACCC considered the undertaking would ensure that the current level of competition in the relevant markets would be maintained through the creation of a strong third major supplier of infant nutrition products in Australia. Due to the global nature of the transaction, the ACCC consulted extensively with competition authorities in foreign jurisdictions in assessing the proposed acquisition and the remedy package offered by Nestlé.

Appendix 9, page 329 lists the undertakings accepted.

Concentrated markets

During 2012–13, the ACCC maintained a focus on concentrated markets such as supermarkets, energy, media and financial services, as these are priority areas identified in the ACCC's *Compliance and Enforcement Policy*.

In June 2012, the ACCC announced it was focusing on incremental small retail acquisitions by the major supermarket chains in light of concerns about the continued expansion of Woolworths and Coles in various sectors. The ACCC considered the best way forward was for the ACCC and the major supermarkets to agree a voluntary streamlined notification and review protocol which would provide benefits for both. In December 2012, the ACCC agreed with Coles a streamlined assessment protocol for single supermarket acquisitions, including in relation to new supermarket developments, for an initial six-month trial period. Agreement was not reached, however, to include in the protocol acquisitions by Coles or Bunnings in liquor or hardware. No agreement on the protocol was reached in any of the sectors with Woolworths.

Reviews in concentrated sectors undertaken during the year included:

APA proposed acquisition of Hastings Diversified Utilities Fund (not opposed following acceptance of section 87B undertaking). The ACCC had concerns that, after the acquisition, APA would own all of the pipelines servicing Moomba and have a significant interest in both of the pipelines servicing Adelaide. It considered that APA's market dominance could substantially lessen competition in the supply of gas transmission pipeline services and ancillary services. However, the ACCC's competition concerns were resolved by APA's offer of an undertaking requiring the divestiture of the Moomba to Adelaide pipeline, which ensured that there is a separate owner of gas pipelines servicing Adelaide and Moomba.

Woolworths Limited and Lowe's Companies Inc proposed acquisition from G Gay & Co of Home Hardware Ballarat, Home Hardware Wendouree and Ballarat Building Suppliers (opposed). The ACCC opposed the proposed acquisition on the basis that it was likely to have the effect of substantially lessening competition by removing a key independent competitor from the market, which would harm local consumers. The ACCC considered the target, G Gay & Co, a vigorous and effective competitor on price, product range and service and likely to provide a strong competitive constraint on the proposed entry by Masters in the Ballarat area hardware and homeware market.

Seven Group's proposed acquisition of all shares in Consolidated Media Holdings which it did not own (opposed). The ACCC opposed the proposed acquisition due to concerns that it would give Seven Network an advantage over other free-to-air networks in relation to joint arrangements with FOX SPORTS to buy sporting rights. Market inquiries indicated that access to premium sporting content is vital if free-to-air networks are to compete strongly with paid services.

Commonwealth Bank Australia proposed acquisition of the remaining 67 per cent of the issued capital in **Aussie Home Loans** that it did not already own (not opposed). The ACCC noted that, as result of the acquisition, the Commonwealth Bank was likely to have the ability and incentive to increase the volume of, for example, 'white label' home loan products. These products are financed by the Commonwealth Bank, rebranded as Aussie Home Loans and supplied through the latter's network. However, the ACCC concluded that the acquisition would not be likely to substantially lessen competition as Aussie Home Loans brokers constituted around 6 per cent of Australia's mortgage brokers, leaving many other distribution channels through which lenders can access brokers and borrowers.

Woolworths Limited proposed acquisition of a supermarket site at the Glenmore Ridge Village Centre (opposed). The ACCC opposed the proposed acquisition after concluding that it would be likely to substantially lessen local supermarket competition. Woolworths already operates the only supermarket in the suburb of Glenmore Park as well as the next closest supermarket in the nearby South Penrith. The Glenmore Ridge site is the only opportunity for a competing supermarket to enter Glenmore Park in the foreseeable future, other than an ALDI that is due to open in 2014. The ACCC believed that loss of choice would be significantly detrimental to local consumers.

Case study

ACCC opposes Carsales acquisition of Trading Post

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

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

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

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

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

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

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

H J Heinz Company Australia Limited acquisition of Rafferty's Garden Pty Ltd (opposed).

The ACCC concluded that the proposed acquisition would combine the two largest suppliers of wet and dry infant food in Australia, resulting in highly concentrated markets where barriers to entry and expansion are high, particularly because of brand recognition and preference. In reaching its decision, the ACCC carefully considered the dependence of both Heinz and Rafferty's Garden on the major supermarket chains for stocking their products but was not satisfied that the power possessed by the major supermarket chains would necessarily constrain prices for consumers or drive innovation.

1.4 Authorisations and notifications to allow arrangements in the public interest

2012–13 Strategy: *Update our authorisation processes to improve efficiency and give clear guidance to merger parties, authorisation applicants and market participants*

- Measures:**
- Authorisation and notification decisions made within statutory timeframes.
 - Collective bargaining notification decisions made within statutory timeframes and communicated promptly.

The role of authorisations and notifications

While the primary aim of the Act is to prevent conduct that damages, or is likely to damage, competition, there are circumstances where competitive markets may not work to deliver the most efficient outcome and may fail to maximise consumer welfare. Thus the public interest may be served by allowing certain restrictions on competition. The authorisation and notification provisions of the Act allow the ACCC to grant legal protection for anti-competitive conduct when the public benefit outweighs the public detriment, including any lessening of competition. Depending upon the type of conduct, businesses may apply for an 'authorisation' or submit a 'notification' to the ACCC.

The types of conduct that can be authorised are:

- a cartel provision
- an exclusionary provision (primary boycott)
- an anti-competitive agreement
- a secondary boycott
- exclusive dealing
- resale price maintenance
- anti-competitive disclosures of pricing and other information
- an acquisition that occurs outside of Australia
- dual-listed company arrangements that affect competition.

Notification is typically a more streamlined process than authorisation but it is only available for the following types of conduct:

- collective bargaining
- exclusive dealing
- price disclosure to competitors in private where doing so is not in the ordinary course of business.

Both the notification and authorisation processes are public. The ACCC publishes the applications, public submissions and the ACCC's decisions on the notifications or the authorisations public register on the ACCC's website. To assist applicants, interested parties, advisers and the public more broadly to understand and participate in the authorisation process, in 2012–13 the ACCC revised and published a new version of its *Authorisation Guidelines*.

The new guidelines are reliable, clear and comprehensive, and reflect the current approach of the ACCC to assessing applications for authorisation under the Act. Prior to releasing the new guidelines on 27 June 2013, the ACCC consulted widely on a draft version, including with its own Small Business Consultative Committee and the Law Council of Australia.

Authorisation applications

In general terms, the ACCC may 'authorise' businesses to engage in conduct that might otherwise breach the Act where it is satisfied that the public benefit outweighs any public detriment, including from any lessening of competition in a market.

In assessing the likely public benefits and detriments of an authorisation application, the ACCC runs a public consultation process, placing submissions on a public register, subject to any claims of confidentiality. After considering submissions, the ACCC issues a draft decision which, on request, the interested parties have an opportunity to discuss in a conference. The ACCC will then reconsider the application in light of any further submissions and release its final decision.

In 2012–13, the ACCC issued 32 final authorisation decisions, excluding minor variations, for arrangements across sectors including aviation, retail, primary production, automotive and medical. The authorisation statistics are shown in table 3.2.

Table 3.2: Authorisations

	Opening balance	New applications	Applications withdrawn	Applications decided	Balance
Authorisation applications	12(25)	23(38)	1(1)	28(54)	6(8)
Minor variation applications	0(0)	1(2)	0(0)	1(2)	0(0)
Revoke and substitute authorisation applications	0(0)	9(25)	0(0)	4(9)	5(16)
Revocations	0(0)	0(0)	0(0)	0(0)	0(0)
Total	12(25)	33(65)	1(1)	33(65)	11(24)

Note: Figures in brackets indicate total applications; figures without brackets indicate number of projects (i.e. some projects involve multiple applications).

Case study

Authorising the Qantas-Emirates Alliance

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

The agreement would involve (among other things) competing airlines jointly setting fares and schedules, so it would have breached the *Competition and Consumer Act 2010*. Qantas and Emirates applied for ACCC authorisation of this arrangement. Qantas and Emirates submitted that the proposed alliance would be pro-competitive and enhance efficiency. They considered that the alliance would offer better connections between Australia and New Zealand, Europe (including the United Kingdom) the Middle East and Northern Africa.

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

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

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

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

Authorisations

Airline authorisations

During 2012–13, the ACCC issued a number of final determinations authorising airline arrangements, the most prominent of which was conditional authorisation of the alliance between Qantas and Emirates (see case study below). Others included:

Star Alliance The ACCC granted authorisation for eight years to Star Alliance for its Corporate Plus and Conventions Plus programs, previously authorised in 2003, and a new Meetings Plus program.

The programs cover arrangements allowing airlines that are Star Alliance members to jointly offer discounted fares, volume incentives and discounts on published fares to corporate customers and conference organisers under one contract. The ACCC concluded that the programs are likely to result in public benefits, including enhanced service to corporate customers, as well as cost savings and other efficiencies for Star Alliance members.

Emirates and flydubai The ACCC authorised an affiliation agreement between Emirates and flydubai under which the airlines would coordinate air passenger and air cargo services between Australia and Dubai and connecting services. The ACCC considered that the agreement would likely result in public benefits by enabling Emirates and flydubai to offer customers improved products and services.

Etihad Airways and Air Berlin The ACCC authorised a commercial alliance between the two airlines under which they would coordinate international air travel services between Germany and Australia via Abu Dhabi.

The ACCC did not consider that the commercial alliance would have any significant anti-competitive effects. Etihad and Air Berlin do not operate overlapping routes to or from Australia.

Qantas Airways Limited and Jetstar Airways Pty Ltd The ACCC authorised Qantas Airways and Jetstar Airways to coordinate the conduct of four Asia-based Jetstar branded joint ventures: Jetstar Asia, Jetstar Pacific, Jetstar Japan and Jetstar Hong Kong. The authorisation allows Jetstar Airways and the Jetstar joint ventures to coordinate with each other on passenger and cargo services, predominately on intra-Asian routes. It also allows the airline owners of the joint ventures to support and expand each joint venture and allows each full service airline shareholder to determine how it relates its Jetstar joint venture to its own business.

The ACCC considered that the coordination is likely to benefit consumers by increasing the likelihood of additional Jetstar flights and destinations in Asia, and providing improved connections which will result in a better overall travel experience. There is likely to be little, if any, detriment.

Other authorisations

During 2012–13, the ACCC issued final determinations authorising conduct in other industries including banking, telecommunications, health, wagering, transport, mining, primary production and entertainment. These authorisations included:

Australian Bankers' Association Inc The ACCC granted authorisation to the association for a project to reduce total ATM fees charged in very remote Indigenous communities. Financial institutions participating in the project will offer fee-free withdrawals and balance inquiries to their customers at selected existing ATMs in very remote Indigenous communities. In order to do so, participating banking providers will subsidise the costs of participating ATM operators in offering these transactions.

Case study

NBN Co and Optus HFC subscriber agreement

In July 2012, the ACCC authorised an agreement between NBN Co and SingTel Optus for the migration of Optus's Hybrid Fibre-Coaxial (HFC) subscribers to the National Broadband Network (NBN) and the decommissioning of parts of Optus's HFC network.

The ACCC took account of a substantial amount of public and confidential information in addition to submissions received from interested parties. The ACCC reached the view that the public benefits, which are clear and quantifiable, on balance outweighed the likely detriment.

The main public benefits of the agreement, in the ACCC's view, were that the HFC agreement would avoid the cost of operating the Optus HFC network to provide a service the NBN is also able to provide, and would reduce the cost of migrating Optus subscribers who are on the HFC to the NBN.

Balanced against this, the HFC agreement removed a potentially significant fixed line competitor to the NBN in Brisbane, Sydney and Melbourne. Competitive pressure from the Optus HFC network may have resulted in positive outcomes, notably prompting NBN Co to improve its performance. However, there were unique reasons to conclude that the detriments are likely to be considerably less than usually expected.

- The ACCC concluded that if it did not grant authorisation, competition between the HFC and the NBN would be unlikely to endure in the long term due to the pervasive and enduring economies of scale associated with the NBN. In addition, the NBN's terms and conditions of supply will be regulated regardless of any competition from the HFC. In this context, the benefits of competition from the HFC would be limited and complementary to, rather than a substitute for, regulation of the NBN.
- Further, the combination of the regulatory framework for NBN Co and uncertainties associated with future utilisation of the NBN will create a set of incentives that are likely to be more effective than those typically faced by other regulated infrastructure providers.
- In particular, NBN Co will only be able to fully recover the costs of its investment if, over time, users demand and migrate to higher speed services with greater data usage. If such demand does not eventuate, then NBN Co will incur a loss. This creates incentives for NBN Co to keep costs to efficient levels and to encourage take-up of higher speed services and greater usage.

For these reasons, the ACCC was satisfied that the public benefits from the HFC subscriber agreement would outweigh the detriments and decided to authorise it.

The ACCC considered that there was likely to be significant public benefit from the project which would outweigh any minimal public detriment, particularly given the limited scope and duration of the project.

Australian Dental Association Inc The ACCC authorised dental practitioners who operate in shared practices where at least one party to the agreement is a member of the Australian Dental Association to reach agreements on the fees that dentists within the shared practice charge their patients.

The Australian Dental Association sought authorisation because dentists who operate as separate legal entities may be at risk of engaging in price fixing or other anti-competitive conduct if they agreed upon the fees charged within the shared practice. The ACCC considers that allowing dentists who operate in shared practices to charge common fees is likely to result in public benefits. It is also likely to encourage more dentists to operate in shared practices, which will improve the availability, continuity and quality of dental care for patients and increase efficiency in the provision of dental services.

Medicines Australia Limited—revocation and substitution The ACCC authorised edition 17 of Medicines Australia's code of conduct for two years. The code regulates the interaction between Medicines Australia's pharmaceutical member companies and healthcare professionals such as doctors and pharmacists. The ACCC expects Medicines Australia to complete the work it has commenced on improving the level of transparency provided by the code and to increase the disclosure of payments to, and sponsorship of, individual healthcare professionals. The steps taken to improve transparency will be relevant to the ACCC's assessment of any future application for authorisation of a new edition of the code.

Exclusive dealing notifications

Exclusive dealing involves one business trading with another and imposing restrictions on the other's freedom to choose with whom, in what, or where it deals. Most types of exclusive dealing will breach the Act only when they substantially lessen competition, although some types such as third line forcing are prohibited outright. Third line forcing involves the supply of goods or services subject to a condition that the buyer also acquires certain goods or services from a third party.

Businesses proposing to engage in exclusive dealing can lodge a notification with the ACCC to obtain protection from legal action under the Act. Lodging a notification provides automatic legal protection from the lodgement date, or after 14 days in the case of third line forcing, which remains in force unless revoked by the ACCC. Notifications can be reviewed by the ACCC at any time.

The ACCC may revoke the protection provided by a notification for third line forcing if it is satisfied that the public detriment outweighs the public benefit. To revoke a notification for other types of exclusive dealing, the ACCC must be satisfied that the conduct is likely to substantially lessen competition and the public detriment outweighs the public benefit.

The ACCC received and assessed more than 750 exclusive dealing notifications involving 410 separate matters in 2012–13, an increase of more than 10 per cent over the previous year.

During 2012–13, the ACCC consulted interested parties about a range of exclusive dealing notifications including:

Jireh International Pty Ltd The ACCC allowed a notification from Jireh International to stand which requires franchisees of **Gloria Jean's Coffees** to buy cafe goods and services from a supplier/s approved in writing by Jireh. Interested parties were consulted and given an opportunity to make submissions prior to the ACCC making its decision.

Case study

Cooperative Bulk Handling Limited—exclusive dealing notification

On 19 April 2013, the Australian Competition Tribunal issued a decision affirming the ACCC's notice revoking an exclusive dealing notification lodged by Co-operative Bulk Handling Limited (CBH). The notified conduct involved CBH requiring Western Australian grain growers who use CBH's 'up-country' grain storage facilities to also use CBH's transport services to move grain to port for export.

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

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

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

Peter McInnes Pty Ltd This company, which appoints various distributors of **KitchenAid** products and other kitchen products and appliances, lodged a notification proposing to supply distributors on condition that they do not sell the product beyond a particular territory. In its notification, Peter McInnes also proposed to supply some nominated distributors on condition that they do not sell particular products, such as KitchenAid products, via the internet.

The ACCC invited submissions from interested parties and received a large number, both in support of and opposing the notified conduct.

By a letter dated 16 November 2012, Peter McInnes advised the ACCC that it withdrew the notification. Accordingly, the ACCC discontinued its assessment of the notification and has closed the matter. Statutory protection conferred by the notification ceased on 16 November 2012.

First Class Taxis Pty Ltd The company notified a proposal to lease its taxis to taxi drivers on condition that they only buy electronic funds transfer at point of sale (EFTPOS) facilities from a supplier it has approved.

In 2011, First Class Taxis lodged a notification which concerned broadly similar, but more restrictive, conduct but withdrew it after significant concerns were raised on the possible restrictive effect. It then submitted a new notification to address those concerns.

The ACCC allowed the new notification to stand and issued a statement of reasons outlining its review of the notification and basis for its decision. The ACCC considered that the new notified conduct was likely to benefit the public through enhanced transparency of transaction records, reduced risk of fraud, and some operational and administrative efficiencies, particularly to First Class Taxis.

The ACCC considered that the notified conduct is likely to cause minimal public harm. This will take the form of costs incurred by drivers and EFTPOS suppliers in seeking approval from First Class Taxis, as well as costs to drivers and First Class Taxis in administering and complying with the terms of the notified conduct.

Football Queensland notified an arrangement where it required clubs which participate in Football Queensland competitions to use only teamwear from licensed suppliers during those competitions. Teamwear includes tracksuits, playing shirts, playing shorts, playing socks and balls.

The ACCC issued a notice revoking Football Queensland's notification on 15 December 2011 because it considered that the notified conduct was resulting in significant public detriment by reducing competition for the supply of football apparel in Queensland, resulting in higher prices for football apparel and equipment than would otherwise be the case.

On 5 January 2012, Football Queensland lodged an application for review of the ACCC's decision to revoke the notification with the Australian Competition Tribunal.

On 25 July 2012, Football Queensland withdrew its application for review. The ACCC's decision to revoke the notification stands and as a result, the statutory protection afforded by the notification ceased on 25 August 2012.

The ACCC subsequently published a factsheet to provide guidance for sporting associations and similar bodies about competition issues in the supply of team wear and equipment. It outlined which types of arrangements are more or less likely to be problematic. This document is available on the ACCC's website.

Collective bargaining arrangements

Collective bargaining involves two or more competitors coming together to negotiate with a supplier or a customer over terms, conditions and prices. There are two ways by which businesses can seek protection under the Act for collective bargaining arrangements:

- by lodging a collective bargaining notification, which provides protection from legal action for small business collective bargaining arrangements 14 days after lodgement. Protection will, however, lapse after three years and the ACCC can review a notification at any time.
- by lodging an application for authorisation where the legal protection commences if and when the ACCC grants authorisation. There is a six-month time limit for the ACCC to consider all new applications for authorisation. A streamlined authorisation process is available for small business collective bargaining where the ACCC undertakes to issue a draft determination within 28 days and a final determination in three months. The ACCC can grant authorisation for collective bargaining arrangements for a longer period of time.

There are some circumstances when a collective bargaining notification is not the best solution and businesses may wish to consider lodging an application for authorisation. For example, in order to lodge a valid collective bargaining notification, small businesses must satisfy a number of requirements. These could include that each member of the bargaining group must be identified, must reasonably expect that they will make at least one contract with the target, and must have transactions with the target that will not exceed \$3 million per year. This figure differs for certain industries. These requirements do not apply to the authorisation process.

In 2012–13, the ACCC issued 15 final determinations authorising collective bargaining arrangements and allowed six matters involving 78 collective bargaining notifications. The majority of collective bargaining arrangements considered by the ACCC during 2012–13 related to primary producers negotiating with processors in the dairy, chicken growing and potato growing sectors. Other collective bargaining arrangements involved coal producers, owner drivers for trucking companies, lottery agents, doctors, dentists, hospitals and local councils.

More information on collective bargaining appears under Strategy 2.4, 'Allowing trading arrangements in the public interest' on page 105.

Examples of collective bargaining arrangements allowed by the ACCC during the year are summarised below.

Nathan Dam Project with Sun Water. The ACCC authorised Cockatoo Coal, Cuesta Coal, MetroCoal, Peabody Energy Australia PCI, QC Resource Investments and Whitehaven Coal to collectively negotiate with SunWater for water supply for the development of the Nathan Dam project in central Queensland.

The ACCC was satisfied that collective bargaining was likely to result in transaction cost savings and help coal producers secure timely access to water supply from the Nathan Dam. This should reduce the risk of unnecessary delays in generating additional export revenue. There is likely to be little, if any, public harm as participation in the collective bargaining is voluntary, does not include boycott activity, and there are limits on the exchange of information between bargaining group members.

Manning Valley dairy farmers. Seven dairy farmers in the Manning Valley in NSW proposed to collectively negotiate raw milk supply agreements between each farmer and Woolworths and Milk2Market (a milk broker and logistics provider), plus an agreement on their obligations to work cooperatively to meet Woolworths's requirements.

The ACCC decided to allow the dairy farmers to collectively bargain with Woolworths and Milk2Market for three years. It noted that any impact on competition would be limited as the arrangement is voluntary for the dairy farmers, Woolworths and Milk2Market. Additionally, the volume of milk to be supplied is relatively small compared to the total volume produced in the surrounding mid-coast region of NSW.

Other work assessing the public interest

Under the *Trade Marks Act 1995*, the ACCC has responsibilities in relation to the approval of Certification Trade Marks. The ACCC's role involves assessing and approving rules for the use of CTMs, including:

- assessing the requirements that goods/services/persons must meet in order to be eligible to have a CTM applied to them, and assessing the proposed process by which compliance with certification requirements will be judged
- examining the rules to ensure they are not in themselves anti-competitive or misleading or deceptive.

Certification trade mark

On 2 November 2012, the ACCC issued an initial assessment of the Australian Egg Corporation Limited's (AECL) Certification Trade Mark (CTM) Application, a proposed national egg quality assurance program. The ACCC proposed not to approve AECL's application due to concerns that the proposed CTM rules may mislead or deceive consumers regarding the nature of a certified egg production process described as 'free range'. The AECL's proposed standards would allow eggs to be certified as 'free range' in circumstances that are inconsistent with consumers' understanding of that term—such as stocking densities that are far higher than existing standards and routine beak trimming of day old chicks. The proposed standards would also allow a range of factors that result in only a small proportion of birds venturing out on the range at any one time, with the bulk of the birds staying inside the shed.

The ACCC sought comments on the AECL's CTM application and received over 1700 submissions from consumers, egg producers, industry associations, consumer and animal welfare organisations and members of parliament—almost all opposed to the application. Following the ACCC's initial assessment, AECL withdrew its application on 20 December 2012.

For more information on the ACCC's focus on credence claims, see page 71.

Targets and results for goal 1: Maintain and promote competition and remedy market failure

Measures and Targets—Goal 1

Measure: Timely and effective identification, investigation and action responses to address instances of anti-competitive conduct.

Target

No specific target.

Results

In 2012–13, the ACCC instituted three separate competition-related proceedings.

The ACCC also accepted four court-enforceable undertakings in relation to competition matters.

Cases are outlined in appendix 10.

Measure: Effective remedies achieved through court action

Target

Obtain positive outcomes from an expected 25 court cases and an expected 40 court-enforceable undertakings in matters relating to competition, fair trading and consumer protection.

In the course of a year there are always more consumer cases than competition cases. Under Goal 1, the ACCC reports its competition matters and under goal 2 its consumer protection and fair trading matters (see page 107). The target in the Portfolio Budget Statements applies to all matters taken.

Results

The ACCC received positive outcomes from 24 court cases.

Six of the court cases related to competition matters.

Cases are outlined in appendix 10.

The ACCC accepted 16 court-enforceable undertakings, with four relating to competition matters.

Measure: Effective remedies through non-court action

Target

Obtain positive outcomes from an expected 40 court-enforceable undertakings in matters relating to competition, fair trading and consumer protection.

Results

The ACCC accepted 16 court-enforceable undertakings, with four relating to competition matters.

Undertakings are outlined in appendix 9.

In addition to resolving matters formally outside of court proceedings through court-enforceable undertakings, the ACCC resolved a further ten matters with infringement notices.

Measure: Effective education and communication about anti-competitive conduct
Target

No specific target.

Results

The ACCC continued its education and communications in relation to anti-competitive conduct, releasing the short film, *The Marker*, about engaging in a cartel activity, and in a range of media activities, including speeches in relation to anti-competitive conduct.

Measure: Enhanced use of data analysis and intelligence to inform our regulatory approaches and interventions
Target

No specific target.

Results

The ACCC increased the number of intelligence assessments produced to inform compliance and enforcement.

The ACCC also used data from a wider range of national and international agencies to improve the quality of intelligence production. Intelligence assessments informed further compliance and enforcement activities.

Measure: Mergers assessed with statutory and organisational timeframes
Target

Assessment of mergers within statutory and organisational timelines and in accordance with published guidelines.

Results

All mergers were assessed within organisational timelines and in accordance with published guidelines. See 1.2 for further details of assessment timeframes.

No applications for formal merger clearance were received in 2012-13.

Measure: Action taken to address competition issues as a result of public or confidential merger reviews
Target

Publication on accc.gov.au of all public merger decisions.

Results

All public merger decisions were published on the mergers register on www.accc.gov.au

Measure: Media and industry monitoring identifies relevant merger intelligence activity
Target

Monitor media and industry on a daily basis for possible mergers and acquisitions reviews.

Results

All relevant media were monitored on a daily basis and followed up where appropriate.

Measure: Authorisation and notification decisions made within statutory timeframes
Target

Authorisation and notification decisions within statutory and organisational timeframes (assessment of validity with five days, authorisation within six months, majority of notifications within four weeks) and promptly communicated.

Results

100 per cent of applications for authorisation were assessed for validity within organisational timeframes.

100 per cent of authorisations were assessed within statutory timeframes.

99 per cent of notifications were assessed for validity within organisational timeframes.

87 per cent of notifications were assessed within four weeks.

All authorisation decisions were published on the ACCC website and communicated to applicants and interested parties in a timely manner.

Measure: Collective bargaining notification decisions made within statutory timeframes
Target

Collective bargaining notification decisions within statutory timeframes (assessment of validity within five days, initial assessment within 14 days) and communicated promptly.

Results

100 per cent of collective bargaining notifications were assessed for validity within five days.

100 per cent of initial assessments of collective bargaining notifications were completed within 14 days.

All collective bargaining notification decisions were published on the ACCC website and communicated to applicants and interested parties in a timely manner.



Goal 2: Protect the interests and safety of consumers and support fair trading in markets

Significant outcomes in 2012-13

- Launched a new website with simple information for businesses and consumers on their rights and obligations.
- Received payment for 27 infringement notices across 10 matters with penalties of over \$300 000. Infringement notices send a message to traders that they need to pay more attention to complying with Australian Consumer Laws.
- Took integrated compliance and enforcement action in the door-to-door energy sector, resulting in significant (\$2.75 million) penalties and substantial improvements in behaviour in the sector.
- Protected consumer rights by taking court action in 11 separate matters for allegedly misrepresenting warranty and refund rights.
- Took action against seven companies for unconscionable conduct, including companies targeting vulnerable and disadvantaged consumers with false and misleading representations.
- Sent a strong message to suppliers to ensure safe, correctly labelled products with a \$1 million penalty to Cotton On Kids Pty Ltd over the supply of unsafe children's nightdresses and pyjamas.
- Launched the Knock! Knock! Who's there? campaign to educate consumers about the Australian Consumer Law's protections against unsolicited selling.
- Improved knowledge of consumer rights in Indigenous consumers with the Your Rights Mob Tiwi Islands Facebook page and five short consumer protection films.
- Removed more than two million hazardous products from the market through 450 product safety recalls.
- In 2012-13 the ACCC took four cases to court relating to alleged misconduct harming small businesses and finalised a further two cases with over \$500 000 in penalties awarded.
- Encouraged greater compliance and sent a strong deterrence message with over \$11 million in penalties and other remedies secured so far under the Australian Consumer Law.

Goal 2: Measures

<div><div></div></div>	Timely and effective identification and investigation of unfair business to business areas , to determine and action responses most likely to address unfairness in line with the Competition and Consumer Act
<div><div></div></div>	Fair trading outcomes achieved through enforcement of mandatory codes of conduct
<div><div></div></div>	Timely and effective identification, investigation and action responses to breaches of the Australian Consumer Law
<div><div></div></div>	Enforcement outcomes achieved through non-court-based remedies
<div><div></div></div>	Effective education and communications to inform consumers (including small businesses) about their rights and responsibilities under the Australian Consumer Law
<div><div></div></div>	Timely identification and responses to product safety hazards
<div><div></div></div>	Product safety activities to effectively assess and address product safety hazards
<div><div></div></div>	Effective education and communication to reduce product safety related injury and maximise industry compliance

The ACCC's role in consumer protection

The ACCC's purpose is making markets work for consumers now and in the future. Protecting the interests and safety of consumers and supporting fair trading is central to the ACCC's work. The Act contains a national law known as the ACL, which is designed to protect consumers and ensure fair trading. The ACL, which forms Schedule 2 of the Competition and Consumer Act, is a single national law which ensures that consumers have the same protections, and businesses have the same obligations and responsibilities, across Australia. The Australian Consumer Law provisions of the Act provide:

- regulatory powers and tools to address conduct that affects consumers and business and promote fair trading
- a civil pecuniary penalty regime and infringement notices to deal with minor breaches
- statutory consumer guarantees on products and services, which, depending on the circumstances, give consumers rights to a repair, replacement or refund and compensation for losses and damages
- a statutory test for unfair contract terms
- a nationally harmonised product safety regime
- a national law for unsolicited consumer agreements, often initiated by door-to-door salespeople and telemarketers.

The ACCC's compliance and enforcement priorities focus on conduct involving one or more of these factors:

- significant public interest or concern
- substantial detriment for consumers (including small business)
- unconscionable conduct, particularly by large national companies or traders
- blatant disregard for the law
- national or international significance
- detriment to disadvantaged and vulnerable consumer groups
- concentrated markets that impact on small business and consumers
- significant new or emerging market issue
- industry-wide conduct, or conduct likely to become industry-wide unless the ACCC intervenes
- ACCC action is likely to have a significant educative or deterrent effect
- the business, person or industry has a history of breaking competition and consumer or fair trading laws.

The ACCC's role is to inform businesses and consumers of their rights and obligations under the Act, monitor markets and emerging markets for unfair practices, and take action against businesses and individuals that break the law.

The ACCC undertakes extensive information and education activities to encourage consumers and small businesses to use their rights and feel confident participating in markets. The ACCC uses its intelligence functions to identify market failures and take action to fix the problems. This means using the regulatory powers available to the ACCC to address breaches and, when possible, gain redress for consumers who have suffered detriment.

The ACCC cannot pursue all complaints received and it is unlikely to become involved in resolving individual consumer or small business disputes—this is a role fulfilled by state and territory consumer protection and small business agencies. While the ACCC carefully considers all complaints, its role is to focus on circumstances that harm the competition process or result in widespread consumer detriment. As a result, the ACCC will exercise its discretion to direct resources to investigating and resolving matters that provide the greatest overall benefit to competition and consumers.

The ACCC works closely with its state and territory counterparts in monitoring and enforcing compliance with the Australian Consumer Law under a one law, multi-regulator model. This includes projects aimed at widespread harm or cross-industry issues, and sharing intelligence on specific matters. Examples of this collaboration are in Part 2.2 *Increase our effectiveness through partnerships* on page 87, and *Collaboration and partnerships with Australian regulators* on page 184, which also include information on collaborative work with the Australian Communications and Media Authority.

The ACCC continued to engage with industry-sponsored ombudsmen schemes, such as the Private Health Insurance Industry Ombudsman, Financial Ombudsman Service and the Telecommunications Industry Ombudsman, including the referral of individual complaints to the relevant industry ombudsman for advice or dispute resolution, where appropriate.

ACCC compliance and enforcement tools

The ACCC has a range of tools to encourage and enforce compliance with the Competition and Consumer Act, as detailed in the *Compliance and Enforcement Policy* on our website. The ACCC determines which matters to prioritise for investigation and action based on this policy. The ACCC can seek a range of remedies in the courts, including injunctions and penalties. Remedies may also be obtained outside the courts, such as through the use of enforceable undertakings. The ACCC also undertakes compliance activities such as trader and industry engagement activities, as well as broader education and communication activities to inform businesses and consumers about what constitutes anti-competitive or unfair trading conduct. In deciding which tools to use, the ACCC's first priority is always to achieve the best possible outcome for the community. The ACCC aims to ensure that consumers and businesses are sufficiently well-informed to benefit from, and stimulate, effective competition. The ACCC undertakes activities encouraging compliance with the law by educating and informing consumers and businesses about anti-competitive conduct.

Court cases

In 2012-13, the ACCC was involved in 54 proceedings relating to consumer protection enforcement.

- 28 cases were carried over from 2011-12
- 26 new cases were commenced in 2012-13
- 33 cases were ongoing at 30 June 2013.

Enforceable undertakings

To protect consumers, the ACCC uses its enforcement powers under section 87B of the Act where a breach, or a potential breach, of the Act might otherwise justify litigation. In these public undertakings, companies or individuals generally agree to:

- remedy the harm caused by the conduct
- accept responsibility for their actions
- establish or review and improve their trade practices compliance programs and culture.

In 2012-13, the ACCC accepted 12 consumer protection-related undertakings.

Infringement notices

The ACCC may issue an infringement notice where it believes a contravention of the Act requires a more formal sanction than an administrative resolution, but resolution is possible without the need to take legal proceedings.

In 2012-13, the ACCC received payment for 27 infringement notices from 10 traders, with penalties totalling over \$300 000.

Administrative resolutions

In some cases, for example, where the ACCC assesses the potential risk as low, it may accept an administrative resolution. Depending on the circumstances, administrative resolutions can range from a commitment by a trader given in correspondence to a signed agreement between the ACCC and a trader setting out detailed conditions.

Administrative resolutions generally involve the trader agreeing to stop the offending conduct, compensate those adversely affected, and take other measures necessary to ensure that the conduct does not recur. The ACCC is unlikely to accept an administrative resolution where a trader is re-offending after a previous administrative resolution.

Voluntary industry self-regulation codes and schemes

The ACCC encourages and assists genuine voluntary compliance initiatives by individual businesses and industry sectors. Initiatives may range from individual trader compliance programs to sector-wide initiatives, including industry charters and voluntary codes of conduct that apply the requirements of the Act to the specific circumstances of a particular industry sector.

Education and advice

The ACCC makes comprehensive use of educational campaigns to inform and advise consumers and businesses, and to encourage compliance with the Act. It firmly believes that preventing a breach of the Act is preferable to taking action after a breach has occurred. It also seeks to ensure that consumers and small businesses are fully aware of both their rights and responsibilities under the Act.

The ACCC disseminates targeted and general information, including tips and tools, to help consumers via a wide range of channels. It liaises extensively with business, consumer and government agencies about the Act and the ACCC's role in its administration.

As well as guiding consumers and small businesses, the ACCC also seeks to maximise the effect of its enforcement actions. A penalty and reputational damage when the ACCC secures a court outcome against a company is a powerful warning and deterrent to other traders, encouraging compliance. Cases can also highlight to consumers how they can use their rights.

2.1 Improve compliance with the Australian Consumer Law

2012–13 Strategy: *Deliver outcomes under the priority areas identified in the ACCC's **Compliance and Enforcement Policy** to improve compliance with the Australian Consumer Law*

- Measures:**
- Timely and effective identification, investigation and action responses to breaches of the Australian Consumer Law.
 - Enforcement outcomes achieved through court action.
 - Non-court based remedies used.
 - Effective education and communications to inform consumers about their rights and responsibilities under the Australian Consumer Law.

2013 compliance and enforcement priorities

Each year the ACCC conducts a strategic review of its compliance and enforcement priorities to determine where to focus its efforts to maximise its impact on preventing and redressing consumer harm. It analyses data from thousands of people who contact the Infocentre and consults broadly on current and emerging issues and conduct to determine where to direct resources to investigate and resolve cases that will provide the greatest overall benefit to consumers.

In consumer protection, the ACCC's priorities are:

- **telecommunications** and **energy**
- **online consumer issues**
- consumer issues in **highly concentrated sectors**
- **credence claims**, particularly in the food industry
- **carbon price claims**
- **consumer guarantees**
- **issues affecting Indigenous communities**
- **product safety issues** with the potential to seriously harm consumers.

The ACCC notes that often small and micro businesses are, in effect, consumers. Specific strategies to benefit small business can be found at Part 2.4 *Support a vibrant small business sector*, on page 100.

Consumer protection in the telecommunications sector

Consumer protection in the telecommunications sector has been an ongoing priority for the ACCC for several years. This focus has been necessary to address the high level of complaints received by regulatory agencies, and the history of poor performance of the telecommunications industry in meeting consumer expectations. Over several years, the ACCC has devoted significant resources to dealing with the consequences of these poor standards—in particular through enforcement action against many telecommunications service providers who have misled consumers through their advertising and marketing. Further enforcement action to address concerns arising in this area occurred in 2012–13.

At the same time, telecommunications services have become essential services for many consumers who are increasingly taking up new technologies and seeking reliable services to meet their needs. The telecommunications industry is dynamic, with ongoing changes in technology, service offerings, and consumer behaviour. The ACCC continues to focus on consumers in this sector to ensure that the increasing complexity in products and services does not lead to greater confusion among consumers, and to prevent consumer detriment flowing from non-compliance among industry participants. A key part of the ACCC's role includes participation in ongoing reviews and reforms in the changing regulatory environment to ensure that consumer protection needs in this sector are met in the future, for example, in the emerging NBN environment.

Court cases

In 2012–13, the ACCC was successful in court in cases against **EDirect Pty Ltd** (\$2.5 million penalty), and **Excite Mobile Pty Ltd** (penalty pending) and instituted a case against **Titan Marketing Pty Ltd**, all of whom the ACCC alleged had breached the Act in marketing their telecommunications products and services. See *ACCC action to protect consumers and business from unconscionable conduct* on page 86 for more information.

In April 2013 the Full Federal Court made penalty and other relief orders in relation to an appeal by **TPG Internet Pty Ltd** (TPG) against a judgment of Justice Murphy of the Federal Court in favour of the ACCC. TPG had appealed Justice Murphy's orders on liability and relief in relation to TPG's \$29.99 ADSL 2+ advertising campaign which ran between 2009 and 2011. His orders included a penalty of \$2 million for false and misleading conduct under the ACL. In April 2013, the Full Federal Court ordered TPG to pay a penalty of \$50 000 in respect of TPG's initial misleading television ads and its failure to prominently display the single price for the advertised service. The Full Court also set aside the injunctions imposed by Justice Murphy, as well as an order that TPG implement a compliance program. The Full Court ordered that the ACCC pay 75 per cent of TPG's costs of the trial and appeal. In January 2013, the ACCC filed an application for special leave of the High Court to appeal the Full Federal Court's decision of December 2012. The ACCC is seeking leave to appeal on both liability and penalty.

The ACCC also instituted proceedings against **ByteCard Pty. Limited** (trading as **Netspeed Internet Communications**), alleging that the standard form consumer contracts they use contain a number of unfair contract terms. See *Unfair contract terms* on page 80 for more information.

Enforceable undertakings

CNT Corp Pty Ltd gave a court-enforceable undertaking and paid three infringement notices totalling \$19 800 after it had offered and charged for wholesale 'fibre to the premises' broadband internet services at data transfer rates that its network could not support. CNT Corp undertook to provide credit vouchers redeemable for broadband services to affected consumers, acquire additional backhaul transmission capacity for its Eden Brook network, not engage in similar conduct in the future and implement a trade practices compliance program.

Utel Networks Pty Ltd provided the ACCC with a court-enforceable undertaking and paid three infringement notices totalling \$19 800 for misrepresentations made by the company's telemarketers. Utel Networks made representations through its telemarketers to consumers that Utel was affiliated or associated with the consumer's existing telecommunications provider, and the quality of the consumer's telecommunications service would not change upon being transferred to Utel from a rival provider, when this was not the case. Utel undertook to refrain from engaging in similar conduct in the future and implement a compliance program.

Infringement notices

In June 2013, **iiNet Pty Ltd** paid one infringement notice totalling \$102 000 in relation to an advertisement for its Naked DSL service. The ACCC had reasonable grounds to believe the advertisement failed to prominently state the total minimum price payable for the service. This was the first infringement notice to be paid by a publicly listed company for an alleged breach of the ACL.

Consumer protection in the energy sector

Consumer detriment in the energy sector is a priority due to the large number of complaints and the considerable detriment caused by the conduct of some salespeople at the door.

Court cases

In March 2012, the ACCC commenced proceedings in the Federal Court against **Neighbourhood Energy Pty Ltd**, a Victoria-based energy retailer, and its former marketing company, **Australian Green Credits Pty Ltd**, in connection with door-to-door selling practices. This was the first case brought under the unsolicited consumer agreement provisions of the ACL.

In September 2012, the Federal Court ordered Neighbourhood Energy to pay a penalty of \$850 000 by consent, while Australian Green Credits was ordered to pay \$150 000 by consent. Both parties contributed towards the ACCC's costs.

The ACCC alleged that Neighbourhood Energy and Australian Green Credits engaged in a number of breaches of the ACL arising from the conduct of salespeople employed by Australian Green Credits. These breaches included salespeople failing to leave the homes of two consumers even when a 'Do Not Knock' sign indicated that door-to-door selling was unwelcome.

The court declared that the door-to-door salespeople failed to leave the homes of two consumers immediately on request, in breach of the ACL. In both instances, the initial request was constituted by a 'Do Not Knock' notice, which indicated that unsolicited door-to-door selling was unwelcome at that home.

The court also determined that Neighbourhood Energy and Australian Green Credits had engaged in misleading or deceptive conduct. The salespeople made misleading or deceptive statements to consumers, including that they were not selling anything, and that the consumer had been 'zoned incorrectly' and was being wrongly billed by his supplier. The court further decided that the two companies had breached the ACL because the salespeople did not clearly advise consumers about matters that the ACL required them to disclose, namely, their purpose of seeking the consumer's agreement to a supply of the services offered, their obligation to leave the premises immediately on request, the name of the marketing company, and the name and address of Neighbourhood Energy as the supplier of the services offered.

In March 2012, the ACCC commenced proceedings in the Federal Court against **AGL Sales Pty Ltd** and **AGL South Australia Pty Ltd**, and marketing company **CPM Australia Pty Ltd**, alleging that these companies engaged in misleading and deceptive conduct, and that AGL Sales and CPM Australia made a range of false representations to consumers in the course of door-to-door selling. In May 2013, the Federal Court ordered AGL Sales Pty Ltd and AGL South Australia Pty Ltd to pay a total of \$1.555 million for illegal door-to-door selling practices. CPM Australia Pty Ltd, the marketing company used by AGL, was also ordered to pay \$200 000 for its role in the conduct. The judge has reserved his judgement on the do not knock aspect of the case.

Case study

ACCC targets door-to-door selling tactics

The ACCC used both education initiatives and enforcement action to address the treatment of consumers by many energy retailers involved in door-to-door selling, and successfully sent a strong message to those involved in this practice. Complaints made by consumers to the ACCC regarding door-to-door sales practices included misleading marketing, pressure sales, transfer of accounts between retailers without customer consent, and breaches of the unsolicited sales provisions of the Australian Consumer Law. The ACCC was particularly concerned with alleged misrepresentations made by energy retailers to disadvantaged and vulnerable consumers in their homes.

In September 2011, the ACCC launched the Knock! Knock! Who's there? awareness campaign. The campaign informed consumers about their rights and ability to refuse door-to-door sales. The campaign materials assisted consumers to avoid unwanted door-to-door selling through educational videos, a consumer guide Knock! Knock! Who's there?, door hangers and stickers. Since September, over 95 000 'Do Not Knock' stickers, 39 000 door hangers and 24 000 consumer guide brochures were distributed. An Indigenous education film *Door-to-door Sales* was also promoted to Indigenous communities via YouTube and the ACCC's Your Rights Mob Tiwi Islands Facebook page.

Enforcement action targeting door-to-door selling in the energy sector including:

- Instituting proceedings against EnergyAustralia, and some of its previous marketing companies, for alleged breaches of the Australian Consumer Law 'at the door', despite the presence of a 'Do Not Knock' sticker. These proceedings are continuing.
- Securing a \$1.555 million penalty against AGL Sales Pty Ltd and AGL South Australia Pty Ltd for illegal door-to-door selling practices, and \$200 000 against CPM Australia Pty Ltd for its role in the conduct.
- Securing penalties of \$850 000 from Neighbourhood Energy Pty Ltd and \$150 000 from its marketing company, Australian Green Credits Pty Ltd in the first case brought under the unsolicited consumer agreement provisions of the ACL. In this matter, the court declared that door-to-door salespeople, failed to leave the homes of two consumers upon request made by a 'do not knock' notice.
- As at 30 June 2013, the three largest energy retailers, Energy Australia, AGL and Origin announced that they have decided to cease door-to-door marketing.

The integrated compliance and enforcement approach to door-to-door selling has significantly raised consumer and business awareness, gained substantial penalties and resulted in beneficial behaviour changes. The ACCC continues to investigate the conduct of some other traders in relation to door-to-door selling by energy retailers.

In March 2013, proceedings were instituted against **Energy Australia Pty Ltd and four of its marketing companies**. The ACCC alleges that Energy Australia and these marketing companies, through the conduct of certain sales representatives engaged by them or acting on their behalf, made false, misleading or deceptive representations while calling on consumers' homes to negotiate retail electricity and/or gas supply agreements by Energy Australia. The ACCC alleges this conduct occurred variously across Victoria, New South Wales and Queensland between July 2011 and August 2012. These proceedings continue.

Online consumer issues

Online trading is a rapidly expanding market, attracting many new business entrants and consumers. The digital economy can deliver increased choice and improved customer service for consumers and opportunities for small business. However, it presents a number of challenges in providing the same kinds of consumer protection activities and in detecting and gathering evidence of harmful conduct. Consumer protection issues in digital and online markets have been identified as a priority area for the ACCC.

The theme of National Consumer Fraud Week in June 2013 was Outsmart the Scammers: stay safe when shopping online. Through this event the ACCC and the Australasian Consumer Fraud Taskforce helped consumers and small businesses identify the risks on online shopping scams (see page 83 for more information).

During fraud week the ACCC also conducted a sweep of internet traders for compliance with the consumer guarantees and warranties laws, as part of the ICPEN internet sweep (see page 83 for more information).

Fake online reviews

As part of the focus on online markets, the ACCC launched a project to determine the extent of misleading or deceptive conduct in online reviews or expert testimonials, which Australians are increasingly using to make purchasing decisions. Consumer opinions posted online are the second most trusted forms of consumer information after 'recommendations from people I know'. Recent research indicates that 74 per cent of social media consumers read online reviews and 58 per cent of consumers decide to buy a product based on these reviews². Fake online reviews have the potential to mislead consumers and confer an unfair competitive advantage or disadvantage on businesses reviewed.

Under the project, the ACCC is liaising with consumers, businesses and industry associations to develop a better understanding of the various review platforms that exist in the Australian market. It has also begun investigations into the posting of fake reviews on various internet sites following allegations of misleading or deceptive conduct. The ACCC is developing guidance for consumers, who rely on online reviews and testimonials, and will also assist businesses to understand how to avoid engaging in conduct that may mislead or deceive consumers.

In May 2013, the ACCC commenced proceedings against **P & N Pty Ltd and P & N NSW Pty Ltd** (Euro Solar) and **Worldwide Energy and Manufacturing Pty Ltd** (Australian Solar Panel) over allegedly false or misleading claims about the country of origin of the solar panels they supply. The ACCC has also taken action against **Mr Nikunj Kumar Patel** for being knowingly concerned in, or a party to, the alleged conduct. It was further alleged that written testimonials that appeared on www.australiansolarpanel.com.au, from January 2013 to February 2013, and video testimonials that appeared on YouTube and www.eurosolar.com.au, from May 2012 to February 2013, were not made by genuine customers of Australian Solar Panel or Euro Solar.

² *Sensis Business Index—Small and medium enterprises—March 2013*



Case study

ACCC v Trading Post and Google—clarification on advertising practices and the internet

When the ACCC commenced proceedings in the Federal Court in 2007 against Trading Post Australia Pty Ltd, Google Inc and a number of other Google entities, alleging misleading or deceptive conduct in relation to the ‘sponsored links’ in Google search results, this was the first action of its type globally taken against Google. While 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 and the Federal Trade Commission 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.

Early in the proceedings, Trading Post as the advertiser accepted that it had engaged in misleading or deceptive conduct and the proceedings continued only against Google. In 2011, the Federal Court dismissed the ACCC’s application against Google on the basis that the misleading or deceptive representations were made only by the advertiser. The ACCC appealed that decision and in 2012, the Full Federal Court upheld the ACCC’s appeal and concluded that Google’s conduct was likely to mislead or deceive.

Google subsequently appealed to the High Court and, in February 2012, that appeal was unanimously upheld. The High Court found that Google did not itself engage in misleading or deceptive conduct. The High Court's decision focused only on Google's conduct and it was not in dispute that the particular representations made by advertisers in the sponsored links under consideration were misleading or deceptive.

While the case against Google was unsuccessful, it resulted in a number of positive outcomes and highlighted the ACCC's concerns for the interests of consumers exposed to misleading conduct via developing online media. The ACCC will continue to assess Google's conduct, especially in light of current US and European Commission investigations.

Highly concentrated sectors

As a result of history and sheer geography, Australia has many highly concentrated sectors. These sectors, including the petrol and supermarket sectors, potentially raise consumer protection issues and therefore require close scrutiny. As a priority area, the ACCC will continue to focus on consumer issues in highly concentrated markets, in particular the supermarket and fuel sectors.

In early 2012, the ACCC sought information from suppliers about their dealings with major supermarket chains. As a result of the information received, the ACCC commenced investigations into potential unconscionable conduct by major supermarket chains in their dealings with suppliers and also into potential misuses of market power in their supply of house brand products. Such conduct, which is not necessarily identical across suppliers, product lines or even supermarkets, includes:

- persistent demands for additional payments from suppliers, above and beyond that negotiated in their terms of trade
- the imposition on suppliers of penalties that did not form part of any negotiated terms of trade, and which apparently do not relate to actual costs incurred by the major supermarket chains as a result of the conduct which has led to the penalty being imposed
- threats to remove products from supermarket shelves or otherwise disadvantage suppliers if claims for extra payments or penalties are not paid
- failure to pay prices agreed with suppliers
- conduct discriminating in favour of homebrand products.

The ACCC's investigations are continuing.

See *Anti-competitive agreements* and *Concentrated markets* on pages 36 and 44.

Credence claims

A 'credence claim' is a claim that a business makes about particular qualities of its product which a consumer is unable to verify at the time of purchase and must take on faith that the business is being truthful.

A credence or premium claim may suggest a product is safer ('non-toxic'), offers a moral or social benefit ('free range eggs') or a nutritional benefit ('fat free'). The benefit may also be 'green' or environmental ('100% recyclable') or therapeutic ('the fastest pain reliever'). A premium claim may also promote a product as being of a perceived quality ('Swiss chocolate' or 'Belgian beer').

Claims that give the impression that a product, or one of its attributes, has some kind of added benefit when compared to similar products and services can be made as long as the claims are not misleading and can be substantiated. Honest small businesses who are

selling premium products need to be protected from unscrupulous competitors making false representations and consumers need to be protected from paying premium prices for non-existent attributes.

Matters involving credence claims, with the potential to have a significant impact on consumers or the competitive process, are currently being prioritised by the ACCC under its Compliance and Enforcement Policy.

Court cases

The ACCC is currently prioritising its work relating to credence claims, particularly those in the food industry with the potential to have a significant impact on consumers or the competitive process. A number of cases were instituted in 2012-13.

Coles Supermarkets Pty Ltd for alleged false, misleading and deceptive conduct in the supply of bread that was partially baked and frozen off site, transported to Coles stores and 'finished' in-store. These products were then promoted as 'Baked Today, Sold Today' and/or 'Freshly Baked In-Store' at Coles stores with in-house bakeries.

Luv-a-Duck Pty Ltd for alleged false, misleading and deceptive conduct in relation to the promotion and supply of its duck meat products, through use of statements such as 'grown and grain fed in the spacious Victorian Wimmera Wheatlands' and 'range reared and grain fed'. The ACCC alleges that the duck meat products sold or offered for sale by Luv-a-Duck were in fact processed from ducks that did not have substantial access to the outdoors, or access to spacious outdoor conditions.

P & N Pty Ltd and others (Euro Solar and Australian Solar Panel) for alleged false or misleading claims about the country of origin of the solar panels they supply.

The ACCC received positive outcomes in a number of credence claims court cases.

In February 2013, the Federal Court imposed a penalty of \$50 000 on a Victorian butcher, **Kingsland Meatworks & Cellars Pty Ltd**, after finding that it had made false or misleading representations that the meat offered for sale through its Brighton shop was from King Island, when in fact very little or none of the meat was from King Island.

In September 2012, the Federal Court ordered **Ms Rosemary Bruhn** to pay a civil pecuniary penalty of \$50 000 for conduct involving substituting cage eggs for free range eggs. The ACCC had alleged that from March 2007 to October 2010, Ms Bruhn, trading as Rosie's Free Range Eggs, represented that eggs she supplied to 109 business customers in South Australia including retail outlets, bakeries, cafes and restaurants, were free range when a substantial proportion of the eggs were, in fact, cage eggs.

Enforceable undertakings

Toyota Australia Pty Ltd gave a court-enforceable undertaking on their use in promotions of the word 'leather' to describe upholstery in certain Toyota vehicles. The ACCC found that, from at least 2005 to 2009, Toyota Australia represented the upholstery of certain vehicle interiors as 'leather', when it was only partially leather. Toyota undertook not to use such misleading descriptions in the future, publish a corrective notice and implement a supplementary compliance program.

Happiness Road Investment Group Pty Ltd provided a court-enforceable undertaking after accepting that it had made misleading claims that its ugg boots were made in Australia and it had used the Australian Made logo without authorisation. Following an ACCC investigation, Happiness Road admitted that its ugg boots were all made in China. Happiness Road undertook to refrain from engaging in the same or similar conduct in the future, offer and pay refunds to consumers who were misled by its conduct, publish an Adword advertisement on Google, which directs visitors to publications on the ACCC's website regarding misleading claims and advertising, and undertake trade practices compliance training.

Case study

Credence claims—a new enforcement and compliance priority for the ACCC in 2013

The ACCC highlighted credence claims as a new enforcement and compliance priority in 2013, as the ACCC identified this as an area where consumers are increasingly placing weight on premium claims of products and are likely to value the types of claims that directly affect the integrity of the product, such as where and how it was made, grown or produced. These claims can give a company a distinct competitive advantage above their competitors and be used as an important marketing strategy. As consumers rely on the honesty and accuracy of businesses' representations, the ACCC is taking action to ensure that consumers are not misled by these claims.

The ACCC has already taken action in a number of credence claim matters, including court action against 'free range' claims in meat and egg products, and court and non-court action against country (or region) of origin claims in products including honey, sheepskin and meat. On 9 July 2012, the ACCC instituted proceedings in the Federal Court in Melbourne against Pepe's Ducks Ltd in relation to alleged contraventions of the ACL arising from Pepe's use of the words 'open range' and/or 'grown nature's way' (with a pictorial image of a duck in the outdoors against a background of a lake) on its packaging, website, delivery trucks, signage, stationery and merchandise. It was alleged that the duck meat products that Pepe's sold or offered for sale were processed from ducks raised solely in indoor sheds without any access to the outdoors, and were not of a different quality from those raised solely in indoor sheds.

As a result, on 19 December 2012, the Federal Court ordered Pepe's Ducks Ltd to pay \$375 000 in penalties. Justice Bromberg noted that the company would clearly have been aware of increasing concern among consumers regarding sources of food and the treatment of animals used to produce food products, and they deliberately sought to take advantage of consumer preferences by employing it as part of its primary promotional message, terms and pictures designed to appeal to such consumers.

The ACCC has also sought to address these types of issues by providing information to consumers on olive oil and country of origin through the ACCC Shopper app.

The ACCC's enforcement action in this area over the last year has obtained penalties of over \$700 000 for this type of conduct.

Infringement notices

In June 2013, **MOI International Pty Ltd** paid two infringement notices totalling \$20 400 for misleading claims on the label of its olive oil products. MOI International's 'Mediterranean Blend' oil product was prominently labelled as 'Extra Virgin Olive Oil' and '100 per cent Olive Oil'. The ACCC considered that, by using these descriptions, MOI International represented that the oil was completely or predominantly composed of extra virgin olive oil when this was not the case.

In June 2013, **Coles Supermarkets Australia Pty Ltd** received six infringement notices totalling \$61 200 for alleged misleading representations about the country of origin of fresh produce made in five of its stores. The ACCC took action following a complaint that Coles had displayed imported navel oranges and kiwi fruit underneath price boards reading 'Helping Australia Grow' with the 'Australian Grown' symbol. The ACCC was of the view that the signage gave the overall impression that the imported produce was Australian grown, when it was not. The overseas country of origin was correctly identified either by stickers on the produce itself, on its packaging or under the display bin. However, the ACCC considered that the relatively small sized stickers or statements were not sufficient to correct the overwhelming impression of the Helping Australia Grow campaign imagery that was associated with the sale of the product.

Administrative resolutions

'Organic water'. In March 2013, the ACCC wrote to seven manufacturers of bottled water about the prominent use of the word 'organic' on the bottle labels. The ACCC alleged that the manufacturers were misleading consumers by using the term when water cannot be organic. While there is no mandatory standard for organic produce, there is no authoritative support for the notion that water can be organic and a number of authoritative statements that it cannot. In particular, *Australian Standard AS6000-2009* and the *National Standard for Organic and Bio-Dynamic Produce* state that water cannot be organic. As a result of the ACCC's approach, the manufacturers voluntarily agreed not to use 'organic' on their labels and remove offending products from sale.

Carbon pricing

Timely and effective identification, investigation and action

The ACCC gave priority over the year to carbon pricing issues as directed by the Treasurer under section 29(1) of the Act. This includes:

- giving priority to investigating businesses which make statements about the impact of a carbon price on their goods and services
- encouraging compliance with the Act by informing and educating businesses about their responsibilities concerning such statements
- raising consumer awareness about their rights under the ACL and the ban on misleading and deceptive business conduct or false or misleading claims about the impact of a carbon price on the supply of goods and services.

In 2012-13, the ACCC received over 3000 carbon pricing complaints and enquiries, with statistics showing a decline following an initial spike at the introduction of the carbon pricing mechanism on 1 July 2012. Most complaints were about energy—approximately 40 per cent of all contacts received since 1 July 2012, while there were also significant numbers of contacts about the refrigerant gas and landfill sectors.

The ACCC continues to assess carbon pricing complaints for evidence of conduct that may raise concerns under the Act and a number of initial and in-depth investigations are ongoing.

Enforceable undertakings

In 2012–13, the ACCC received two court-enforceable undertakings in relation to carbon price claims.

Retail Food Group Ltd, owner of **Brumby's Bakeries Pty Ltd**, gave a court-enforceable undertaking regarding suggestions by the latter to its franchisees that they link retail price increases to the carbon price. Retail Food Group undertook not to make such claims in future.

Equipserve Solutions Pty Ltd provided a court-enforceable undertaking about statements it made in an email to customers which falsely attributed the entire increase in the price of refrigerant gas to the carbon price. Equipserve Solutions agreed not to behave that way in the future, issue notices correcting the error to customers on its website and implement a trade practices compliance program.

Infringement notices

In July 2012, **GFC Berwick Pty Ltd** paid an infringement notice of \$6600 for carbon price claims made about the cost of gym membership fees. GFC Berwick sent a letter to a number of its members offering a range of lengthy contract extensions at current or reduced membership rates saying that, by taking up the offer, members could avoid a fee increase of 9 to 15 per cent due to the carbon price. As a part of the resolution, the company sent a letter to affected members offering them the opportunity to withdraw from contract extensions at no cost.

Administrative resolutions

Through investigations into carbon pricing matters, the ACCC resolved 44 matters administratively with traders across a range of sectors. Resolutions included a combination of formal warning letters and informal undertakings, including on consumer refunds. For example, in July 2012 it accepted informal undertakings from solar panel suppliers **Polaris Solar Pty Ltd** and **ACT Renewable Energy Pty Ltd** on carbon price claims in advertising leaflets. The claims, which the ACCC considered likely to mislead, concerned the impact of the carbon price on household electricity prices.

Consumer guarantees, warranties and refunds

Consumer guarantees are a set of rights which all consumers have when they purchase goods or services anywhere in Australia. Under the Australian Consumer Law, products and services come with automatic guarantees on entitlement to repair, replacement or refund. Questions and complaints about guarantees and warranties are one of the most common reasons consumers contact the ACCC and other ACL regulators.

Timely and effective identification, investigation and action

Following the introduction of the national consumer guarantees laws in 2011, in 2011–12 the ACCC, together with the other ACL regulators, conducted a national consumer guarantees compliance project to improve business compliance and consumer awareness of their consumer guarantee rights.

In 2012, the ACCC ran the **Repair Replace Refund national campaign** raising awareness of consumer guarantees. The campaign complemented the national compliance program and used a mixture of advertising including digital, radio and outdoor media placements, and ongoing stakeholder engagement and communication activities to increase consumers' awareness and confidence. The campaign targeted consumers and businesses generally, but focused on those consumers most at risk of detriment—those with a lower knowledge of consumer law and lower confidence in pursuing entitlements than the broader community. The campaign evaluation showed an increase in confidence of consumers about their

knowledge of consumer rights if they purchase a faulty product or service. The largest increases in confidence were amongst the target audience sectors of consumers who do not speak English at home, and consumers with an education level of high school or below.

The ACCC is also working with other ACL regulators on a national project on extended warranties. The project aims to investigate extended warranties to see whether they offer any additional benefits above that provided by the ACL, and to educate consumers to ensure they are aware of their rights and can make informed decisions about extended warranty purchase.

During fraud week the ACCC also conducted a sweep of internet traders for compliance with the consumer guarantees and warranties laws, as part of the ICPEN internet sweep (see page 83 for more information).

Building on the work of Consumer Affairs Victoria, on 5 December 2012, the ACCC released a free **'ACCC Shopper' app** for consumers to coincide with the busy Christmas shopping period. Consumers had downloaded the app more than 33 000 times by 30 June 2013. The app includes consumer information on warranties, refunds and lay-bys; allows users to set reminders for their gift vouchers and warranties; and stores photos of receipts. It also includes information about country-of-origin food labelling and olive oil claims.

A compliance program focused on suppliers and manufacturers ran within the telecommunications, white goods and electronics industries, which were selected following research that indicated consumers experienced considerable detriment in these sectors. In 2012-13, the ACCC instituted the first proceedings under the consumer guarantees provisions.

Court cases

In 2012-13, the ACCC began a number of separate cases in the Federal Court about alleged misrepresentations to consumers on their rights under the consumer guarantee provisions of the ACL.

The ACCC alleges that **Hewlett-Packard Australia Pty Ltd** made false or misleading claims to consumers about their consumers' warranty and guarantee rights. It also alleges that the company made a false or misleading claim to retailers that it was not liable to compensate them if they gave consumers a refund or replacement product without prior authorisation. The ACCC is seeking a range of remedies, including declarations, injunctions and penalties.

The ACCC instituted separate proceedings against **10 Harvey Norman franchisees** alleging they engaged in misleading or deceptive conduct by making false or misleading claims to consumers about their rights under the consumer guarantee provisions of the ACL. While the allegations against each of the franchisees differ, examples of misrepresentations include representation that the franchisee had no obligation to provide remedies for damaged goods unless notified within a specific time period such as 24 hours or 14 days, the franchisee had no obligation to provide remedies for good still covered by the manufacturers warranty, or the consumer must pay a fee for the return and repair of faulty products. The ACCC is seeking penalties, declarations, injunctions and costs.

Infringement notices

In March 2013, **Super-A-Mart Pty Ltd** paid two infringement notices totalling \$13 200 for misleading representations regarding the application of consumer guarantee provisions on floor stock furniture offered for sale. The ACCC alleged that, in August 2012, Super-A-Mart falsely represented that consumer guarantees did not apply to certain furniture offered for sale at its Gepps Cross store in South Australia. Following ACCC action, Super-A-Mart also changed the labelling on its 'floor stock' or 'shop soiled' furniture.

Consumer protection issues in Indigenous communities

The ACCC's Indigenous consumer protection strategy seeks to ensure that Indigenous Australians enjoy the same rights under the Australian Consumer Law as non-Indigenous Australians.

The strategy's aim is to better inform Indigenous consumers of their rights, improve their access to ACCC services, better detect breaches of the Act affecting them, and vigorously enforce the law to protect them. The ACCC is also working very closely with state and territory consumer protection agencies, the Australian Securities and Investments Commission (ASIC), legal services and relevant non-government organisations to ensure Indigenous consumers have greater knowledge of their rights and greater confidence in exercising those rights.

The ACCC continued to interact with remote Indigenous communities through its **Northern Territory community outreach program**, which is run by a dedicated Indigenous manager in the ACCC's Darwin office. The ACCC has also appointed a dedicated Indigenous outreach officer in its Townsville office. Over the year, the officer visited several remote Indigenous communities in the Northern Territory and Queensland and helped put in place partnerships to identify and address important consumer issues.

In February 2013, the ACCC launched the pilot **Your Rights Mob Tiwi Islands Facebook page** in response to growing use of Facebook among Indigenous communities in northern Australia. The page offers a new way for Indigenous consumers to report issues directly to ACCC staff through a private message or wall post, enabling early alerts on contraventions of consumer law. In addition, it allows the ACCC to reach Indigenous consumers with important consumer educational messages. Consideration is currently being given to rolling out the Facebook page to a broader range of Indigenous consumers.

The ACCC produced **five short consumer protection films** in a joint project with Indigenous members of the Tiwi community. The films cover topics such as exercising consumer rights, protection against high pressure telemarketing calls, rights in door-to-door sales and baby safety.

Further details on the ACCC's Indigenous consumer protection initiatives appear in the case study *Engagement increases consumer protection in Indigenous communities* on page 78.

Case study

Engagement increases consumer protection in Indigenous communities

In our experience, Indigenous consumers, particularly from remote communities, are less likely to complain to the ACCC through traditional channels such as the Infocentre or writing a letter or email. As a result, there have been high levels of consumer detriment, due to contravening conduct being undetected or notified to the ACCC only after a significant delay.

The relatively low levels of complaints from Indigenous consumers may be attributed to language difficulties, lack of knowledge of what the ACCC does, feelings of shame, or a lack of confidence in articulating issues over the phone.

The ACCC has developed a strategy to better equip Indigenous consumers to avoid being affected and to help the ACCC intervene quickly to stop conduct and minimise detriment when contraventions have occurred. The strategy is collaborative; conducted in conjunction with state and territory offices of Fair Trading, ASIC, the Indigenous Consumer Action Network and key legal aid and non-government services involved in the rights of Indigenous Australians.

The ACCC Indigenous Consumer Rights Strategy

- seeks to address the low profile of the ACCC in remote Indigenous communities
- attempts to rectify low likelihood of consumer protection issues being raised with the ACCC by Indigenous consumers in a timely manner or at all, and
- aims to equip Indigenous people with the information they need to protect their rights.

Remote community visits and grass roots engagement in identified communities across the country is a key element of the strategy. The ACCC has conducted community outreach visits to a number of Northern Territory communities, with engagement to extend to other regions.

As our research has indicated that social media is a popular form of communication among many Indigenous Australians, traditional forms of communication have been supplemented by the use of media such as Facebook and YouTube. Five consumer protection education films are available online, featuring local Indigenous residents of the Tiwi Islands. The style of communication is colloquial and humorous, and is designed to overcome some of the reasons for low complaint levels to the ACCC, identified above.

A number of recent ACL contraventions detected by the ACCC involving Indigenous consumers have resulted from outreach visits and stronger relationships with representative groups. This conduct was also typically identified before detriment could become serious. For example, swift ACCC action in proceedings against Titan Marketing Pty Ltd has led to interlocutory injunctions by consent; see further page 66). The effectiveness of the work of the ACCC will be enhanced by local engagement, and by gaining a greater level of confidence from Indigenous consumers about ACCC action.

Court cases

In September 2012, the Federal Court ordered **EDirect Pty Ltd** to pay \$2.5 million for telemarketing and 'voice' contracting with 350 customers from remote and regional communities across Australia without network coverage. EDirect made misleading and deceptive claims that it had confirmed that coverage was available at customers' addresses when it had not and no such coverage existed.

While EDirect is now in liquidation, the ACCC successfully negotiated the payment of over \$100 000 in consumer refunds from both EDirect and the company which took over its assets.

In June 2013, the ACCC commenced proceedings in the Federal Court Brisbane against **Titan Marketing Pty Ltd** and its sole Director. The ACCC alleges that Titan representatives engaged in misleading and unconscionable conduct when conducting door-to-door sales of first aid kits and water filters in Indigenous communities and other locations in Queensland, New South Wales and the Northern Territory. The ACCC also alleges that Titan contravened the unsolicited consumer agreement provisions; made false or misleading representations in relation to Titan's affiliation with a charity group, consumers' refund rights and the value of goods supplied; and entered into contracts with consumers which contained unfair contract terms. The ACCC is seeking declarations, injunctions, pecuniary penalties, a community service order and costs.

The ACCC obtained interlocutory injunctions by consent, which preventing the trader from entering any Indigenous community that requires visitors to obtain permission from an appropriate authority in order to enter that community, and prevent the trader from making any representation that Titan has an affiliation with any charity or aid organisation. The orders also restrain Titan from requesting or accepting payment from any consumer under an unsolicited consumer agreement negotiated in person or by telephone, unless certain conditions are met. The injunctions apply until further or final orders are made by the court.

Enforceable undertakings

In August 2012, the ACCC accepted a court-enforceable undertaking and received payment of three infringement notices totalling \$19 800 from **G & R Wills Holdings Pty Ltd** for supplying baby walkers and offering two models of strollers which did not comply with the relevant safety standards. G & R Wills had supplied the unsafe products to remote Indigenous communities in the Northern Territory. The company agreed not to behave that way in the future and to implement a trade practices compliance program.

In addition, G & R Wills agreed to initiate a \$25 000 bi-lingual product safety campaign for parents of young children living in remote Indigenous communities about the potentially harmful features of prams and baby walkers. Radio broadcasts in Yolngu Matha and English have now been produced and will be broadcast on the Aboriginal Resources and Development Services radio network which covers many of the affected communities.

In December 2012, the ACCC accepted a court-enforceable undertaking from **Angela Jane Delgiacco** of Alice Sundown Aboriginal Art on false or misleading claims in a certificate of authenticity for an Indigenous artwork sold on eBay under the username 'sundownnt01'. Ms Delgiacco agreed not to prepare certificates with false or misleading information for three years.

Other consumer protection outcomes

False, misleading and deceptive conduct

The Australian Consumer Law gives the ACCC a range of remedies and powers to effectively respond to breaches of fair trading and consumer protection laws.

Section 18 prohibits businesses from engaging in conduct that is misleading or deceptive, or likely to mislead or deceive. Section 29 prohibits businesses from making false or misleading representations about goods or services. Business conduct is likely to breach the law if it creates a misleading overall impression with potential buyers about the price, value or quality of consumer goods or services.

Section 21 prohibits businesses from engaging in unconscionable conduct, that is, conduct so harsh that it goes against good conscience, in their dealings with other businesses or their customers.

Court cases

In 2012–13, the ACCC finalised 21 consumer protection matters. These are listed in appendix 10 and include:

- **Metricon Homes Queensland Pty Ltd** were ordered to pay \$800 000 in penalties for false or misleading advertising for the build and sale of homes in south-east Queensland and northern NSW. The court also ordered declarations, undertakings and a contribution towards ACCC costs.

Infringement notices

In 2012–13, the ACCC received payment for 27 infringement notices across 10 matters with penalties of over \$300 000. These are listed in appendix 10 and include:

- **Craftmatic Pty Ltd** paid three infringement notices totalling \$19 800 for alleged false or misleading claims about the price and warranty of its adjustable beds during an in-home sales presentation.
- **Nissan Motor Co (Australia) Pty Ltd** paid three infringement notices totalling \$19 800 and gave a court-enforceable undertaking for alleged misleading claims in advertising for the Nissan Dualis sport utility vehicle. Nissan's 'Paintball' advertisement had displayed drive-away prices that were not available for all of the vehicles pictured. As a part of the undertaking, Nissan agreed not to repeat such conduct, publish a corrective notice and appoint an independent compliance professional to review its advertising and promotional procedures.

Unfair contract terms

Court cases

In April 2013, the ACCC began proceedings in the Federal Court against **ByteCard Pty. Limited** (trading as **Netspeed Internet Communications**). The ACCC alleges that the standard form consumer contracts used by Bytecard include a number of unfair contract terms that should be declared void. The ACCC is seeking declarations that the terms are unfair and void under section 23 of the ACL.

This case marked the first legal proceedings by the ACCC based exclusively on the unfair contract terms provisions of the ACL.

Administrative resolutions

In January 2013, the ACCC met with the **Jetset Travelworld Group** to discuss concerns which had previously been raised with Jetset by CHOICE and other parties regarding Jetset's consumer contracts. One of the areas of concern related to a no liability clause unfairly restricting consumer chargeback rights, which are generally available on credit card purchases. Jetset confirmed that it agreed to delete this clause and also undertook to make other changes to the contracts to make them more clear and transparent to consumers.

Timely and effective identification, investigation and action

On 15 March 2013, the ACCC released the findings of extensive reviews of consumer contracts in the airline, telecommunications, fitness and vehicle rental industries, as well as some contracts commonly used by online traders and travel agents. The aim of the reviews was to evaluate compliance and work with the businesses involved on positive changes to standard form consumer contracts.

The ACCC called on all businesses to consider the terms of their own standard form contracts in the light of the ACCC's findings, and to make changes where necessary to ensure their contract terms were compliant. Good contract terms offer an opportunity for businesses to deal upfront with consumer dissatisfaction and disputes, thereby reducing complaints.

The ACCC found that, in most cases, the businesses under review chose to make changes to their standard form contracts.

The ACCC has now moved from compliance implementation to enforcement with this work. A number of outstanding issues identified by the reviews are being investigated with a view to litigation.

Scams

The impact of scams on Australians continues to be substantial, with consumers and businesses suffering considerable financial and non-financial losses. **The ACCC received more than 83 000 contacts about scams** from consumers and small businesses in 2012, with **losses reported exceeding \$93 million**.

Court cases

- **Adepto Publications Pty Ltd**, its owner and director and a former manager were ordered to pay penalties totalling \$750 000 after they admitted to false and misleading representations regarding advertising services that were never requested. The court also ordered declarations, injunctions and costs.

Effective education and communication

The ACCC undertakes a range of work to protect consumers against scams. Both its SCAMwatch website and *Little black book of scams* are internationally regarded as best practice resources, with overseas regulators linking to the site and producing their own localised versions of the book. In 2012, SCAMwatch received over 970 000 unique visitors, up 25 per cent from 2011, and over 125 000 copies of the *Little black book of scams* were distributed across Australia.

Table 3.3: Overview of scam types reported to the ACCC in 2012 in order of total reported losses

Scam category	Amount reported lost	Contacts	Contacts reporting loss	Less than \$10k lost	Greater than \$10k lost	Contacts reporting no loss	Conversion rate
Advanced fee/up-front payment	\$30 203 373	27 039	2 362	2 056	304	24 677	8.7%
Dating and romance (incl. adult services)	\$23 311 211	2 441	1 119	773	346	1 322	45.8%
Investment seminars and real estate	\$17 349 347	762	248	130	116	514	32.4%
Online auction and shopping (incl. classifieds)	\$4 038 479	8 275	3 038	2 949	89	5 237	36.7%
Computer prediction software (incl. betting)	\$4 033 442	733	343	211	132	390	46.8%
Job and employment	\$2 704 235	2 673	294	247	47	2 379	11.0%
Lottery and sweepstakes	\$2 618 835	9 337	260	214	46	9 077	2.8%
Phishing and identity theft (incl. banking and online account)	\$1 503 958	8 788	494	458	40	8 294	5.6%
Computer hacking (incl. malware and viruses)	\$1 312 794	10 961	1 013	1 001	12	9 948	9.2%
Unexpected prizes	\$1 057 378	5 942	184	165	19	5 758	3.1%
False billing	\$566 061	2 546	485	474	11	2 061	19.0%
Psychic and clairvoyant	\$444 895	125	41	34	7	84	32.8%
Chain letter/pyramid scheme	\$427 014	640	45	34	11	595	7.0%
Mobile phone (ringtones, competitions and missed calls)	\$367 739	1 302	269	266	3	1 033	20.7%
Door-to-door and home maintenance	\$192 769	364	77	71	6	287	21.2%
Health and medical	\$58 076	173	77	76	1	96	44.5%
Spam and 'free' internet offers	\$26 574	687	114	114	0	573	16.6%
Fax back	\$1 820	64	1	1	0	63	1.6%
Other (scams that do not fit into predefined categories)	\$3 205 030	951	108	91	17	843	11.4%
Total	\$93 423 030	83 803	10 572	9 365	1 207	73 231	12.6%

The ACCC continues its educational activities, including through Twitter (now with around 5000 followers), **SCAMwatch radars** and **'scam of the month'** media releases, in an effort to raise awareness about the latest scams and limit the number of consumers and small businesses who fall victim to scams.

In June 2013, the ACCC released its **'Small business factsheet'**, which provides information to help you protect yourself and your business by being aware of the common scams targeting small business.

This financial year, the ACCC successfully prosecuted individuals involved in a scheme tricking small business operators into paying for advertising services that were never requested or provided. See 'Adepto' under *Scams* on page 81.

It also worked extensively with industry, other regulators, and local and international law enforcement agencies to disrupt scams.

As chair of the Australasian Consumer Fraud Taskforce (ACFT), the ACCC continues to lead a strong coordinated effort by state, territory and Australian government agencies, as well as representatives from New Zealand, to minimise the harm arising from scams. The National Consumer Fraud Week highlights the ACFT's calendar each year.

National Consumer Fraud Week

This year's National Consumer Fraud Week was held from 17 to 23 June 2013. It began with the launch of the ACCC's fourth annual **Targeting scams report**, which contained data on all scam contacts received by the ACCC in 2012. The next day the ACCC hosted a forum on behalf of the Australian Consumer Fraud Taskforce at the Arts Centre, Melbourne. The theme was 'Outsmarting the scammers: Staying safe when shopping online'. A broad-based group of government, industry and academic stakeholders attended and discussed ways to help consumers identify and avoid online shopping scams, as well as new initiatives aimed at disrupting scam conduct.

A small business scams Fraud Week event was co-hosted with the WA Small Business Development Corporation in Perth on 21 June 2013. The event included the presentation of research by Curtin University into the prevalence of scams in the small business sector, as well as a scam victim sharing her own experience.

Reviews of online businesses

The ACCC undertook reviews of several online shopping websites further to some concerns identified in the September 2012 International Consumer Protection and Enforcement Network (ICPEN) internet sweep about the use of fine print by some of these businesses.

The ACCC participated in the ICPEN Internet sweep along with 40 global counterpart consumer protection agencies. The sweep targeted traders using confusing or misleading fine print to avoid their obligation to consumers.

The ACCC's sweep activities focused on how consumer guarantee rights are represented to consumers online. The consumer guarantees provide statutory rights to consumers, including the right to have a faulty product repaired, replaced, or to receive a refund.

The ACCC targeted 12 online businesses whose websites presented a high level of concern under the ACL. These businesses were asked to make changes to their business practices, including terms and conditions set out on their websites. Several of these businesses engaged readily with the ACCC to ensure they were not misrepresenting consumers' rights to a repair, replacement or refund and overall nine businesses made changes to improve their websites' compliance with the ACL.

Educating businesses about the Australian Consumer Law

The ACCC seeks to engage with and educate small business and consumers on most areas of its work. Our aim is to increase their awareness of their rights and responsibilities under the Competition and Consumer Act and the Australian Consumer Law, and to empower them to assert those rights.

The ACCC has a dedicated role in ensuring small businesses understand and comply with their obligations and in encouraging them to exercise their rights under the Competition and Consumer Act. Importantly, the ACCC seeks to ensure small businesses understand how the legislation helps them.

The ACCC aims to promote a competitive and fair operating environment for small business and to help raise small businesses' awareness of the Competition and Consumer Act.

Educational activities included work with key small business associations and networks. Among these were state and national representative groups such as:

- Australian Chamber of Commerce and Industry
- Council of Small Businesses of Australia
- the Institute of Public Accountants and CPA Australia
- local government associations
- national and existing state small business commissioners
- selected small business associations
- members of the ACCC's consultative committees, including the Small Business Consultative Committee and the Franchising Consultative Committee.

The ACCC also engaged with members of key consumer groups such as:

- CHOICE
- Consumer Action Law Centre
- Council on the Ageing
- Indigenous Consumer Action Network
- Australian Communications Consumer Network.

It also consulted with local organisations such as Business Enterprise Centres, local councils and chambers of commerce.

National Consumer Congress

On 14 March 2013, the ACCC hosted the **2013 National Consumer Congress** in Sydney. The congress is a key annual event on the consumer calendar and coincided with World Consumer Rights Day.

Tying in with the global day's theme of 'Consumer justice now!', the congress focused on the role of advocacy in empowering, protecting and advancing the interests of consumers.

It covered a wide range of topical issues from energy, financial distress, superannuation, food and health to virtual markets, behavioural economics and campaigning. More than 150 representatives from the consumer, community and government fields attended and engaged in thought-provoking discussions about how to improve consumer justice and welfare.

This year's Ruby Hutchison Address guest speaker, Carolyn Bond AO, Co-Chief Executive Officer of the Consumer Action Law Centre, spoke on the role of advocacy in empowering, protecting and advancing the interests of consumers.

Supporting consumer literacy education in schools

The Australian Curriculum, Assessment and Reporting Authority (ACARA) is finalising the 'Years 5-10 Australian Curriculum: Economics and Business' in 2013. The ACCC, in collaboration with ASIC and the Australian Tax Office, will provide feedback to ACARA through the curriculum drafting process to raise the profile of consumer and financial literacy in the curriculum. Through the inclusion of consumer and financial literacy in the curriculum, students have the opportunity to gain knowledge, skills, values and behaviours in making responsible and informed decisions about consumer issues and managing money and assets to improve individual and community financial well-being.

Protecting vulnerable and disadvantaged consumers

The ACCC uses tailored information and communication strategies to meet the needs of its diverse audiences, including those groups who might be disadvantaged or vulnerable in the marketplace. It makes information available in the full range of media, and in languages other than English. By supporting published material with targeted initiatives, including presentations by the chair, commissioners and staff, the ACCC has built a strong presence within the community.

Unconscionable conduct

One of the ACCC's continuing enforcement and compliance priorities is to address unconscionable conduct. Unconscionable conduct is generally understood to be conduct that is so harsh that it goes against good conscience. This conduct does not have a precise legal definition instead developed by courts over time. In broad terms, the courts have considered the threshold for unconscionable conduct to be conduct that:

- goes beyond robust commercial dealings or the notion of unfairness
- shows no regard for conscience
- is irreconcilable with what is right or reasonable.

Case study

ACCC action to protect consumers and business from unconscionable conduct

The ACCC has taken on a number of unconscionable conduct cases, some have been successful and a few unsuccessful. Unsuccessful cases will not deter the ACCC from taking enforcement action, including litigation where appropriate, in circumstances where the ACCC considers that companies have engaged in unconscionable conduct involving disadvantaged or vulnerable consumers.

- In September 2012, the Federal Court penalised **EDirect Pty Ltd** \$2.5 million for misleading and deceptive representations. EDirect told customers that it had verified that there was coverage at the customers' nominated address. Coverage was not available at those addresses, and EDirect did not verify this. A previous judgment was made against EDirect in 2008 for similar conduct. The ACCC successfully negotiated payment of over \$100 000 in consumer refunds from EDirect.
- In a separate matter, in September 2012, the Federal Court dismissed an application from the ACCC for declarations that EDirect Pty Ltd engaged in systemic and specific unconscionable conduct, and misleading and deceptive conduct in its telemarketing of mobile phone services. EDirect went into liquidation after the ACCC commenced proceedings.
- In March 2013, the ACCC appealed the Federal Court's decision dismissing the ACCC's allegation that **Lux Distributors Pty Ltd** engaged in unconscionable conduct in relation to the sale of vacuum cleaners to five elderly consumers. The ACCC appealed on the grounds that the trial judge erred in fact and law by finding that the conduct of Lux in relation to three consumers was not, in all the circumstances, unconscionable. In August 2013 the ACCC's appeal was upheld.
- In April 2013, the Federal Court found that **Excite Mobile Pty Ltd** engaged in false and misleading and unconscionable conduct in its provision of mobile phone services to customers across Australia. The Court also found Excite Mobile acted unconscionably and used undue coercion when attempting to obtain payment for mobile phone services. A large number of consumers across all parts of Australia were affected by Excite Mobile's conduct, including rural and Indigenous consumers in Queensland and the Northern Territory.
- In July 2013 The Federal Court ordered former Tasmanian **Europcar franchisee**, BAJV Pty Ltd (BAJV), to pay a \$200 000 civil pecuniary penalty for deliberately overcharging customers for hire vehicle repair costs and failing to refund overcharged customers. The Court also ordered BAJV director Brendon Ayers to pay a \$40 000 civil pecuniary penalty for being knowingly concerned in the conduct. The Court found that BAJV and Mr Ayers had engaged in unconscionable conduct and made false or misleading representations in relation to charging customers for hire vehicle damage based on inflated estimated repair costs and failing to refund customers the overcharged amount once repairs had been completed, despite being aware of the actual lower cost of the repairs.

In addition to protecting consumers from unconscionable conduct, the ACCC also addressed similar conduct targeting small businesses.

- On 20 September 2012, the Federal Court ordered three publishing companies to pay penalties totalling \$400 000 and the companies' director to pay \$100 000. The companies and the director admitted that they had engaged in misleading and deceptive conduct, harassment and coercion, and unconscionable conduct in relation to advertising services that were never requested or provided.

2.2 Increase our effectiveness through partnerships

2012–13 Strategy: *Multiply the effectiveness of our compliance and enforcement initiatives through an active program of stronger and managed partnerships with ACL regulators and law enforcement agencies*

- Measures:**
- Timely and effective identification, investigation and action responses to breaches of the Australian Consumer Law.
 - Enforcement outcomes achieved through court action.
 - Non-court based remedies used.
 - Effective education and communications to inform consumers about their rights and responsibilities under the Australian Consumer Law.

The ACL gives consumer regulators a single set of investigation and enforcement tools to respond to breaches of fair trading and consumer protection laws. These replace the differing powers under previous national, state and territory legislation. The ACL also allows regulators to collectively work on broader issues and take pro-active and timely compliance and enforcement action.

In 2012–13, the ACCC continued to engage with businesses on a range of compliance concerns relating to the ACL, including consumer guarantees and warranties against defects. These included concerns about the information in consumer guarantees, warranties and returns policies. Following contact with the ACCC, many businesses amended their refunds and returns policies to ensure compliance with the consumer guarantees provisions in the ACL.

The ACCC continued to work with businesses, industry associations and consumer groups to promote awareness of the ACL. It also engaged with specific stakeholders, including peak industry associations, to promote industry-wide compliance with the requirements in the ACL regarding consumer guarantees and warranties against defects.

The ACCC continued to work closely with the Treasury, ASIC, and state and territory consumer protection agencies on several national projects.

One such project concerned extended warranties, identifying areas of non-compliance with the ACL and educating consumers on whether or not buying an extended warranty is worthwhile. Another considered consumer protection concerns about food labelling practices, including country-of-origin labelling of food and the labelling of olive oils in Australia. To complement compliance and enforcement activities, the ACL regulators developed consumer material that explains Australia's country-of-origin labelling framework plus a useful buying guide about the different grades of olive oil products. These publications assist consumers to make more informed buying decisions. The ACCC extended the reach of this information by incorporating it in the ACCC Shopper app for mobile devices. (See *Consumer guarantees, warranties and refunds* in this chapter for more information.)

The ACCC continued to actively support the Council of Australian Governments Legislative and Governance Forum on Consumer Affairs.

It also participated in Consumer Affairs Australia and New Zealand and its advisory committees: the Education and Information Advisory Committee, the Compliance and Dispute Resolution Advisory Committee, the Policy and Research Advisory Committee and

the Product Safety Consultative Committee. The role of each of the committees and their activities in 2012–13 are outlined below. Work with other bodies is covered under Goal 4 on page 174.

Education and Information Advisory Committee

The ACCC participated in the Education and Information Advisory Committee which comprises Australian, state and territory ACL regulators. The committee focuses on national cooperation and coordination of education and information activities relating to the ACL and consumer issues more generally. Under the collaborative leadership model for the ACL, it is taking advantage of new opportunities to support and promote policy and compliance activities.

To reach diverse audiences, the committee uses a range of media to communicate information on the ACL. Resources are developed collaboratively to minimise duplication and distributed nationally to ensure consistent messages.

Compliance and Dispute Resolution Advisory Committee

The advisory committee aims to ensure that compliance and dispute resolution across Australia is coordinated, efficient, responsive and, where appropriate, consistent. It is currently chaired by NSW Fair Trading which provides support for day-to-day liaison on enforcement issues.

Regulators have actively sought justice for consumers experiencing difficulties with traders which have failed to meet their obligations under the ACL. In 2012–13, the advisory committee worked on a number of projects including extended warranties and unfair contract terms.

Policy and Research Advisory Committee

The committee aims to ensure that consumer protection research, policy development and legislative reform is best practice and undertaken in a nationally consistent and cooperative manner. It has participated in a number of national projects to improve policy coordination and research activities and support the operation of Consumer Affairs Australia and New Zealand.

The ACCC is working with its state and territory counterparts through the committee to consider such issues as a national approach to fuel price boards to address consumer confusion, and amendments to the application of single price advertising laws to the disclosure of surcharges on restaurant and café menus.

In 2012–13, the ACCC met with stakeholders through the Fuel Consultative Committee to better understand the issues affecting industry and consumers in relation to fuel price boards. Consumer Affairs Australia and New Zealand released a consultation paper seeking business and consumer views on options for a consistent national approach to the display of information on fuel price boards, including the possibility of a national information standard. In July 2013 Ministers for Consumer Affairs noted that agreement was not reached over a national information standard and discussed the value of a standard to help consumers make better fuel purchasing decisions by providing clearer, more standardised information. Ministers agreed to undertake further consultation with industry and consumer stakeholders.

Product Safety Consultative Committee

The committee meets regularly to progress a range of national product safety matters, including the twice yearly national product safety surveillance program, and nationally coordinated consumer and supplier education campaigns. Chaired by the ACCC, the committee represents product safety regulators across Australian states and territories,

as well as New Zealand and Papua New Guinea. It is a key forum through which the ACCC and state and territory fair trading agencies collaborate on a range of emerging product safety issues.

Cooperation between the ACCC and state and territory fair trading agencies has seen a high level of ongoing product safety promotion, for example, on the hazards of small powerful magnets in adult toys.

2.3 Protect consumers from unsafe products and services

2012–13 Strategy: *Identify and implement nationally integrated approaches to minimise the risk of injury and death from safety hazards in consumer products*

Measures:

- Timely identification and responses to product safety hazards.
- Product safety activities to effectively assess and address product safety hazards.
- Effective education and communication to reduce product safety-related injury and maximise compliance.

The ACCC administers the product safety provisions of the Australian Consumer Law. This means it acts on complaints, collects and assesses data and intelligence, including mandatory reports, administers the consumer goods recalls system, conducts marketplace surveillance, commissions and assesses reports, and other relevant injury related information, to allow it to identify emerging issues, advise the Australian Government Minister responsible for product safety (in 2012–13 the Assistant Treasurer David Bradbury), and take action on remedies for unsafe products. These remedies include bans, mandatory safety standards and recalls. The ACCC conducts programs to inform and educate consumers and businesses about their rights and responsibilities. It also enforces the product safety requirements in the Australian Consumer Law.

Consumers, businesses and suppliers all have rights and responsibilities. Consumers have a right to expect that the products they buy work properly without unreasonable risk of causing illness or injury. Businesses must use quality control measures to ensure that the products they supply meet acceptable safety levels. Suppliers must ensure products meet relevant mandatory standards and bans and comply with recall and mandatory reporting requirements.

To achieve its product safety compliance objectives the ACCC employs three integrated and flexible strategies:

- enforcing the Australian Consumer Law by resolving possible contraventions
 - administratively
 - by litigation
- encouraging compliance by educating and informing consumers and businesses about their rights and responsibilities under the Act
- working with other agencies to implement these strategies.

Since the introduction of the new harmonised national product safety system, the ACCC has continued to strengthen the relationships with its state and territory counterparts. Additionally, it continues to build relationships with local organisations such as Customs, the National Roads and Motorists Association, Kidsafe, Standards Australia and state and territory fire safety agencies along with international agencies such as the US Consumer Product Safety Commission.

2012-13 action on priorities

Products with the potential to cause serious harm to consumers are such a significant risk that the ACCC will always prioritise product safety matters.

During 2012-13, the ACCC achieved these outcomes in matters with the potential for significant consumer harm:

- Removed more than two million hazardous products from the market through 450 product safety recalls, 91 of which were directly negotiated by the ACCC.
- A permanent ban on certain small, high powered magnets, which came into effect on 15 November 2012.
- The Federal Court fined Cotton On Kids Pty Ltd \$800 000 for supply of children's nightwear that did not comply with the mandatory standard and \$200 000 for misrepresenting that children's nightwear was low fire danger when the garments, in fact, represented a high fire danger.
- A new safety standard for portable swimming pools, which mandates warning labels and comes into effect in March 2014.
- The ACCC improved the effectiveness of more powerful images on tobacco packages illustrating the health dangers of smoking on tobacco products through an amendment to the Tobacco (Graphic Health Warning) Labelling information standard. The ACCC used social media to more effectively target safety messages to those who most need to hear them.

Safeguarding consumer safety

In other activities, the ACCC made significant progress in developing a new mandatory service standard for the installation of corded internal window coverings and safety warning labels on domestic trampolines. It progressed reviews of existing standards, including those for disposable cigarette lighters, children's nightwear, hot water bottles, elastic luggage straps, bean bags and motorcycle helmets.

The ACCC's close relationship with Standards Australia was strengthened when agreement between the two agencies was reached on Copyright so the full text of relevant Australian Standards could be reproduced in mandatory standards. This agreement also allows an important Memorandum of Understanding between the ACCC and Standards Australia aimed at better aligning the development of voluntary Australian Standards and mandatory standards. The ACCC continued its membership of the committees reviewing the voluntary Australian Standards for trampolines, babies' dummies, children's nightwear, household cots, prams and strollers and projectile toys. Review results will inform recommendations for new or revised mandatory standards.

The 2013 Standards Australia Committee Award for Outstanding Service to Standardisation was awarded to Committee CS-003, Safety Requirements for Children's Furniture, which manages numerous product safety standards for children's products including cots, prams and strollers. The ACCC is a long-standing committee member.

In partnership with NRMA Motoring & Services, CHOICE, EnableNSW and Vision Australia, the ACCC released a national mobility scooter user survey on our Product Safety Australia website, www.productsafety.gov.au. The survey aims to examine safety issues associated with mobility scooters and to build a better understanding of how and why Australians are using them. The ACCC continued to support the work of AustRoads in addressing safety concerns associated with the use of the scooters.

On the international front, the ACCC continues to chair the Organisation for Economic Cooperation and Development (OECD) Product Safety Working Party. It contributed to several working party projects, including the OECD extranet portal for sharing information among product safety regulators and enforcement bodies globally. The working party also launched the OECD global portal on product recalls, www.globalrecalls.oecd.org, which lists product safety recalls from countries across the world, including Australia. It continues to investigate the development of a global injury data base and international alignment of risk assessment processes.

In October 2013, Australia will co-host the International Consumer Product Health and Safety Organization Conference in Queensland. This is the first time the premier international product safety conference will take place in Australia alongside other international meetings such as that of the OECD Working Party. Conference planning is well advanced.

The ACCC was host to two Korean delegates from the Korean Agency for Technology and Standards. Discussions fostered better mutual understanding and may lead to collaboration on risk assessment methodologies, harmonised approaches to unsafe products and an increased involvement in Asia-Pacific Economic Cooperation (APEC) product safety work.

Identifying emerging hazards

The identification of emerging product hazards remains a priority for the ACCC. The ACCC's clearinghouse system identifies safety hazards, enabling the ACCC to quickly respond to emerging issues. At the end of 2012-13, the ACCC had received 3524 and assessed 3387 reports relating to the safety of unregulated consumer products. The ACCC received 2518 mandatory reports, 1235 of which were referred to other regulators such as Food Standards Australia New Zealand. Of the 1283 assessed by the ACCC, 79 assessments indicated the need for further action. For example, information reported concerning potential finger amputation associated with prams and strollers led to an extension of an Australian recall of the prams involved and is being considered by the Standards Australia committee CS0-20 in its current review of the Australian New Zealand standard for prams and strollers.

In promoting mandatory reporting, the ACCC held an online webinar which attracted over 300 registrations.

The potential hazards posed by laundry liquid capsules were investigated following reports of injury in Australia and overseas. With their confectionery-like appearance, the capsules are attractive to children but can cause severe chemical burns if swallowed. The ACCC worked closely with industry and individual suppliers on changes to lessen their appeal to children. Accord, the national industry association for hygiene, cosmetic and specialty products, is developing an industry guideline to set clear packaging and labelling principles designed to enhance product safety.

Product recalls

A recall can be initiated by a supplier or ordered by a Minister. The majority of Australian recalls are initiated by suppliers and are called voluntary recalls. A voluntary recall may also be negotiated by the ACCC where surveillance work by the ACCC detects a product which may cause injury.

Case study

Pro-Teeth Whitening legal challenge to compulsory recall

In 2011–12, the ACCC took action to address a rising trend of injuries (including tooth sensitivity, gum and throat irritation and chemical burns to gums) caused by do-it-yourself (DIY) teeth whiteners. Twenty eight voluntary recalls were negotiated because the products contained more than 6 per cent hydrogen peroxide or 18 per cent carbamide peroxide.

On 6 February 2012, the Assistant Treasurer ordered the compulsory recall of two DIY teeth whiteners which contained unsafe concentrations of hydrogen peroxide. The supplier, Pro-Teeth Whitening (Pro-Teeth), had refused repeated requests by the ACCC to voluntarily recall the products.

The compulsory recall notice was issued without delay under the *Competition and Consumer Act 2010*, as the Minister was satisfied that the goods created an imminent risk of serious injury.

In June 2012, Pro-Teeth appealed the decision to compulsorily recall the goods without delay. A mediation between the ACCC and Pro-Teeth was unsuccessful. Pro-Teeth argued that recalling without delay and bypassing a conference meant that Pro-Teeth was unaware of the possible consequences, had been denied procedural fairness and natural justice. Pro-Teeth did not contest the validity or merits of the ACCC's determination regarding the threshold for safe products.

The Minister argued that Pro-Teeth had been fully advised of the basis for the safety concerns and was made aware that the Minister could order a recall without delay. The Minister and the ACCC provided Pro-Teeth with the opportunity to provide information and put their case.

On 9 May 2013, the Federal Court dismissed the appeal. A key aspect of the ruling related to whether natural justice required that Pro-Teeth be given the opportunity to put its case to the Minister before he ordered the recall. The judge found that the ACCC had contacted Pro-Teeth on several occasions setting out its concerns, provided relevant information, and had requested that the applicant cease supplying products that contained unsafe concentrations of peroxide.

Pro-Teeth has appealed the judgment; the date for the hearing has not been set.

The ACCC's actions have had a major impact on the previously widespread supply of unsafe DIY teeth whitening products, resulting in increased compliance with recognised safe levels of peroxide.

Suppliers should recall consumer goods as soon as they realise the goods:

- may cause injury
- do not comply with a safety standard
- are banned.

The Australian Consumer Law requires suppliers voluntarily recalling consumer goods for safety related reasons to notify the Australian Government Minister responsible for consumer affairs in writing within two days of initiating the recall.

The ACL also empowers the Minister responsible for consumer affairs to order a supplier to recall goods that will or may cause injury to any person if it appears to the Minister that the supplier has not taken satisfactory action to prevent the goods from causing injury. The Minister's recall order will stipulate the manner and timing of the recall. These are relatively rare occurrences and are known as 'compulsory' recalls.

The objectives of a recall are to:

- stop the distribution and sale of the affected, unsafe product as soon as possible
- effectively and efficiently remove from the market place any product which is potentially unsafe
- inform the public of the problem
- inform the relevant authorities of the problem.

The ACCC published details of 450 recalls in 2012-13, prompted by mandatory reports, industry intelligence, complaints to authorities including the ACCC, monitoring of overseas recalls and marketplace surveillance by product safety authorities including the ACCC. Of these, 91 were put in place by direct negotiation by the ACCC. This resulted in over two million hazardous products being recalled from the Australian market.

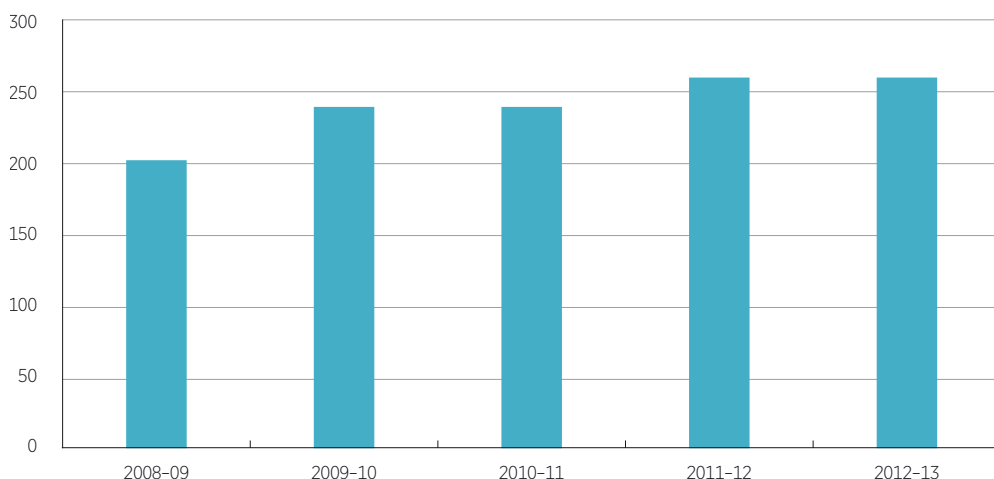
Of the 450 recalls published, the ACCC directly monitored and administered 262—the remainder being administered by other regulators. The recall figures for 2012-13 were up by 2 per cent on recalls monitored by the ACCC in the previous year.

The ACCC continued to work with suppliers to improve the effectiveness of recalls in removing unsafe goods from consumers. One of the key activities was the release of the supplier bulletin, *How to conduct a successful recall*, also published in simple Chinese.

In July 2012, state work safety authorities notified the ACCC that asbestos, a cancer-causing prohibited substance, had been discovered in gaskets in cars imported from China. Australian Customs and work safety regulators were concerned that automotive workers would be unaware of the potential danger during gasket replacement work. A collaborative investigation began to determine how best to remedy the defect quickly and safely. The investigation resulted in an ACCC-negotiated recall of all affected Chery and Great Wall vehicles.

Expert opinion and reports were sought to determine the asbestos variety, level of hazard posed by the asbestos under various conditions, and precautions to be taken during replacement. An independent scientific risk assessment showed that the risk to vehicle owners, passengers and mechanics was negligible. However, there was a risk to repairers who did not take precautions. The ACCC has actively ensured that the affected vehicles are remedied as quickly as possible.

Figure 3.2: Year-on-year growth (based on financial years) of recalls monitored by the ACCC



Product safety compliance and enforcement

The ACCC continued to apply a risk-based approach to maximise compliance with product safety regulations. In determining action, it considers factors such as the severity of the hazard posed by the breach, the level of consumer harm, and the market profile of the trader and their compliance history. During 2012-13, a total of 174 matters were investigated.

It brought two enforcement actions against suppliers. One was against Cotton On Kids Pty Ltd, where the Federal Court imposed a penalty of \$800 000 for supplying children's nightwear that did not comply with the mandatory standard and a penalty of \$200 000 for misrepresenting that children's nightwear was low fire danger when the garments represented a high fire danger.

Case study

Product safety ban on high powered magnets

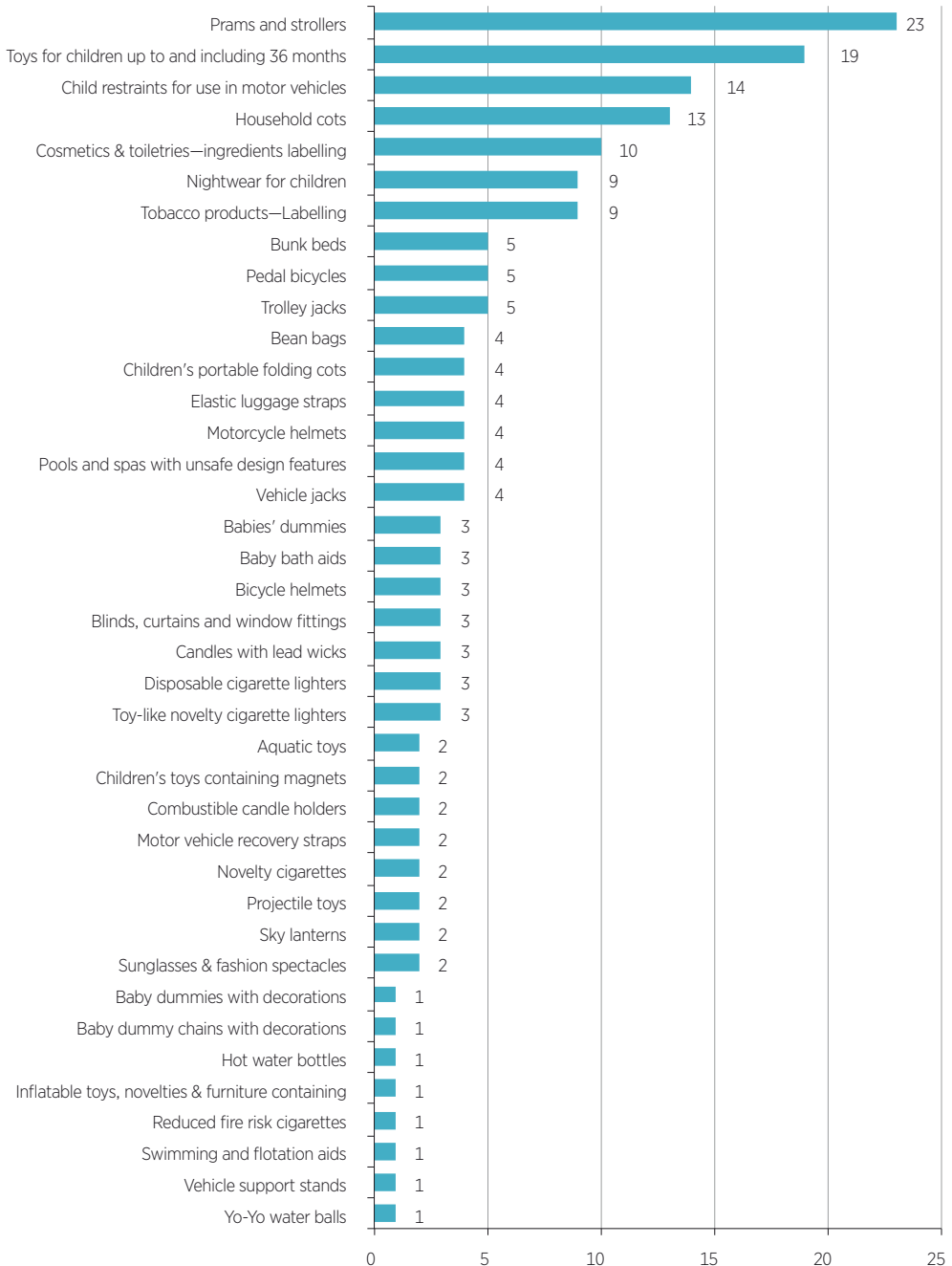
In December 2011, a 21-month-old child died after swallowing 12 small high powered magnets. These high powered magnets were first introduced into Australia in 2011, mostly as novelty desk toys. Due to the nature of injuries caused by magnets, where symptoms can resemble a range of other common illnesses, if a child swallows several small high powered magnets unobserved (and does not tell their parents), it can be difficult for medical staff to correctly and quickly diagnose the cause of the child's illness.

The ACCC is aware of at least 17 severe cases of small high powered magnets being swallowed by Australian children. Some incidents involved older children and teenagers who had accidentally swallowed small magnets while trying to mimic a tongue or lip piercing.

The hazard associated with swallowing several high powered magnets is not immediately apparent to consumers. If a child swallows more than one small high powered magnet, it is likely that the magnets will stick together across the walls of the intestine or other digestive tissue. This can lead to tissue death, perforation, infection and sepsis. Children have required extensive surgery and have suffered permanent injury, including having extensive sections of their bowels removed.

In November 2012 the Commonwealth Assistant Treasurer imposed a permanent ban on small high powered magnets. The ACCC's consultation on the proposed ban, as well as research into injury data and the use of magnets more broadly, assisted the Assistant Treasurer to focus the ban so that only the novelty magnet sets implicated in these ingestion incidents would be banned. Magnets used for industrial, commercial and other beneficial purposes were not affected.

- New Zealand and Papua New Guinea have imposed similar bans. Canada has determined that it will impose a similar ban, and the United States of America is considering new regulations which effectively ban the supply of these magnet sets.
- In the first half of 2013, two companies conducted voluntary recalls for magnetic products which did not comply with this ban after ACCC market surveillance activities detected them being offered for sale. The ACCC has also worked to educate suppliers about the ban, including by publishing detailed information on the Product Safety Australia website and developing an education bulletin.
- The ACCC is aware of one ingestion incident that has occurred since the ban was introduced. As a result, the ACCC developed additional educational material for consumers about the hazards of magnet ingestion. Given that, prior to the ban, thousands of these magnet sets were sold to Australians and may still be in use, the ACCC will continue to prepare and deliver safety messages to consumers raising awareness about the risks associated with small high powered magnets.

Figure 3.3: Matters considered by standard/ban 2012–13

During 2012–13, the ACCC partnered with state and territory fair trading offices to undertake national surveillance programs and investigate non-compliance in the marketplace. Work included the ACCC-led product safety survey covering toys for children aged under three, toys containing lead and other heavy metals, aquatic toys, projectile toys, bicycles and banned products.

The survey involved surveying products from over 3300 retailers, including internet-based traders Australia-wide. More than 94 000 product lines were surveyed, resulting in the removal from sale or seizure of over 11 000 products.

Case study

Quad bike safety

Quad bike deaths and injuries are attributed to a combination of use, user behaviour, product design and increased availability of the product in Australia and overseas.

The ACCC is currently investigating the safety of quad bikes. This includes both assessing the safety of the bikes themselves, and developing key 'safe use' messages for consumers.

Between 2001 and 2009, quad bikes were implicated in at least 127 deaths in Australia. Since 2011, there are 49 recorded deaths (25 are noted as 'recreational'). A significant proportion (almost 30 per cent in 2012) of these deaths involved children under 15 years of age.

In October 2012, the ACCC joined the Quad Bike Project Reference Group. This group is conducting a University of NSW Transport and Road Safety Research project into the safety of quad bikes. This work is expected to be complete in November 2013. It is seeking a technical solution to the deaths and serious injuries associated with quad bikes.

In March 2013, the ACCC commissioned detailed national quantitative consumer research to understand the attitudes and behaviours of recreational quad bike users. Through the consumer research, a set of safety tips was developed and a campaign entitled *Prepare Safe, Wear Safe, Ride Safe* was released, using social media and a dedicated campaign site. A more comprehensive and detailed consumer education campaign is planned for later in 2013.

The ACCC research showed that, although over half of the participants said they always wear some form of personal protective equipment, one in six never wears any form of protective gear. Notwithstanding most quad bikes are made for one person only, about a quarter of users surveyed rode with someone accompanying them on the same bike as a passenger.

Manufacturers continue their opposition to crush protection devices in particular, focusing on helmet use, training and awareness raising to address quad bike safety, others believe that crush protection (or roll over protection devices) and or engineering solutions will reduce the number of deaths or serious injury attributed to quad bikes.

The ACCC's *Prepare Safe, Wear Safe, Ride Safe* seeks to promote the safe use message while the ACCC continues to work alongside Safe Work Australia and Comcare to identify engineering criteria for roll over protection solutions and the Quad Bike Project Reference Group aims to address wider engineering and stability risks associated with quad bikes.



Case study

Use of social media to engage with consumers on product safety issues

In 2012–13, the ACCC implemented new and engaging social media initiatives to raise awareness of key product safety issues amongst Australian consumers. From having robust internal processes in place to ensure consumers who posted questions online were provided helpful responses in a timely manner to ensuring key recalls and safety issues that impact Australians everyday reached them in time and provided valuable information.

For example, in December 2012, ACCC's pre-Christmas Safe Santa campaign provided a safety checklist for consumers when purchasing gifts for their friends and family. By using engaging and interesting posts that embraced the festive season but also highlighted key issues for Australians to consider, the online campaign resulted in a 400 per cent increase in likes for the ACCC Product Safety Facebook page.

Similarly, in June 2013, with the use of targeted messaging and reach initiatives, ACCC's alert post on the recall of an infant recliner generated over 400 000 impressions on Facebook along with 285 likes on the post alone, over 60 comments (many tagging friends to notify them of the recall) and over 2200 shares. The post also assisted in the increase of likes with more than 400 likes in that month alone (an over 500 per cent increase on previous months).

The ACCC will continue to seek new and innovative ways to reach affected consumers and to raise awareness of key product safety issues impacting Australian consumers.

A further national survey program, which focused on infant and nursery-related mandatory standards and bans, resulted in the removal from sale of over 100 unsafe products. Suppliers made four recalls of infant and nursery products which led to the removal from shelves of over 18 000 individual unsafe products.

The ACCC and Consumer Affairs Victoria staff conducted a joint inspection of a newly opened suburban shop selling non-compliant nursery furniture and baby products imported from China. A wide range of non-compliant nursery furniture products were embargoed and subsequently seized by Consumer Affairs Victoria. Swift action by the two agencies prevented the sale of any non-compliant products to consumers.

The ACCC conducted the annual show bag inspection prior to the Alice Springs, Darwin, Hobart and Perth shows to identify non-compliant products. Of the 500 plus show bags inspected, only one unsafe toy was detected, in Hobart, and removed. However, a number of cosmetics and sunglasses required relabelling before the show bags were sold to consumers.

The ACCC conducted over 1500 tests for lead and other heavy metals in toys, choking hazards in toys for young children, eye hazards in projectile toys and bicycles to ensure they met the reasonable use and abuse tests as per Australian mandatory safety standards.

Effective education and communication

The ACCC explored innovative ways to communicate directly with consumers and suppliers about product safety, including an online webinar on mandatory reporting. Ninety six per cent of participants completing the online survey after the webinar indicated that it had improved their knowledge of the subject.

Product safety websites

The ACCC's Product Safety Australia website remained a significant source of information for consumers and businesses and recorded over 460 000 visits during the year. New developments included updates to better reflect the most frequently asked questions and translation of product safety information online into Chinese. See www.productsafety.gov.au/chinese

Education campaigns

Among the major campaigns for 2012-13 were:

- The online product safety campaign, EasterSafe, which involved the posting of holiday safety tips on Twitter @ACCCProdSafety, and the ACCC Product Safety Facebook page, where followers were encouraged to share their own safety recommendations.
- The Safe Santa campaign, including a checklist for shoppers wanting to give safe gifts, which resulted in a significant increase in ACCC Facebook followers (over 400 per cent increase since campaign launch in November 2012). The checklist is the most shared post ever on the ACCC Product Safety Facebook page and is available at www.productsafety.gov.au/safesanta
- The online WinterSafe campaign conducted via Twitter, Facebook and the Public Service Association website. The campaign generated audience interest by offering useful product safety tips for the colder months and inviting others to share their own. Most importantly, it increased our profile on Twitter and Facebook and drove more visits to our website.
- The recently released video, ACCC tortures toys to keep kids safe, on the Product Safety Australia website, which demonstrates tension testing on toys intended for children under three. Included were a list of hints and tips.

A range of traditional and new media was used to raise awareness of users of movable soccer goals. The '*Grim Keeper Goal Post Safety*' campaign continued with additional material alerting users to goal post hazards.

Led by Victoria, the ACCC and state and territory consumer protection agencies produced and launched the *Product Safety* guide for business. The guide was specially developed to help discount variety stores and weekend market stallholders to better understand mandatory product safety requirements and ensure they are selling safe products. The guide is in English, Chinese and Vietnamese.

Social media

The ACCC posts recalls, safety alerts and safety tips on both Twitter and Facebook. At 30 June 2013, ACCC Product Safety had more than 3100 Twitter followers and over 5900 Facebook fans.

Further extending ACCC use of electronic media was the launch of two free apps. These allowed mobile access to *Keeping baby safe* on our Product Safety Australia website by iPhone and iPad, and to our Recalls Australia site (www.recalls.gov.au) by Android. *Keeping baby safe* was downloaded over 6500 times and the Recalls Australia iPhone and Android app was named 'app of the week' by the Sunrise breakfast program on Channel 7.

2.4 Support a vibrant small business sector

2012–13 Strategy:

To support a vibrant small business sector, deter anti-competitive and unconscionable conduct targeted at small business and facilitate collective conduct by small business operators where that conduct is assessed to provide a net public benefit

Measures:

- Collective bargaining notification decisions affecting small business made within statutory timeframes.
- Fair trading outcomes achieved through enforcement of mandatory codes.
- Effective education and communication to inform businesses about their rights and obligations under the Competition and Consumer Act.

Using the Act to support small business

The ACCC has a dedicated role in ensuring small businesses understand and comply with their obligations and in encouraging them to exercise their rights under the Competition and Consumer Act. The ACCC aims to promote a competitive and fair operating environment for small business so, importantly, seeks to ensure small businesses understand how the legislation helps them.

The ACCC is increasingly engaging with small business to assist them in asserting their rights as consumers to larger suppliers, and in meeting their obligations under the ACL and relevant industry codes of conduct. The ACCC engages and educates businesses through:

- the new website (which includes a link to a page dedicated to information for small businesses) and an online small business complaint form
- the Infocentre small business hotline
- the small business networks, which small businesses can subscribe to, provide information about ACCC enforcement action, new ACCC guidance material and changes to the Competition and Consumer Act
- targeted publications, mobile apps, online education modules and DVDs
- face-to-face and online education and compliance sessions.

The ACCC's information for businesses includes instructions on how to notify the ACCC of any collective bargaining proposals so that small businesses can get timely decisions on ventures that help gain efficiencies and savings, result in public benefit and do not impede competition.

The ACCC also regulates commercial behaviour, including enforcing fair trading provisions, protecting small business against misuse of market power, promoting and enforcing codes of conduct, and administering the authorisation and notification provisions of the Competition and Consumer Act that allow for certain trading arrangements in the public interest.

In this way the ACCC helps 'level the playing field' for small businesses by tackling unreasonable commercial behaviour.

Enforcement activities

The ACCC aims to make markets work for everyone—including small businesses. For example, by taking action on misleading product claims that can undermine the level playing field and disadvantage competing businesses. As discussed earlier in this report, the ACCC uses a range of compliance and enforcement tools, such as seeking court orders and obtaining undertakings enforceable in court.

Effective remedies through court action

The following cases were finalised or progressed in 2012–13:

- **Exclusive Media & Publishing Pty Ltd and others**—in September 2012, the Federal Court ordered three publishing companies to pay penalties totalling \$400 000 and the companies' directors to pay \$100 000 after they admitted they had engaged in misleading and deceptive conduct, harassment and coercion, and unconscionable conduct in relation to advertising services that were never requested or provided. The publishing companies contacted mostly small businesses and told them that they had already paid for, or agreed to, advertising in one of the companies' magazines, when they had not.
- **Ms Rosemary Bruhn trading as Rosie's Free Range Eggs**—in September 2012, the Federal Court made orders that a South Australian woman pay a penalty of \$50 000 for conduct involving substituting cage eggs for free range eggs. The ACCC alleged that the woman represented that eggs she supplied to 109 business customers, including retail outlets, bakeries, cafes and restaurants, were free range when a substantial proportion were in fact cage eggs.
- **Sensaslim Australia Pty Ltd (In liquidation)**—In September 2012 the Federal Court heard the ACCC's proceedings against Sensaslim Australia Pty Ltd and others. Judgment was reserved. In July 2011, the ACCC commenced proceedings against Sensaslim and a number of individuals involved in the Sensaslim business, alleging misleading and deceptive conduct and false representations in relation to the identity of Sensaslim

officers, the business opportunities offered by Sensaslim and the clinical basis for the Sensaslim Solution. The ACCC obtained interim orders restraining the respondents from making the misleading representations. The ACCC also obtained interim orders freezing the assets in Australia of a number of individuals who had received funds from Sensaslim, including Mr Peter Foster and his relatives.

The following cases were instituted in 2012–13:

- **Coles Supermarkets Australia Pty Ltd**—alleged false, misleading and deceptive conduct in the supply of bread that was partially baked and frozen off site, transported to Coles stores and ‘finished’ in-store. The ACCC’s concerns included the detrimental impact on competitors, being the smaller, often franchised bakeries that compete with Coles. See case reference on page 72.
- **Visa Inc and a number of related Visa entities**—alleged misuse of market power for the purposes of preventing the expansion of ‘dynamic currency conversion’ services to new merchant outlets in Australia, such as retail stores. See case reference on page 37.
- **Renegade Gas Pty Ltd (trading as Supagas NSW) and Speed-E-Gas (NSW) Pty Ltd (a subsidiary of Origin Energy Ltd)**—alleged cartel conduct in relation the supply of forklift gas in Sydney. The ACCC was concerned that this alleged conduct may have resulted in forklift gas customers of Renegade Gas and Speed-E-Gas, for example small businesses not being able to obtain a more competitive price from the other supplier and therefore paying a higher price than they may otherwise had to pay. See case reference on page 35.
- **Taxsmart Group Pty Ltd, Taxsmart Franchising Pty Ltd and Resultsmart Pty Ltd**—alleged false, misleading or deceptive conduct in relation to job advertisements for graduate accountant positions to attain a tax agent licence and subsequently operate a small business as a Taxsmart franchise.

Effective remedies through non-court action

In March 2013, the ACCC accepted court-enforceable undertakings from **All Homes Pty Ltd** following concerns that it may have attempted, via an email sent to about 1000 real estate agents, to induce agents to arrive at an understanding about fees. The ACCC was concerned that such conduct could lead real estate agents to reach an understanding on a minimum price for real estate services in relation to property sales. This may lead to increases in prices for consumers or a decrease in price competition between those agents.

In June 2013, the ACCC accepted court-enforceable undertakings from **Happiness Road Investment Group Pty Ltd**, trading as Koala Jack, after the company accepted it had used the ‘Australian Made’ logo without authorisation and made misleading claims that its sheepskin boots were made in Australia. The ACCC was concerned about the conduct because purchasing decisions can be influenced by claims regarding the place or country of origin of a product and, in many cases, consumers are willing to pay a premium for products that they believe are genuinely Australian made.

Small business education and outreach

At last count, there were about 2.1 million businesses operating in Australia and most were small, with about 1.8 million of them employing fewer than five people. To interact with small businesses in this large and varied sector, the ACCC works closely with small business associations, publishes a variety of targeted online and hardcopy guides and is increasingly developing and implementing interactive online training. In 2012–13, education and outreach activities included:

- an online education program covering topics such as pricing, advertising, selling safe products, unlawful competition and scams, with over 5000 visitors since its April 2013 launch

- *The Marker*, a short film showing the devastating effects involvement in a cartel can have on individuals and businesses (see page 35 for further details)
- the updated *Small business and the Competition and Consumer Act* guide with practical tips on advertising and promotion and refunds and returns
- a *Business snapshot*, on how to avoid engaging in unconscionable conduct and what a business should do if it is subjected to unconscionable conduct
- the ACCC Shopper app for Apple and Android smartphones and tablets, with advice to shoppers on refunds and returns, lay-bys and 'Made in Australia' labelling with over 19 000 downloads since its December 2012 launch
- nearly 200 speeches and presentations to small business audiences and attendances at expos and field days, including sponsoring and participating in the National Small Business Summit
- handling nearly 5600 contacts to the ACCC Infocentre about and from small businesses
- direct links from the front page of our website to information tailored to small businesses
- a dedicated small business helpline: 1300 302 021
- meetings with our Small Business Consultative Committee and Franchising Consultative Committee
- an information session on scams targeting small businesses during the Australasian Consumer Fraud Taskforce National Consumer Fraud Week.

Enforcing codes of conduct

The ACCC is responsible for promoting and enforcing compliance with four mandatory industry codes: the Franchising Code, the Horticulture Code, the Oilcode and the Unit Pricing Code.

Franchising Code

The Franchising Code aims to regulate conduct within the sector and ensure that prospective franchisees are sufficiently informed before buying into a franchise. Also included in the code is a cost-effective dispute resolution scheme for franchisees and franchisors.

In 2012, there were approximately 1180 franchise systems operating in Australia, with an estimated 73 000 franchisees.³

In 2012–13, the ACCC continued to promote the code to the franchising sector. The ACCC-funded pre-entry education program for prospective franchisees, administered by Griffith University, maintained healthy registration numbers. As at 30 June 2013, more than 4400 people had signed up for the course.

The ACCC also actively enforced the Franchising Code, using its audit powers to review trader compliance (see section *Audit notices issued* in appendix 8, page 328). Investigations into alleged breaches of the code or the Act by franchisors are currently underway.

The ACCC made a submission to the 2013 review of the Franchising Code of Conduct, along with a supplementary submission at the request of the code's reviewer, Mr Alan Wein. Both submissions are available on the website of the Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, www.innovation.gov.au

³ Sourced from Franchising Australia 2012 report produced by Griffith University <http://www.franchise.edu.au/franchising-australia-2012-report.html>

Horticulture Code

The purpose of the Horticulture Code is to improve the clarity and transparency of transactions between growers and wholesalers of fresh fruit and vegetables and establish a fair dispute resolution procedure.

The ACCC's role is to investigate complaints and, where necessary, take enforcement action against anyone who fails to comply with the code. Our role includes promoting compliance by publishing educational material such as guidelines, articles and factsheets as well as giving presentations through our outreach programs in each state and territory.

As in previous years, the ACCC liaised with the Department of Agriculture, Fisheries and Forestry regarding the Horticulture Code and related matters. The ACCC also used its audit powers to review traders' compliance with the mandatory code.

On 21 February 2013, the ACCC accepted an undertaking from **V & A Liangos Pty Ltd** for failing to comply with the code.

Oilcode

In general terms, the code regulates the conduct of suppliers, distributors and retailers in the retail industry for petroleum products.

In 2012-13, the ACCC liaised with the Oilcode Dispute Resolution Adviser on the development of educational materials on non-binding determinations, breaches of which the adviser must still include in reports. It also investigated complaints and answered enquiries about the operation of the code.

Unit Pricing Code

The Unit Pricing Code is a mandatory industry code of conduct enforceable under the Competition and Consumer Act. It compels large grocery retailers and online retailers selling the minimum range of food items to use unit pricing when selling non-exempt grocery items, such as fruit and vegetables, to consumers. This enables consumers to assess the price of a range of comparable items when buying groceries.

Through education and collaboration, the ACCC is helping grocery retailers to understand the rights and responsibilities the code establishes, and to promote retailer compliance. It also investigates complaints and, where necessary, takes enforcement action for failure to comply with the code.

Since the introduction of the code in 2010, the ACCC has noted a decrease in the number of complaints about the use of in-store unit pricing.

Legislative amendments

Amendments to the *Wheat Export Marketing Act 2008* in December 2012 will provide a mandatory code of conduct to govern access to port terminal services for bulk wheat. The code will apply to all port terminal operators, unlike the current arrangements which apply only to operators that also export bulk wheat.

The Department of Agriculture, Fisheries and Forestry is liaising with the ACCC and Treasury regarding the development of the code, which is to take effect from October 2014. Given that it will be a mandatory code, the ACCC will have an ongoing role in ensuring compliance and enforcement.

Voluntary codes of conduct

The ACCC encourages industry to develop codes that ensure businesses comply with the Competition and Consumer Act. Effective codes potentially increase consumer protection and reduce regulatory burdens for business.

During 2012–13, the ACCC assisted with the development of a number of voluntary codes of conduct, for example, the Jewellery Industry Code of Conduct.

Audits of code compliance

Under the Competition and Consumer Act, the ACCC can conduct audits to monitor compliance with the industry codes the Act establishes. This power enables the ACCC to force a trader to produce all documents they must keep, generate or publish under the relevant industry code. The trader has 21 days to do so.

Since 1 January 2011, the ACCC has served audit notices on 60 traders (11 on horticulture traders and 49 on franchisors) to produce documents.

It found that the vast majority of traders comply with industry codes. However, there were some concerns about potential non-compliance by a number of traders and the ACCC investigated three matters further. The compliance audits have also revealed ongoing issues in the franchising sector regarding disclosure requirements and marketing fund financial statements.

Allowing trading arrangements in the public interest

Under the authorisation and notification provisions of the Act, the ACCC can grant protection from legal proceedings for some arrangements or conduct, on public benefit grounds, that might otherwise breach the competition provisions. The ACCC also received and assessed more than 750 exclusive dealing notifications, a significant number of which relate to small businesses.

Table 3.4: 2012–13 authorisations

Authorisations decided	32
Small business authorisations	12

Collective bargaining arrangements may breach the Act yet, in some circumstances, allowing collective arrangements may be in the public interest. For example, smaller businesses can face challenges when negotiating with larger businesses and the outcomes from these negotiations may not be the most efficient or optimal. By allowing small businesses to get together, they may have a better opportunity to have input into negotiations than if they negotiate on their own.

There are two ways that parties can obtain legal protection from the ACCC—authorisation and notification. During 2012–13, the ACCC considered 21 collective bargaining proposals (authorisations and notifications), the majority of which involved small business participants. Many of the collective bargaining arrangements considered by the ACCC during 2012–13 related to primary producers negotiating with processors in the dairy, chicken growing and potato growing sectors. Other collective bargaining arrangements involved coal producers, owner drivers for trucking companies, lottery agents, doctors, hospitals and local councils.

Examples of other types of small business arrangements allowed by the ACCC in the public interest are:

- Exclusive dealing notifications covering **franchise supply arrangements** where franchisees are required to source equipment, point of sale systems and/or stock or ingredients from approved suppliers as a condition of being part of the franchise system.
- Authorisation of the **Casual Mall Licensing Code of Practice**. The voluntary code provides transparency and certainty around granting licences to occupy part of the common area of a shopping centre for a short period of time—usually for product launches and demonstrations, stock clearance sales and brand awareness campaigns.

The ACCC has authorised previous versions of the Shopping Centre Council of Australia's code since 2007.

- Authorisation to enable **dentists** operating within a shared practice to agree the fees charged within the practice. The Australian Dental Association sought authorisation because dentists who operate as separate legal entities may be at risk of engaging in price fixing or other anti-competitive conduct if they agreed upon the fees charged within the shared practice. The ACCC considers that allowing dentists who operate in shared practices to charge common fees is likely to result in public benefits flowing from the increased availability of shared practices, which will improve the availability, continuity and quality of dental care for patients and increase efficiency in the provision of dental services.
- Authorisation of the **Royal Automobile Club of Queensland (RACQ)** warranty repair scheme to enable approved repairers to set the labour rate for warranty repairs undertaken by another approved repairer. Under the warranty repair scheme, defects in an original repair can be fixed by any RACQ approved repairer at no cost to the member. Being able to offer reciprocal warranty repairs to members also assists RACQ-approved repairers to better compete with larger network repairers.

Further information on authorisation, notification and collective bargaining can be found under goal 1.4 on page 47.

Targets and results for goal 2: Protect the interests and safety of consumers and support fair trading in markets

Measures and Targets—Goal 2

Measure: Timely and effective identification and investigation of unfair business to business areas, to determine and action responses most likely to address unfairness in line with the Competition and Consumer Act

Targets	Results
Obtain positive outcomes from an expected 25 court cases and an expected 40 court-enforceable undertakings in matters relating to competition, fair trading and consumer protection.	The ACCC received positive outcomes from 24 court cases and accepted 16 court-enforceable undertakings. In these matters, 18 court cases and 12 court-enforceable undertakings related to fair trading and consumer protection matters. Cases are outlined in appendix 10, page 334.

Measure: Fair trading outcomes achieved through enforcement of mandatory codes of conduct

Targets	Results
Obtain positive outcomes from an expected 25 court cases and an expected 40 court-enforceable undertakings in matters relating to competition, fair trading and consumer protection.	The ACCC received positive outcomes from 24 court cases and accepted 16 court-enforceable undertakings. In these matters, one undertaking related to the mandatory codes of conduct. Cases are outlined in appendix 10, page 334.

Measure: Timely and effective identification, investigation and action responses to breaches of the Australian Consumer Law

Targets	Results
Obtain positive outcomes from an expected 25 court cases and an expected 40 court-enforceable undertakings in matters relating to competition, fair trading and consumer protection.	The ACCC received positive outcomes from 24 court cases and accepted 16 court-enforceable undertakings. In these matters, 18 court cases and 12 court-enforceable undertakings related to fair trading and consumer protection matters. Cases are outlined in appendix 10.

Measure: Enforcement outcomes achieved through non-court-based remedies
Targets

Obtain positive outcomes from an expected 25 court cases and an expected 40 court-enforceable undertakings in matters relating to competition, fair trading and consumer protection.

Results

The ACCC accepted 16 court-enforceable undertakings, with 12 relating to fair trading and consumer protection matters.

In addition to being able to resolve matters formally outside of court proceedings by accepting court enforceable undertakings, since 2011 the ACCC has been able to resolve matters with the use of infringement notices. In 2012–13 the ACCC resolved a further 10 matters through use of infringement notices.

Cases are outlined in appendix 9, page 329.

Measure: Effective education and communications to inform consumers about their rights and responsibilities under the Australian Consumer Law.
Targets

Websites that are accessible and a source of relevant up-to-date information.

Results

The ACCC launched its new website in 2012–13 which meets accessibility standards.

Measure: Timely identification and responses to product safety hazards
Targets

No specific target.

Results

During 2012–13, the ACCC introduced the following bans and standard changes to further enhance consumer safety:

- a permanent ban on certain small, high powered magnets,
- the new safety standard for labelling portable swimming pools
- a minor amendment to the Tobacco (Graphic Health Warning) Labelling information standard.

During 2012–13, the ACCC worked closely with industry and individual suppliers on changes to lessen the appeal of laundry capsules to children.

On the international front, the ACCC continues to:

- chair the Organisation for Economic Cooperation and Development (OECD) Product Safety Working Party
- contribute to several international projects, including the OECD extranet portal for sharing information among product safety regulators and enforcement bodies globally, the OECD global portal on product recalls, the development of a global injury data base and international alignment of risk assessment processes.

Measure: Product safety activities to effectively assess and address product safety hazards

Targets

No specific target.

Results

During 2012–13, the ACCC:

- assessed 3387 of 3524 reports relating to the safety of consumer products. Of the 2490 mandatory reports received, 1232 were referred to other regulators such as Food Standards Australia New Zealand
- published 450 recalls. Of these, 91 were the direct result of negotiation by the ACCC. This resulted in over two million hazardous products being removed from the Australian market
- investigated 174 matters which alleged non-compliance with safety standards or bans
- surveyed products from over 3300 retailers, including internet-based traders Australia-wide and showbag distributors in the Northern Territory. More than 94 000 product lines were surveyed, resulting in the removal from sale or seizure of over 29 000 products
- conducted over 1500 tests for lead and other heavy metals in toys, choking hazards in toys for young children, eye hazards in projectile toys and bicycles to ensure they met the reasonable use and abuse tests as per Australian mandatory safety standards.

Measure: Effective education and communication to reduce product safety related injury and maximise industry compliance

Targets

Websites that are accessible and a source of relevant and up-to-date information.

Results

During 2012–13, the ACCC:

- created a mobile-friendly version of the Recalls Australia website (Australian Recalls are now available via web, mobile, social media, iPhone and Android devices)
- Product Safety Australia website is updated regularly (sometimes multiple times in a day) to feature the latest news, happenings, features and alerts related to product safety
- Keeping baby safe guidance is available in various formats to meet the diverse needs of the audience—hardcopy booklet, eBook, iPhone and iPad app
- the ACCC's Product Safety Australia website recorded over 460 000 visits during the year. At 30 June 2013, ACCC Product Safety had more than 3100 Twitter followers and over 5900 Facebook fans. Mobile access to Keeping baby safe increased downloads to over 6500 times and the Recalls Australia iPhone and Android app, was named 'app of the week' by the Sunrise breakfast program on Channel 7
- information page developed on the Product Safety Australia website in simplified Chinese
- the following product safety publications are now available in other languages via the Product Safety Australia website:
 - *Product Safety in Australia* factsheet (Chinese)
 - *Mandatory standards and bans* factsheet (Chinese)
 - *Supplier bulletin—Baby bath aids* (Chinese and Vietnamese)
 - *Supplier bulletin—Hot water bottle compliance* (Chinese and Vietnamese)
 - *Product Safety Guide* (Chinese and Vietnamese)—developed with state and territory consumer affairs agencies
 - *How to conduct a successful recall* (Chinese).

The Product Safety Australia website also features webcasts from previous webinars on general product safety, product testing and mandatory reporting. Ninety six per cent of participants completing the online survey after the mandatory reporting webinar indicated that it had improved their knowledge of the subject.



Goal 3: Promote the economically efficient operation of, use of and investment in monopoly infrastructure

Significant outcomes in 2012-13

- The ACCC focused on overseeing Telstra's implementation of its structural separation undertaking and migration plan and monitoring compliance with both.
- The ACCC issued a draft decision on the NBN Co's Special Access Undertaking and continued to work with NBN Co and other participants in the telecommunications industry in relation to the proposed terms of NBN Co's Special Access Undertaking.
- The AER launched the Energy Made Easy website which provides customers with an independent comparison of energy costs from different suppliers.
- The AER commenced its Better Regulation Program to implement fundamental reforms to the rules for regulating network businesses.
- ACCC data showed fewer farmers are leaving irrigation in the Murray-Darling Basin, instead using water markets to increase business flexibility and maximise the value of their water assets. Compliance with the ACCC enforced water rules continues to improve.
- ACCC airport monitoring showed that growth in passenger numbers is continuing to drive airport profits and there is a need for new investment to avoid excessive congestion in the future, while overall quality of service was lower at all airports.
- Australia Post is not using its statutory monopoly in standard letter delivery to cross subsidise its competitive services; rather, Australia Post's competitive services as a whole were a possible source of subsidy for the monopoly service.
- The ACCC helped facilitate competition in the bulk wheat export market, assessing new capacity allocation arrangements in South Australian and on the east coast.

Goal 3: Measures

<div></div>	Reasonable access terms and conditions (including prices) determined for nationally significant infrastructure services in a timely and transparent manner after appropriate consultation with stakeholders
<div></div>	Industry-specific laws (technical, pro-competitive, consumer protection) monitored and enforced in a transparent and consistent way
<div></div>	Prices and quality of goods and services monitored and reported on to provide relevant information to the community about the effects of market conditions
<div></div>	Relevant information disseminated to assist stakeholders in understanding the regulatory frameworks and the structure and operation of infrastructure markets so that they can more effectively engage in the regulatory process
<div></div>	Timely advice provided to government and policy agencies on how efficient regulatory outcomes and competitive, well-functioning markets can be achieved
<div></div>	Enhanced use of data analysis and intelligence to inform our regulatory approaches and interventions

The ACCC's objective in regulation

Australians rely on the market economy to provide positive outcomes for their prosperity and welfare. But the market economy is not perfect: market forces, particularly where infrastructure is provided by monopoly suppliers, can undermine competition in the broader economy and harm consumers.

The ACCC objective is to promote competition and to achieve the dividend from competition—an increase in welfare for Australians. Competition is recognised as a means of enhancing community welfare by promoting a more efficient use of resources. This is because competitive markets usually act to align the interest of consumers and suppliers/producers.

However, for some markets increased competition can only be achieved with increased regulation and this is the paradox recognised by the National Competition Policy reforms. In this context, the ACCC and AER's objective is to provide efficient and effective regulation.

While markets that work through competition are the aim, this is not always possible, especially in some areas of infrastructure provision where there are or have been suppliers that display natural monopoly characteristics. To allow competition to develop in related markets, access and other regulatory provisions may need to be put in place requiring a high level of regulatory intervention.

To foster a pro-competition culture the *Hilmer Report* recommended that competition law, consumer protection and multi-sector economic regulation should be administered by one body—the ACCC. The aim of the one institutional approach was to reduce distortions, provide administrative savings, reduce investor uncertainty and regulatory intervention, provide greater accountability and reduce the risk of regulators being too closely intertwined with regulated businesses.

Independence allows regulatory decisions to be made unencumbered by political and industry factors. It ensures a focus on the longer-term benefits to end-users and final consumers of cost-based prices that also provide an appropriate return to the asset holders.

Functions

Our functions include:

- determining the prices and access terms and conditions for some nationally significant infrastructure services
- monitoring and enforcing compliance with industry-specific laws for bulk water, energy and communications
- monitoring and reporting on the prices and quality of particular goods and services to provide information about the effects of market conditions
- disseminating information to assist stakeholders in understanding the regulatory frameworks and the structure and operation of infrastructure markets
- providing advice when requested by governments and policy agencies on how efficient regulatory outcomes and competitive, well-functioning markets can be achieved.

Strategies

Our strategies include:

- Refresh the rationale for why we regulate in particular markets to inform the policy debate.
- Improve our regulatory practices and processes by further developing our thinking on how we regulate.
- Build relationships with international regulatory agencies to leverage their experience in the regulation of infrastructure industries.
- Deliver network regulation to promote competition and meet the long-term interests of end-users.
- Support the AER in promoting energy network regulation that meets the long-term interests of consumers.
- Improve the workability of emerging markets by enforcing market rules and monitoring market outcomes.
- Respond to government requests to provide monitoring reports on industries in highly concentrated and newly de-regulated markets.

Industries and sectors

The following sections describe how the ACCC and AER delivered on their strategies in the industries and sectors subject to regulation and monitoring. Those sectors were:

- telecommunications
- energy
- water
- fuel
- airports
- container stevedoring
- wheat export
- rail
- postal services

3.1 Delivering sound telecommunications regulation

2012–13 Strategy: *Deliver network regulation to promote competition and meet the long-term needs of end-users*

Measures

- Reasonable access terms and conditions (including prices) determined for nationally significant infrastructure services in a timely and transparent manner after appropriate consultation with stakeholders.
- Industry-specific laws (technical, pro-competitive, consumer protection) monitored and enforced in a transparent and consistent way.
- Prices and quality of goods and services monitored and reported on to provide relevant information to the community about the effects of market conditions.
- Relevant information disseminated to assist stakeholders in understanding the regulatory frameworks and the structure and operation of infrastructure markets so that they can more effectively engage in the regulatory process.
- Timely advice provided to governments and policy agencies on how efficient regulatory outcomes and competitive, well-functioning markets can be achieved.
- Enhanced use of data analysis and intelligence to inform our regulatory approaches and interventions.

Significant outcomes in 2012–13

- The ACCC consulted with industry on the proposed terms of NBN Co's Special Access Undertaking, and issued a draft decision on the undertaking.
- The ACCC published a final access determination for the wholesale asymmetric digital subscriber line (ADSL) service, which provides consumers with broadband over Telstra's copper network. The determination provides prices and other terms access seekers can rely on in commercial negotiations with Telstra.
- The ACCC oversaw Telstra's structural separation, monitoring it for compliance with its separation undertaking and migration plan. The Minister for Broadband, Communications and the Digital Economy tabled the ACCC's report on Telstra's compliance.

Introduction

The ACCC is responsible for the economic regulation and monitoring of the communications, broadcasting, subscription television and audiovisual content sectors and carries out functions under industry-specific competition and access regulation in Parts XIB and XIC of the Act.

These provisions concern anti-competitive conduct in the industry and access by companies to essential telecommunications infrastructure, mainly supplied by Telstra via its fixed-line network. In future, extensive infrastructure services will be supplied via the National Broadband Network (NBN). Other companies need to access infrastructure and services to

be able to supply voice and broadband services to consumers and businesses. The ACCC's role is to ensure this access is supplied on terms that promote competition for the long-term benefit of consumers and businesses.

The NBN will be a national fibre-to-the-home (FTTH) and wireless/satellite network that will be operated on a wholesale-only, open access basis, subject to the ACCC's oversight of wholesale access arrangements. However, retail services supplied over the NBN will be subject to the same competition and consumer protection framework, including the ACL, which currently applies to retail telecommunications services.

The ACCC also examines competition issues in the mobile, broadcasting, subscription television and audiovisual content sectors and in spectrum developments and emerging new technologies.

While these responsibilities fall under the Act, the ACCC also has responsibilities under the:

- *Broadcasting Services Act 1992* (Cth)
- *National Broadband Network Companies Act 2011* (Cth)
- *Radiocommunications Act 1992* (Cth)
- *Telecommunications Act 1997* (Cth)
- *Telecommunications (Consumer Protection Services Standards) Act 1999* (Cth).

Reasonable access terms

The ACCC aims to establish reasonable access terms that:

- balance the interests of infrastructure owners, users and the broader public
- achieve any-to-any connectivity
- encourage efficient investment in, and use of, infrastructure
- promote competition for the long-term benefit of consumers and businesses.

The ACCC aims to do this in a timely and transparent manner after consulting with stakeholders, as shown in the activities for 2012–13 detailed below.

Declaration of telecommunications services

Part XIC of the Act is a key part of the regulatory framework supporting the development of a competitive telecommunications industry. Part XIC allows services to be 'declared'. Once declared, the service must be supplied, on request, to other providers for use in their own services. This arrangement guarantees access to telecommunications services in the interest of the provision of competitive services to end-users.

The ACCC can declare a service by:

- holding a public inquiry and allowing access providers, access seekers and consumers the opportunity to comment
- accepting a special access undertaking from the provider of a service which effectively declares the services to which the undertaking relates.

In addition, there is another method for declaring a service which applies only to NBN corporations (such as NBN Co). Where a service is being supplied or is intended to be supplied by NBN Co and it publishes a Standard Form of Access Agreement for that service on its website, the service to which the Standard Form of Access Agreement relates is declared.

National Broadband Network Special Access Undertaking

In December 2012, the NBN Co lodged a Special Access Undertaking for assessment by the ACCC. This replaced a similar one lodged in September 2012, which was a substantially revised version of the first undertaking lodged by NBN Co in December 2011.

After extensive consultation, including publication of a consultation paper and presentation of an industry forum, the ACCC released its draft decision on the undertaking in April 2013. The draft decision stated that the ACCC was not satisfied that the undertaking met the legal criteria for acceptance. In such circumstances, the Act allows the ACCC to give the company concerned a notice specifying variations to the undertaking which allows it to lodge an amended version.

On 4 July 2013, the ACCC released a draft notice to vary. The draft notice to vary specified a range of variations aimed at reducing the complexity of the undertaking and clarifying its operation, and creating certainty about when and how NBN Co must comply with its obligations in relation to access determinations and binding rules of conduct made by the ACCC.

Other key variations included enabling the ACCC to oversee prices, product introduction and withdrawal, and allowing it to mirror regulatory best practice to encourage efficient investment in, and operation of, NBN Co over time. The ACCC further proposed the removal of a number of the non-price terms, to allow their continued commercial negotiation, and later regulatory determinations of the terms if needed.

During 2013–14, the ACCC will continue to consider access arrangements for the NBN.

Fixed Services Review

In July 2013, the ACCC commenced the Fixed Services Review, an inquiry into the existing declarations for fixed-line services which expire on 31 July 2014.

During the review, the ACCC will consider which services provided using existing fixed-line networks should be regulated in coming years. The ACCC's deliberations will be made in the context of the significant changes in the telecommunications industry that have occurred since the last review was completed in 2009. Further changes are expected over the coming declaration period, particularly relating to the rollout of the NBN and other likely changes in technologies. The ACCC will need to consider which services should be declared and how the service descriptions should be defined.

Domestic transmission capacity service

On 11 July 2013, the ACCC began a review of the declaration of the domestic transmission capacity service (DTCS). The purpose of the review is to determine whether the declaration should be remade, extended, revoked, varied, allowed to expire or extended and then allowed to expire.

The DTCS is a high capacity transmission service which is capable of carrying large volumes of voice, data and audiovisual traffic. The DTCS is often used by telecommunications companies to carry the combined traffic of separate services across long distances.

The ACCC released a discussion paper on 11 July 2013. Once it has received and considered stakeholder submissions, the ACCC will release a draft decision for consultation before reaching its final decision. The ACCC expects to conclude the review by 31 March 2014 when the current declaration expires.

Mobile terminating access service

On 27 May 2013, the ACCC commenced an inquiry into whether the mobile terminating access service should be extended, varied, revoked, allowed to expire or a new declaration made. The existing declaration expires on 30 June 2014.

The mobile terminating access service is a component of a declared service used by providers of fixed-to-mobile and mobile-to-mobile calls to allow their customers to call mobile subscribers. It allows consumers (either fixed-line or mobile) to call mobile users. If a call made by a service provider's customer terminates on another mobile network, the service provider pays the other network's owner for access.

Access determinations

The ACCC must make final access determinations for all services that it declares. These determinations enable the ACCC to set default price and non-price terms for declared services. The terms only apply where there is no commercial agreement between an access seeker and an access provider, creating a benchmark which access seekers can fall back on while still allowing parties to negotiate different terms of access.

The ACCC may also make interim access determinations in some circumstances, which operate before final determinations are made.

In June 2012, the ACCC temporarily varied the final access determinations for some fixed-line services (wholesale line rental, local carriage service and public switched telephone network originating access) by removing the requirement to supply these services over the NBN. Access seekers typically use these services in combination to provide retail fixed-voice services to end-users. This temporary variation ended on 7 December 2012.

In October 2012, the ACCC issued a final access determination for the local bitstream access service. The determination sets out the price and non-price terms of access to the service. The local bitstream access service is a point-to-point service for carrying communications in digital form between a network-network interface and a user-network interface supplied using a designated superfast telecommunications network that is both:

- a layer 2 bitstream service
- a superfast carriage service.

In May 2013, the ACCC issued a final access determination for the declared wholesale ADSL service, to apply nationwide until 30 June 2014. 'The Wholesale ADSL' case study on page 121 provides an overview of the determination process.

Approaches to regulated pricing in access determinations

The ACCC determined the prices for the local bitstream access service using benchmarking methodology. This set a price ceiling at \$27 per service per month and benchmarked to the NBN Co wholesale broadband agreement price for a similar 25 megabits per second (Mbps) upstream/5 Mbps downstream service.

The ACCC determined the prices for the wholesale ADSL service using a cost-based methodology. The prices were approximately 15 per cent lower than the average commercial wholesale prices prior to declaration, although there were a range of different commercial prices in the market. The final access determination terms only apply to Telstra and on a national basis.

Current access determination inquiries

In July 2013, the ACCC commenced an inquiry into the declared fixed-line services and wholesale ADSL final access determinations. The inquiry covers a number of services including: the unconditioned local loop service, line-sharing service, wholesale line rental, local carriage service, public switched telephone network originating and terminating access, all of which are subject to final access determinations made by the ACCC in July 2011. The inquiry also covers the wholesale ADSL service, for which the ACCC made a final access determination in May 2013. The current determinations for all of these services expire on 30 June 2014.

The inquiry will review the price and non-price terms for access to the services and make new final access determinations should the ACCC decide to re-declare the relevant services as part of the Fixed Services Review.⁴ Conducting this inquiry for multiple services concurrently with the Fixed Service Review will promote consistency in establishing terms between these services, particularly in non-price terms.

Access disputes under the Act

Following amendments to Part XIC of the Act, transitional provisions allowed notification of access disputes to the ACCC until a final access determination regarding a regulated service was made. At that point, access disputes could no longer be notified to the ACCC relating to that service.

Two access disputes concerning the mobile terminating access service were withdrawn by the parties in July 2012.

In November 2012, the ACCC made final determinations on 13 access disputes relating to the line-sharing service and unconditioned local loop service. Each concerned the charge levied by Telstra for the internal interconnect cable, a necessary component for the provision of both declared services.

The ACCC has now made final determinations regarding the eight regulated services, meaning that no further disputes in relation to these services can be notified to the ACCC for arbitration.

Access disputes under the *Telecommunications Act 1997*

The ACCC was notified of three facilities access disputes in September 2012 and established a commission to arbitrate each on 21 December 2012. These disputes are ongoing.

Market structure and equivalence

Telstra's structural separation undertaking

Last financial year, the ACCC accepted Telstra's structural separation undertaking and migration plan. Together, these will implement the government's chosen approach to structural reform of the telecommunications industry. Telstra's undertaking includes commitments to safeguard competition until the NBN is built and Telstra has migrated its fixed-line customers to the new network. Of particular significance is Telstra's commitment to providing equivalent outcomes (service levels) to wholesale customers and its own retail businesses.

In 2012–13, the ACCC focused on overseeing Telstra's implementation of its undertaking and migration plan and monitoring compliance with both.

Telstra's compliance with its structural separation undertaking

Under the *Telecommunications Act 1997*, the ACCC must monitor and report each financial year on breaches by Telstra of its structural separation undertaking. On 20 June 2013, the Minister for Broadband, Communications and the Digital Economy tabled the ACCC's inaugural report, which identifies a number of breaches of the undertaking during the period between its acceptance in March 2012 and 30 June 2012.

⁴ Note that the Fixed Service Review does not include wholesale ADSL. The declaration for this service was made in February 2012 and will expire in February 2017.

Case study

Wholesale ADSL final access determination

ADSL is the dominant fixed-line broadband technology in Australia. ADSL can be used to provide end-users with a broadband service over Telstra's existing copper network.

Telstra supplies ADSL services at both the wholesale and retail levels and retains a dominant position in these markets. The ACCC was concerned that competition in these markets was not effective despite competitors installing competing broadband infrastructure in a significant number of exchange service areas (ESAs).

These concerns included that:

- infrastructure based competition has not developed in a significant number of ESAs for a variety of reasons
- Telstra's pricing of its wholesale ADSL service was above competitive levels and the level and structure of that pricing could impede competition
- together this meant the national wholesale and retail markets were not effectively competitive overall.

In 2012, the ACCC completed a public inquiry which determined the wholesale ADSL service should be regulated. The decision to declare the wholesale ADSL service involved the ACCC assessing, in accordance with the legislation, whether declaration of the service will promote the long-term interests of end-users.

The ACCC's role and approach

In 2012, the ACCC issued an interim access determination to address the main threats to competition, and commenced a public inquiry to make a final access determination.

In 2013, the ACCC completed its inquiry and published a final access determination for the wholesale ADSL service. During the inquiry the ACCC considered a number of issues, including the method for setting prices, the relationship between pricing and network congestion, and whether the service should or could be provided independently of an underlying voice service. The final access determination provides a set of prices and important non-price terms that access seekers can rely on if they cannot negotiate a commercial agreement with Telstra.

The impact of the decision to make a final access determination

The final access determination will promote the long-term interests of end-users of fixed-line broadband internet services throughout Australia. It will allow Telstra's competitors to acquire the wholesale service at cost-based prices and remove other impediments to reasonable access to Telstra's national ADSL network.

Regulated access to Telstra's wholesale ADSL services is not likely to impact on access seekers' incentives to invest in their own infrastructure where it is efficient to do so.

The final access determination is expected to increase the scope for competition at the retail level and lead to a better range of reasonably-priced retail services.

Future consideration

The wholesale ADSL final access determination will expire on 30 June 2014 (the same date as the final access determinations for other currently regulated fixed-line services). As discussed on page 119, another final access determination inquiry has commenced for the wholesale ADSL service.

The majority of the reported breaches concern Telstra's obligations to safeguard protected information from disclosure to its retail businesses that compete with Telstra's wholesale customers. The information concerned is confidential/commercially sensitive wholesale customer information relayed to Telstra in its capacity as access provider of regulated services.

The ACCC's focus has been on stopping the use and disclosure of such information and minimising any detrimental impact on Telstra's wholesale customers. The ACCC is further investigating Telstra's failure to comply with its information security obligations and will make a decision on what action (if any) to take when this investigation concludes.

Identifying these issues under the structural separation undertaking—some of which were longstanding but previously undetected—demonstrates that the ACCC is now much better placed to respond to equivalence concerns. Telstra is also clearly taking its commitments seriously. This is seen in its internal compliance monitoring, self-reporting, and review of systems and procedures to ensure it meets the standard of equivalence required by the undertaking.

Migration plan required measures

When Telstra submitted its draft migration plan to the ACCC for approval, it was yet to develop six disconnection measures, known as required measures. Under the migration plan, Telstra must develop and submit each required measure to the ACCC for approval. The ACCC must approve a draft measure if satisfied that it complies with the *Telecommunications (Migration Plan Principles) Determination 2011* (the migration plan principles).

In October and November 2012, Telstra submitted the following required measures which specify how it will:

- seek consent from its wholesale customers for NBN Co to use the pull-through connection process and advise them if a problem occurs during the process. These processes were submitted as two separate required measures
- disconnect services from its copper network which have not migrated to the NBN within the applicable switchover period
- disconnect services from its hybrid fibre coaxial network that have not migrated to the NBN within the applicable switchover period
- build new copper lines to supply services that cannot yet be provided over the NBN
- protect information provided by NBN Co under the definitive agreements so it cannot be used to gain an unfair commercial advantage over Telstra's wholesale customers. These agreements govern the terms on which Telstra will disconnect its fixed-line customers and provide services and access to key infrastructure to NBN Co.

Following public consultation in February and April 2013, the ACCC rejected the draft required measures and asked Telstra to resubmit them, taking account of the concerns detailed in the ACCC's decision paper.

In April and May 2013, Telstra resubmitted four of the draft required measures. The ACCC has consulted publicly on the resubmitted drafts and has requested Telstra to address a number of residual concerns raised by industry. The ACCC has encouraged Telstra to consult further with NBN Co before resubmission of the draft required measures on the pull-through connection process.

Minor variations to the migration plan

Telstra must submit any proposed variations to the migration plan to the ACCC for approval. The ACCC must approve a proposed variation if it considers that the revised plan complies with the migration plan principles.

In 2012–13, the ACCC approved several minor variations to Telstra's migration plan:

- The commencement of the cease sale obligation—a restriction on Telstra's ability to supply new copper services—was deferred on two occasions. Telstra will now stop supplying new copper services in early rollout regions on 1 July 2013.
- A new exception to the cease sale obligation where the cease sale obligation would potentially disrupt end-users from retaining their existing telephone numbers when migrating to the NBN.
- The definition of 'initial release rollout regions' was amended. The variation allows Telstra to continue to supply new retail and wholesale copper services in an additional 85 NBN rollout regions before NBN services are available across the entire region.

Rectification proposals

The undertaking obliges Telstra to ensure that particular aspects of retail and wholesale services will be equivalent. Telstra may report possible breaches of this commitment and must, no later than 30 days after reporting the possible breach, submit a proposal to the ACCC which sets out the steps that Telstra proposes to take to remedy the possible breach.

If the ACCC is satisfied that the rectification proposal provides an effective remedy for the possible breach it may accept the rectification proposal. If not, the ACCC may reject the rectification proposal and direct Telstra to take alternative steps to remedy the possible breach.

On 10 July 2013 the ACCC accepted two rectification proposals submitted by Telstra in relation to:

- The availability of 'ADSL profiles'
 - Telstra reported that two ADSL profiles that were available for retail ADSL services were not made available for wholesale ADSL services.
- The ACCC conducted public consultation on this rectification proposal.
- Order management for wholesale upgrades from ADSL1 to ADSL2+
 - Telstra reported that a small number of wholesale orders for service upgrades from ADSL1 to ADSL2+ were not being allowed to progress by Telstra's online ordering systems, when similar retail orders were allowed to progress.
 - The issue impacted a subset of wholesale ADSL2+ service upgrade requests in some areas where Telstra has deployed 'Top Hat' infrastructure in order to upgrade existing ADSL1 broadband services to ADSL2+. The issue did not impact new wholesale orders for ADSL2+ services.
- The ACCC sought feedback from affected wholesale customers in relation to this rectification proposal.

Industry-specific codes and rules

Facilities access code

On 4 July 2012, the ACCC published a discussion paper to examine whether the Facilities Access Code (the code) needs to be updated following changes to the *Telecommunications Act 1997* and the Act. The code sets out arrangements for carriers wishing to install their equipment on or in facilities owned by other carriers. The facilities covered by the code include telecommunications transmission towers, the sites of those towers, and underground facilities designed to hold lines. The ACCC received eight submissions in response to the discussion paper.

On 1 May 2013, the ACCC published a draft decision to vary the code to remove obsolete references, reflect legislative changes, and align the code with Telstra's structural separation undertaking to ensure there is no inconsistency in relation to how eligible facilities are

regulated. On 31 May 2013, the ACCC received four submissions on the draft revised code, all broadly supporting the proposed changes to the code. A revised code is expected to be published in the third quarter of 2013.

The Communications Alliance Local Number Portability Code

Since October 2012, the ACCC has participated as a non-voting member of the Communication Alliance working committees reviewing the Local Number Portability Industry Code and the long-term arrangements for local number portability in an NBN environment.

Local number portability allows consumers and businesses to retain their existing telephone numbers when moving between service providers. Effective local number portability processes are critical to facilitating consumer choice and effective competition between service providers.

The Communications Alliance working committee reviewing the Local Number Portability Industry Code released a revised code for public comment on 11 June 2013.

Building block model record keeping rule

Under the Act, the ACCC can make a record keeping rule and require that carriers and carriage service providers comply with it. The rules may specify what records are kept, how reports are prepared and when these reports are due to the ACCC. The ACCC uses the rules in undertaking its responsibilities regarding communications markets.

In May 2013, the ACCC began an inquiry into varying the building block model record keeping rule to require Telstra to provide the information needed to estimate prices for the wholesale ADSL service using the ACCC's fixed-line services model. The proposed variation would require Telstra to provide forecasts and actual information on operating expenditure (opex) and capital expenditure (capex) and demand on the wholesale ADSL service. The building block model rule already requires Telstra to provide this information for the other declared fixed-line services.

On 28 June 2013, the ACCC varied the building block model record keeping rule after completing its variation inquiry. The final variation made minor drafting changes to the draft proposed in May 2013. These changes will not require Telstra to provide the ACCC with any additional information to that outlined in the proposed variation.

Monitoring prices

Statutory reporting

In its statutory reports, the ACCC examined market conditions, prices, and the quality of telecommunications goods and services.

In February 2013, the ACCC published a report on the changes in the prices paid for telecommunications services in Australia 2011–12. The report noted that consumers continue to benefit from falling prices, as discussed further on page 127 under the *Telecommunications Report 2011–12* heading.

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

Information to assist stakeholders

The ACCC publishes regulatory reports, determinations and issues papers as soon as possible on its website.

It also updates information on ongoing activities to inform stakeholders about key industry developments and current consultations such as:

- assessment of NBN Co's Special Access Undertaking
- implementation of Telstra's structural separation undertaking and migration plan, including the implementation of the independent telecommunications adjudicator scheme
- access determination inquiries
- lodgement of access agreements by carriers or carriage service providers relating to access to a regulated service.

In accordance with a ministerial direction, the ACCC published reports that assist stakeholder understanding of the accounting separation regime applying to Telstra, namely:

- reports on imputation testing and non-price terms and conditions for the June 2012, September 2012, December 2012 and March 2013 quarters
- a current cost accounting report for the second half and the full year ended 30 June 2012
- a current cost accounting report for the first half of 2012–13.

In order to give stakeholders the information they need to effectively participate in regulatory processes, the ACCC also published website summaries of data obtained under some of the record keeping rules issued to telecommunications companies relating to:

- telecommunications infrastructure
- access to Telstra's telecommunications exchange buildings
- access services provided by Telstra to other companies over its customer access network
- the portion of the copper network that connects each telephone end-user to the network switch at their local exchange.

For all regulatory activities in 2012–13, the ACCC issued at least one discussion paper seeking comments from interested stakeholders. The ACCC met the consultation requirements in the Act, and usually issued a draft decision or determination for further comment before making a final ruling.

Enforcement and compliance

During 2012–13, the ACCC investigated several allegations relating to anti-competitive conduct in the communications sector, primarily misuse of market power, but did not initiate formal enforcement action. Further to these investigations, the ACCC:

- corresponded with industry regarding non-compliance with access agreement lodgement obligations. The ACCC continues to assess compliance issues on a case-by-case basis
- liaised with industry and monitored compliance with the 'level playing field' obligations, which came into effect in April 2012
- continued to liaise with industry regarding potentially misleading broadband performance claims. The ACCC's work included a sweep of NBN-based retail service provider websites and follow-up correspondence to ensure truthful marketing.

In relation to broadband performance claims, the ACCC investigated and formally resolved one matter that raised significant consumer protection concerns. CNT Corp Pty Ltd paid three infringement notices totalling \$19 800 and gave a court-enforceable undertaking to the ACCC after offering and charging for wholesale fibre to the premises broadband internet services at data transfer rates that its network could not support.

Between July 2011 and early April 2012, CNT Corp had stated it could supply such broadband internet services with downstream data transfer rates of 25, 50 and 100 Mbps to the Eden Brook housing estate in Pakenham, Victoria. It also maintained that its network had backhaul transmission capacity of 100 Mbps when this was not the case. In fact, because of its limited backhaul capacity, CNT Corp's network could not support data transfer rates above 20 Mbps for even a single user. As a result, a number of consumers on the estate never received the performance levels for which they were paying.

The undertaking required CNT Corp to acquire additional backhaul transmission capacity for its Eden Brook network, supply affected consumers with credit vouchers redeemable for broadband services and implement a trade practices compliance program.

Timely assistance to government and agencies

The ACCC provided timely assistance to government and other agencies on communications-related matters by:

- appearing before the Joint Parliamentary Committee on the NBN
- preparing an annual report to the Minister on Telstra's breaches of the structural separation undertaking
- making a submission to the Australian Law Reform Commission's Inquiry into Copyright and the Digital Economy on issues relevant to its competition jurisdiction and technical expertise
- commenting on the joint draft report by the New Zealand Communications Minister and the Minister for Broadband, Communications and the Digital Economy on transTasman roaming services
- advising the Department of Broadband, Communications and the Digital Economy on the communications industry-specific regime in the Act
- advising the Minister for Broadband, Communications and the Digital Economy and other agencies on competition issues regarding spectrum allocations and digital dividends.

Other significant events

NBN's points of interconnection

The ACCC published the list of points of interconnection to the NBN as required by the Act in November 2012.

The Act also requires the ACCC to review the policies and procedures relating to identification of listed points of interconnection to the NBN. On 19 February 2013, the ACCC released a consultation paper inviting submissions to the review on:

- the policies and procedures relating to identification of points of interconnection
- the extent of interconnection
- the impacts of the ACCC approach to identify point of interconnection locations.

The ACCC received 13 submissions—seven were public, three confidential and three in both public and confidential forms. The ACCC's report of the review findings was sent to the Minister for Broadband, Communications and the Digital Economy on 10 July 2013.

Reports released

Telecommunications annual report for 2011-12

On 26 February 2013, the ACCC's annual telecommunications reports for 2011-12 were tabled in the Australian Parliament.

The *Telecommunications competitive safeguards for 2011-12* report highlighted key trends in telecommunications industry competition, including:

- A rapid increase in consumer consumption of broadband data. Consumers are increasingly watching video content online, with recent upgrades to wireless and hybrid fibre coaxial cable networks meaning that the networks are better equipped for delivering bandwidth-intensive content in real time. Other increases in data consumption have occurred because new and improved devices such as tablets and smartphones have enabled consumers to access the internet more frequently.
- Network operators are looking at a range of strategies for addressing demands on their networks, including alternative pricing structures and network management practices. The demand represents both an opportunity and challenge for the industry. In particular, the report noted the potential for anti-competitive conduct arising from network management practices.
- Telstra continues to strengthen its position in the mobile handsets and wireless broadband markets, with many customers moving to Telstra following performance problems on the Vodafone Hutchison network in 2010. Telstra's success here may reflect its ability to differentiate the quality of services its network offers from that of competitors.

The *Changes in prices paid for telecommunications services in Australia 2011-12* report noted that consumers continue to benefit from falling prices for telecommunication services. Prices fell by 2.2 per cent in real terms in 2011-12 and are now almost 20 per cent lower than in 2006-07. Notably, real prices for fixed-to-mobile calls fell by over 10 per cent in 2011-12.

Use of data analysis and intelligence

The ACCC enhanced its use of data analysis and intelligence to inform regulatory approaches and intervention in telecommunications, particularly by:

- using data received under record keeping rules in making regulated access pricing decisions and in considering the geographic scope of regulation for fixed-line services. During 2012-13, the ACCC enhanced its record keeping rules by:
 - formulating the building block model rule in August 2012 following public consultation. The rule requires Telstra to report and publish information that will assist the ACCC when it makes future pricing determinations for fixed-line services.
 - updating the infrastructure rule in March 2013 after public consultation. The rule requires specific carriers to report on the locations of their core network and customer access network infrastructure
 - releasing a position paper in May 2013 proposing changes to the Division 12 rule, partly to reflect current market conditions and remove dated obligations
- monitoring international developments and engaging regularly with stakeholders on emerging regulatory issues in communications markets.

3.2 Making energy markets work

2012–13 Strategy:

Support the AER in promoting energy network regulation that meets the long-term interests of consumers

Improve our regulatory practices and processes by further developing our thinking on how we regulate

Measures:

- Industry-specific laws (technical, pro-competitive, consumer protection) monitored and enforced in a transparent and consistent way.
- Prices and quality of goods and services monitored and reported on to provide relevant information to the community about the effects of market conditions.
- Relevant information disseminated to assist stakeholders in understanding the regulatory frameworks and the structure and operation of infrastructure markets so that they can more effectively engage in the regulatory process.
- Timely advice provided to governments and policy agencies on how efficient regulatory outcomes and competitive, well-functioning markets can be achieved.
- Enhanced use of data analysis and intelligence to inform our regulatory approaches and interventions.

Significant achievements

- The Australian Energy Regulator (AER) determined the revenue to be received by seven electricity and gas transmission and distribution network businesses.
- The AER launched the Better Regulation Program, developing and consulting on seven new guidelines to improve regulation of energy networks.
- In fulfilling new roles in the retail energy markets under the National Energy Retail Law, the AER launched the Energy Made Easy website, www.energymadeeasy.gov.au.

Role of the AER

The AER, which regulates national energy markets, has an independent board but shares staff, resources and facilities with the ACCC. The AER has one Australian Government member and two state/territory members.

The AER operates under the *Competition and Consumer Act 2010*, with functions as set out in national energy market legislation and rules. These mostly relate to electricity and gas markets in eastern and southern Australia and include:

- setting the prices for using energy networks (electricity poles and wires and gas pipelines) that transport energy to customers.
- fulfilling wide ranging responsibilities in retail energy markets
 - providing the Energy Made Easy comparator website
 - enforcing compliance with retail legislation
 - authorising retailers to sell energy
 - approving retailers policies for dealing with customers in hardship

- administering a national retailer of last resort scheme
- reporting on retailer performance and market activity
- monitoring wholesale electricity and gas markets to ensure compliance with legislation and rules, taking enforcement action where necessary
- publishing information on energy markets, including the annual state of the energy market report.

Laws, regulations, and rules

The AER is guided by the objectives of national energy legislation. The objectives are to: promote efficient investment in, and efficient operation and use of, energy services for the long-term interests of consumers regarding price, quality, safety, reliability and security of supply. The AER applies the following laws, regulations, and rules:

- National Gas Law
- National Gas Rules
- National Gas Regulations
- National Electricity Law
- National Electricity Rules
- National Electricity Regulations
- National Energy Retail Law
- National Energy Retail Rules
- National Energy Retail Regulations.

In Victoria, the AER also regulates cost recovery for mandated smart metering infrastructure under the *Victorian Electricity Act 2000*.

AER reporting

This annual report meets the AERs formal reporting requirements under the *Financial Management and Accountability Act 1997* and s. 44AAJ of the *Competition and Consumer Act 2010*. For 2012–13, in addition to AER-specific content in this report, the AER has prepared a report providing a greater level of detail on its performance indicators, as well as information on the AERs staff and expenditure. This report is available via the AER website www.aer.gov.au.

The Better Regulation Reform Program

One of the key functions of the AER is to regulate energy networks that transport energy to consumers (electricity poles and wires and gas pipelines) in accordance with the National Electricity and National Gas rules.

The Australian Energy Market Commission (AEMC) announced important changes to the rules affecting the AER's role in regulating energy network businesses on 29 November 2012 while the Council of Australian Governments announced further energy market reforms on 7 December 2012.

The changes announced by the AEMC followed an extensive review of the regulatory framework and national energy rules by the AER, culminating in a rule change proposal to the Commission in September 2011. The changes enable the AER to:

- determine network revenues that allow for recovery of efficient costs, while ensuring that consumers pay no more than necessary for a safe, reliable energy supply
- more effectively assess the costs proposed by electricity network businesses

- use an enhanced process for determining the rate of return that network businesses are allowed to earn on their regulatory asset bases.

To successfully incorporate these reforms in the regulatory framework and optimise the way it approaches network regulation, the AER announced the Better Regulation Reform Program on 18 December 2012. The program, which focuses on the long-term interests of consumers, has so far resulted in release of the following papers for public consultation:

- an issues paper on expenditure forecast assessment guidelines released on 20 December 2012. The guidelines will describe the techniques the AER will use to determine expenditure allowances in line with the National Electricity Rules.
- the confidentiality guideline issues paper issued on 18 March 2013. The guideline sets out how confidential information will be considered for regulator determinations. It will cover the types of information considered confidential and the process for disclosure to ensure more information is available for stakeholders to engage in the regulatory determination process.
- an issues paper on the expenditure incentives guideline published on 20 March 2013. This guideline will set out how the AER will apply improved incentives for network businesses to incur efficient capital expenditure so customers only fund the investment necessary to provide a safe, reliable network.
- an issues paper on the shared assets guideline released on 2 April 2013. A shared asset is any electricity supply asset providing both standard regulated electricity supply services and unregulated services. The shared asset guideline will set out the AER's approach to reducing the regulatory value of such assets to reflect costs recovered through charging for unregulated services.
- a paper on the rate of return guidelines published on 10 May 2013 following an earlier issues paper. The guidelines will establish how the AER intends to apply the new rules to set rates of return for network business that meet the long-term interest of consumers. This will involve defining the high level regulatory criteria that will guide our assessment of methodologies, financial models, market data and other evidence to determine returns on equity and debt that make up the overall rate of return.

Together these form an integrated package of changes to the way the AER approaches network regulation.

Under the Better Regulation Reform Program the AER is also developing a service provider consumer engagement guideline. Although not specifically required by the changes announced by the Australian Energy Market Commission, this additional guideline will detail how consumers can make a useful input to the regulatory process.

Program activities that relate to the AEMC's Power of Choice review focus on enabling consumers to respond more effectively to efficient price signals by adjusting their demand for energy. This includes developing regulatory tools and schemes that encourage efficient participation by consumers in energy markets.

Stakeholder consultation has been a critical component of the Better Regulation Reform Program, with the AER supplementing existing consultation processes through:

- a Consumer Reference Group established in January 2013 to assist consumer groups to contribute to the Better Regulation Reform Program without necessarily writing formal submissions. Twenty one customer representative groups were selected to participate. The group enables coordinated and informed input from a cross-section of consumer groups and will indicate where such groups can invest their limited resources to most effectively contribute to future regulatory processes. All members meet monthly to discuss the broad Better Regulation Reform Program and subgroups meet regularly to provide input to specific guidelines.
- a Consumer Challenge Panel designed to engage with network businesses' proposals and advise the AER through the regulatory determination process, ensuring AER

decisions reflect the long-term interests of consumers. The AER called for expressions of interest on 28 March 2013 and appointed panel members on 1 July 2013 for a three-year term.

In addition, the AER conducted over 30 workshops and forums on aspects of the Better Regulation Reform Program throughout 2012–13.

Publishing activities included a dedicated Better Regulation Reform Program page on the AER website, a calendar of events and monthly newsletters to keep all stakeholders informed of progress. On 13 May 2013, the AER published the policy note: *Better Regulation: an integrated package* which presents an overview of the program and highlights how the different work streams dovetail to form a comprehensive reform package.

Revenue determinations for electricity network businesses

The electricity law and rules set out the regulatory framework for the national electricity market.⁵

Regulated network businesses involved in transmitting and distributing electricity must periodically apply to the AER to assess their revenue, typically every five years. The application is known as a 'revenue proposal' and starts a regulatory reset process that results in a final AER revenue determination.

The AER assesses the costs of each business and approves forecasts of efficient costs and energy demand to provide them with the revenue to deliver services for the period. The determination also allows for the pass through to consumers of some costs in the regulatory period that were outside a business's control and for which it has not been compensated in the determination.

This maximum allowable revenue is the sum of several decisions, or building blocks, including opex, return on capital, an allowance for depreciation and estimated corporate income tax over the period. The electricity rules require the AER to divide determinations into these building blocks.

A final revenue determination involves extensive assessment and consultation over 11 months. This includes preparing a draft determination and considering public submissions. Public meetings are also often held to explain draft decisions and receive oral submissions. As detailed in our separate annual report, the AER introduced new techniques for engaging with consumers in revenue determinations.

The AER made the following electricity transmission and distribution determinations in 2012–13:

- Citipower, Powercor, SP AusNet, Jemena Electricity and United Energy distribution (Victoria) 2011–15. On 2 October 2012, the AER remade its 2010 electricity distribution determinations in accordance with decisions by the Australian Competition Tribunal. The re-made determinations will increase network charges for 2013–15.
- The tribunal's decision, and the offsetting impact of the government's legislation, mean that the Victorian distribution network businesses will be allowed to recover \$255 million in additional revenues from customers compared to those allowed by the AER in its 2010 determination. In 2013, the resulting increase in network charges across all the distribution businesses is estimated to be around \$19 or 2.6 per cent for the average residential customer.
- ElectraNet transmission (South Australia) 2013–18. On 30 April 2013, the AER released its final decision on ElectraNet's revenue proposal for five years. It determined a total

⁵ Chapter 6 of the electricity rules contains the timelines and processes for the regulation of electricity distribution network businesses (chapter 6A for transmission network businesses).

revenue cap of \$1578 million (\$ nominal) to deliver electricity to customers over the regulatory period.

The final decision rejects 12 and 23 per cent of ElectraNet's originally proposed opex and capex forecast expenditure respectively. The key reason for the opex reduction was insufficient economic justification for ElectraNet's significantly high field maintenance costs. The final decision capex forecast was lower because ElectraNet accepted the lower demand forecast set out in the AER's draft decision, resulting in a \$132 million reduction. Additionally, the AER's capital expenditure forecast included a \$38 million reduction to replacement capex to make it efficient and consistent with ElectraNet's management practices and historical outcomes.

- Murraylink transmission (South Australia and Victoria) 2013–18. On 30 April 2013, the AER issued its final decision on Murraylink's proposed revenue proposal. Murraylink is the 220MW capacity interconnector that links the South Australian and Victorian regions in the national electricity market. The AER set revenues of \$68 million, similar to the amount Murraylink sought in its revenue proposal, and will leave Murraylink's revenue largely unchanged for the next five-year period. The return on assets is the main driver of revenues and therefore interconnection charges. The AER set Murraylink's benchmark financing needs at 7.5 per cent.

During the year, the AER commenced the following determinations:

- New South Wales and Australian Capital Territory distribution 2014–19. On 25 March 2013, the AER published papers on stage 1 of its approach to determinations for New South Wales and Australian Capital Territory electricity distribution network service providers. The determinations will cover Endeavour Energy, Essential Energy and Ausgrid in New South Wales and ActewAGL in the Australian Capital Territory. The papers outline the AER's likely classification of services, the form of control to apply to those services and the AER's decision on dual-function assets. The determinations will cover the transitional (1 July 2014 to 30 June 2015) and subsequent regulatory control periods (1 July 2015 to 30 June 2019).
- The AER must publish stage 2 of the approach setting out the likely application of its incentive schemes and guidelines to the New South Wales and Australian Capital Territory service providers in early 2014. This work will be completed under the new regulatory determination framework.
- SP AusNet transmission (Victoria) 2014–17. On 1 May 2013, the AER published an issues paper on SP AusNet's revenue proposal for its electricity transmission network. The paper aims to assist stakeholders prepare their submissions to the AER. It identifies the key issues in SP AusNet's revenue proposal and poses questions which the AER believes stakeholders should address. On 24 April 2013, the AER also held a public forum on the revenue proposal submitted by SP AusNet and the negotiated transmission service criteria proposed by the AER.
- Queensland and South Australia electricity distribution 2015–20. On 27 June 2013, the AER released a notice inviting submissions on whether it is necessary or desirable to amend or replace the current framework and approach (F&A) papers for Energex and Ergon Energy in Queensland and SA Power Networks in South Australia for the next regulatory control period. The AER also released an information sheet on the purpose of the F&A to assist interested parties. This includes a high level explanation of the matters the AER may amend or replace in its F&A paper under the National Electricity Rules.

Cost pass through applications from electricity providers

Under the regulatory framework, network businesses can apply to the AER to pass through costs to network customers that arise from events outside their control and were not anticipated when their price determinations were made. The rules require that, before approving any pass through amounts, the AER must consider the efficiency of the network business's decisions and all action to mitigate costs.

The AER assessed the following cost pass through applications from electricity network service providers.

- SP AusNet's Victorian Bushfire Royal Commission cost pass through application. On 23 October 2012, the AER released its final determination on SPI Electricity's (SP AusNet) cost pass through application. The application was for the recovery of costs arising from its implementation of recommendations from the Victorian Bushfire Royal Commission. SP AusNet sought to recover expenditure of \$134 million (\$2012) over 2011–15. The AER determined that these new regulatory obligations meant a positive pass through event occurred and approved a total pass through amount of \$20.2 million (\$ nominal) for inclusion in distribution charges over the period.
- Australian Capital Territory and Queensland feed-in tariff pass through applications. On 10 January 2013, the AER approved pass through applications from ActewAGL Distribution, Energex and Ergon Energy. These reflect the changing costs the businesses experienced in 2011–12 as a result of feed-in payments made under the solar bonus schemes operating in the Australian Capital Territory and Queensland. From 1 July 2013:
 - ActewAGL will decrease its approved revenue by \$727 564 (a decrease of 0.5 per cent from the determination). The decrease will be returned to customers in the form of lower network charges.
 - Energex will increase its approved revenue by approximately \$78.5 million (an increase of 6 per cent from the determination) and Ergon Energy will increase its approved revenue by approximately \$27.8 million (an increase of 2 per cent from the determination). The increases can be recovered from customers through higher network charges.
- ActewAGL cost pass through application. On 22 January 2013, the AER approved an application from ActewAGL for costs associated with its national energy customer framework implementation. The AER determined that ActewAGL could increase its approved expenditure by approximately \$2 million (an increase of just over 1 per cent from the determination). From 1 July 2013, the increase can be recovered from customers through higher network charges.
- Powerlink cost pass through event. On 8 March 2013, the AER made a decision to include certain cost pass through events in Powerlink's 2012–17 transmission determination. However, the AER amended the events proposed to ensure better alignment with the National Electricity Rules.
- SP AusNet's easement tax change event for 2013–14. On 26 March 2013, the AER approved a negative cost pass through application received from SP AusNet for its licensed entity, SPI PowerNet. SP AusNet submitted that the actual easement land tax was less than the amount allowed for in the AER's 2008 determination of network costs. SP AusNet applied for the difference to be passed back to transmission network users. The AER determined that the required pass through amount of approximately \$12 million (\$ nominal, GST-exclusive) should be passed through in 2013–14.
- SP AusNet's insurance pass through event. On 19 April 2013, the AER released a decision regarding SP AusNet's insurance pass through event framework. The AER decided to expand the definition of an insurance event to include the costs which exceed the insurance limits covered by pre-2011 insurance policies. When the AER first decided SP AusNet's charges for 2011–15, it allowed for the costs of insurance and included a pass through provision for costs in excess of those covered by insurance. However, the decision did not cover pre-2011 insurance policies. The AER reconsidered the matter on direction from the Australian Competition Tribunal on 5 April 2012 following a review sought by SP AusNet.

The AER neither received applications nor made a determination allowing any additional costs related to SP AusNet's bush fire-related insurance claims. The April 2013 decision does not automatically entitle SP AusNet to pass through costs above insurance.

Other electricity network matters

Transmission networks

- Heywood interconnector (South Australia–Victoria). On 16 April 2013, the AER received an application from ElectraNet for a determination regarding the proposed South Australia–Victoria (Heywood) interconnector upgrade which it is considering in accordance with the National Electricity Rules.
- Regulatory investment test for transmission. On 20 November 2012, the AER published a final determination following its review of cost thresholds for the regulatory investment test for transmission. This is a cost-benefit test that transmission companies must apply before building electricity transmission infrastructure where investment costs are above certain cost thresholds. The National Electricity Rules require the AER to review the cost thresholds every three years to decide whether they need to be changed to reflect changes in input costs. The AER's final determination was that, in the National Electricity Rules:
 - the \$5 million cost thresholds (clause 5.6.5C) be maintained
 - the \$35 million cost threshold (clause 5.6.6(y)) be increased to \$38 million. The revised cost threshold took effect on 1 January 2013.

Distribution networks

- CitiPower and Powercor's 2011–15 operational expenditure changes for managing vegetation. On 31 August 2012, the AER released its final decision, having not received any stakeholder submissions in response to its draft decision or CitiPower and Powercor's remitted proposal. The proposal was submitted in response to the Australian Competition Tribunal's decision to remit the businesses' vegetation management opex step change back to the AER for re-consideration. Following this, CitiPower and Powercor submitted revised forecast opex proposals of \$16.5 million and \$72.8 million respectively. The AER did not change its approach from the draft decision, published on 9 August 2012, and was satisfied that the proposals reasonably reflected the opex criteria.
- Electricity distribution ring fencing guidelines. On 4 September 2012, the AER released and called for submissions on a position paper setting out its view on whether or not a nationally consistent distribution ringfencing guideline should be developed. The paper incorporates information from submissions to the related AER discussion paper released December 2011.
- Following assessment of the submissions, the AER's preferred position is to develop a national guideline to apply to electricity distributors in the national electricity market. In response to submissions, the AER is developing a framework for electricity distribution ring-fencing, providing greater detail on the arrangements and obligations that may apply. This framework, which should be published in 2013, will take into account outcomes of the Australian Energy Market Commission Power of Choice Report.
- ActewAGL's dual-function assets. On 12 September 2012, the AER called for submissions on its proposed determination on pricing the dual-function assets of Australian Capital Territory distributor ActewAGL. Dual-function assets are transmission-style, high voltage capacity lines and supporting assets. On the basis of information from ActewAGL, the AER proposed to include in its final framework and approach its determination that transmission pricing rules, rather than distribution pricing rules, will apply to ActewAGL's dual-function assets.
- SA Power Network's revised cost allocation method (South Australia). On 15 October 2012, the AER approved the proposed revisions to reflect the change in trading name from ETSA Utilities. The cost allocation method governs how SA Power Network is allowed to allocate costs to the distribution services that it provides.

- Advanced metering remote services (Victoria). On 31 October 2012, the AER released a draft decision on the proposed charges and terms for these services for Powercor, Jemena, United Energy and CitiPower in Victoria. Previously provided by a visiting field officer, metering services can now be offered remotely to customers. Services including special meter reads, meter reconfiguration, and connections and disconnections are available on a fee-for-service basis to customers who have had smart meters installed.
- Regulatory investment test for distribution. On 21 January 2013, the AER released its issues paper on the test and application guidelines for consultation. The test will replace the current regulator test for distribution projects. The application guidelines will guide test proponents in applying it and enhance transparency and consistency in investment decisions. Twelve submissions were received. The cost-benefit test must be applied by transmission companies before building electricity transmission infrastructure where proposed investment costs are above certain cost thresholds.
- Rejection of SP AusNet smart meter expenditures. On 11 February 2013, the AER released a revised decision on SP AusNet's expenditures for 2012–15 following a review requested by the Australian Competition Tribunal. The AER rejected significant increases to expenditure allowances, as sought by SP AusNet, which would have meant customers paying more because of cost overruns in the business's choice of communications technology. The tribunal agreed with the AER that a reasonable business in SP AusNet's circumstances would have thoroughly reconsidered its communications solutions when it realised that its original cost estimates had blown out. However, the tribunal required the AER to examine the cost of changing to another technology, including whether switching costs would have been incurred by SP AusNet.

While no increases were considered necessary to account for switching costs, the AER increased SP AusNet's allowance by a small amount for foreign exchange contracts and project management, as required by the tribunal. This will increase SP AusNet's allowance by \$17.5 million. The effect is that current meter prices will increase by approximately 3 per cent each year in 2014 and 2015 on top of the 7 per cent previously allowed by the AER.

- Direct control services in New South Wales and the Australian Capital Territory. On 12 February 2013, the AER published a discussion paper on the formulae to apply to direct control services in New South Wales and the Australian Capital Territory and a revised discussion paper on 15 February. The AER received two submissions.
- Demand management and embedded generation connective incentive scheme interim decision. On 26 March 2013, the AER determined an approach to applying an incentive scheme to Australian Capital Territory and New South Wales distribution network service providers as part of the next distribution determination process. These schemes give distributors a financial incentive to engage in cost-effective demand-side or non-network options. The AER is currently reviewing the interaction between the various aspects of the new regulatory framework and how these influence the decision making of distributors in implementing recommendations from the Australian Energy Market Commission's Power of Choice review. This will include development of a new incentive scheme.

Transmission and distribution networks

On 31 January 2013, the AER published a draft version of its revised network service provider exemption guideline for consultation. The guideline relates to privately-owned embedded or exempt networks, that is, networks supplying electricity to a third party, but not transmission or distribution networks registered with the Australian Energy Market Operator. There were no submissions received.

Dispute resolution

The AER assessed and resolved 12 connection disputes, with seven consumers receiving significant reductions in their connection charges or otherwise receiving favourable resolutions.

Determinations—gas

The AER is responsible for the economic regulation of gas pipelines in all Australian states and territories except Western Australia. The National Gas Law and National Gas Rules set out the regulatory framework. Various levels of regulation apply to particular pipelines and services, based on their importance and the level of competition. Gas transmission and distribution businesses are subject to full AER regulation, meaning that they must periodically (usually every five years) submit an access arrangement for approval.

An access arrangement sets out the tariffs and terms for pipeline use, including the charges that retailers and other parties pay for gas transmission and distribution services. Customers, including households, ultimately pay for these services through their gas bills. It is open to the gas businesses and their users to negotiate different arrangements to those the AER approves.

The AER can withhold approval of an element of an access arrangement proposal under the National Gas Law and Rules if, in its opinion, a preferable alternative exists that is legally compliant and consistent with prescribed criteria. The law and rules provide that, if the AER decides against an access arrangement proposal, it must propose an alternative or a revised arrangement.

The AER made the following determinations on access arrangements for gas transmission and distribution pipelines:

- Roma to Brisbane Gas Pipeline transmission access arrangement (Queensland) 2012–17. On 9 August 2012, the AER published its final decision on the access arrangement for the transmission pipeline for 1 September 2012 to 30 June 2017. It did not approve the revised proposal from APT Petroleum Pipelines (APTPPL) after taking into account advice from independent experts and submissions from interested parties. The AER published an approved access arrangement for APTPPL on 27 August 2012.

This decision resulted in total revenue of \$262.7 million over the access arrangement period. APTPPL had proposed total revenue of \$325.3 million in its revised proposal, an increase of 90 per cent over approved revenue in the earlier access arrangement period.

The final decision is expected to result in little change in a typical residential customer's bill over the next five years, with pipeline charges making up only a small percentage of a residential customer's bill. For large industrial users, the final decision is expected to increase overall gas prices by approximately 10 per cent over the life of the access arrangement. This compares to an expected residential price impact of around 1.5 per cent over the period.

- Gas access arrangement review transmission and distribution (Victoria) 2013–17. On 15 March 2013, the AER released its final decisions on the price reviews for Victorian gas distribution service providers SP AusNet, Envestra and Multinet and gas transmission service provider APA GasNet. The decisions will determine prices for the next five years. The final decision cuts \$1.1 billion (\$ nominal) from the four network businesses' initial proposals, representing a 26 per cent reduction. This will result in a slight reduction in rates charged by all businesses except Envestra. If the reduction in allowed revenue is passed through to consumers, the impact on a typical residential bill (in nominal terms) could be as follows:
 - Multinet—not expected to change from 1 July 2013
 - SP AusNet—could be expected to fall by approximately \$5 each year

- Envestra Victoria—could be expected to increase by approximately \$16 each year
- APA GasNet—could be expected to fall by approximately \$5 each year (on top of the change in distribution charges).

The access arrangement decisions made by the AER in March 2013 for the Victorian gas transmission network, owned by APA GasNet and Victorian gas distribution network owned by Multinet, were the subject of applications for review by the Australian Competition Tribunal in May 2013.

Gas transmission and distribution compliance

On 25 July 2012, the AER granted the exemption sought by Meridian SeamGas Joint Venture and WestSide Corporation from the minimum ring fencing requirements under the National Gas Law. However, the AER decided to not grant exemption from the account-keeping requirements under the same law. An essential criterion for exemption is that the cost of compliance must outweigh its public benefit. The final decision repealed a previous ring fencing exemption the ACCC granted to the Dawson Joint Venture in February 2007.

Network performance reporting

- Victorian gas distribution business performance report 2009–2011. On 13 March 2013, the AER issued this report for Victorian distribution network service providers Envestra, Multinet and SP AusNet. It detailed the financial performance, reliability and customer service of the Victorian distribution networks managed by the providers and their performance against targets.
- On 24 April 2013, the AER published and invited submissions on its draft decision to waive the obligation for Aurora Energy's electricity distribution business to prepare regulatory accounts as per the Office of the Tasmanian Economic Regulator guideline. Instead, Aurora Energy will be required to comply with the AER's annual reporting requirements. Submissions closed on 7 June 2013.

Annual energy pricing approval processes

The AER is required to assess the annual pricing proposals of energy network businesses to ensure that they comply with its current revenue determination.

- Gas distribution and transmission tariff variations and cost pass through proposals. On 10 July 2012, the AER allowed the proposed 2012–13 annual tariff variations for APT Allgas distribution (Queensland) and Dawson Valley Pipeline transmission (South Australia). The AER also approved cost pass through proposals for gas distribution pipelines Envestra (South Australia) and Queensland's Envestra and APT Allgas.
- Advanced metering infrastructure (AMI) smart meter charges. On 31 October 2012, the AER approved revised charges to customers of CitiPower, Powercor, Jemena Electricity Networks, SP AusNet and United Energy in Victoria for 2013. This was in line with the regulatory requirement that smart meter charges reflect the actual costs incurred by network businesses. The process for determining the AMI charges is set out in the AMI Order in Council made under the *Electricity Industry Act 2000* (Vic). It involves the AER in establishing a budget for the rollout of smart meters to Victorians, which it originally did for 2012–15 in October 2011.
- Victorian electricity network tariffs for 2013—on 19 December 2012, the AER approved increases in network tariffs from 1 January 2013 to 31 December 2013 for CitiPower, Powercor, SP AusNet, Jemena Electricity and United Energy. Network tariffs recover the costs associated with transporting electricity along the low and high voltage power lines which typically make up between 30 and 40 per cent of total residential electricity bills in Victoria. Network charges for the average residential customer in Victoria are expected

to increase by 16 per cent in 2013, corresponding with an average increase in retail tariffs of about 5 per cent. The impact of the approved network charges will differ, depending upon a customer's individual tariff and their service provider. On 22 November 2012, the AER decided that the pricing proposals of service providers CitiPower, Powercor, SP AusNet and United Energy regarding their 2013 forecasts for the take-up of flexible tariffs were not reasonable. It required these businesses to resubmit their proposals with amended forecasts.

- Gas distribution and transmission tariff variations and cost pass through proposals for non-Victorian network businesses. On 28 May 2012, the AER allowed the proposed 2013–14 annual tariff variations for gas distribution networks ActewAGL, Jemena Gas Networks (New South Wales) APT Allgas, Central Ranges Pipeline, Envestra Wagga Wagga, Envestra (Queensland) and Envestra (South Australia)). It also approved annual tariff variations for gas transmission businesses Amadeus Gas Pipeline, Roma to Brisbane Pipeline, Central Ranges Pipeline and Dawson Valley Pipeline.
- Electricity distribution network service provider pricing proposals 2013–14. On 31 May 2013, the AER approved electricity distribution pricing proposals for the 2013–14 regulatory year from ActewAGL (Australian Capital Territory), Aurora Energy (Tasmania) Endeavour Energy (New South Wales), Essential Energy (New South Wales) and Energex (Queensland). On 7 June 2013, the AER approved pricing proposals for Ausgrid (New South Wales), Ergon Energy (Queensland) and SA Power Networks. These set distribution network prices from 1 July 2013.

Incentives for improved performance

Electricity distribution incentives

Under the demand management incentive scheme at the end of each regulatory year, distribution network service providers must report their demand management innovation allowance (DMIA) expenditure to the AER. The AER then assesses provider expenditure to ensure compliance with the DMIA criteria and their entitlement to recover expenditure.

- Non-Victorian electricity distribution 2010–11. On 18 July 2012, the AER approved around \$1 million DMIA expenditure for ActewAGL (Australian Capital Territory), Ausgrid, Endeavour Energy and Essential Energy (New South Wales) and Energex and Ergon Energy (Queensland).
- Victorian electricity distribution 2010–11. On 26 November 2012, the AER approved total DMIA expenditures of around \$550 000 for CitiPower, Jemena and SP AusNet in Victoria. Powercor and United Energy did not seek approval of any DMIA expenditures for 2010–11.
- Non-Victorian electricity distribution 2011–12. On 29 April 2013, the AER approved the 2011–12 DMIA expenditure for ActewAGL (Australian Capital Territory), Ausgrid, Endeavour Energy and Essential Energy (New South Wales) and Ergon Energy (Queensland).

Electricity transmission incentives

The service target performance incentive scheme was established by the AER to encourage electricity transmission companies to maintain or improve the reliability of transmission network services in a way most valued by customers. The scheme also seeks to encourage transmission network owners to develop their networks to facilitate efficient wholesale electricity prices.

On 4 September 2012, the AER published a draft new scheme proposing changes to the existing one. The final decision was published in December that year. The amendments focus more on lead indicators of reliability and change the way performance is measured

against the target relating to the impact of power failure on the market. The new scheme also introduces a network capability component to give transmission businesses incentives to identify and implement low cost solutions to network limitations.

Victorian F-factor amount determinations

The F-factor scheme was established by the Victorian Government in June 2010 to provide incentives for Victorian distribution businesses to reduce the risk of fire starts and loss or damage caused by fire starts from electricity infrastructure. Businesses can only receive a reward for sustained and continuous improvement. The benchmark fire-start targets will be tightened in future years.

On 20 June 2013, the AER released a draft determination on the proposed rewards/penalties for businesses under this scheme. Each business will receive a reward under the scheme as their actual number of fire starts for 2012 was below their respective fire start targets. This will mean a small increase in network tariffs (between \$0.03 and \$3.16 in 2014), depending on a customer's distribution area. Submissions close on 2 August 2013.

Wholesale energy markets monitoring and compliance

On 24 August, 19 October and 8 November 2012, the AER released reports on high prices in the Victorian wholesale gas market and the Sydney, Brisbane and Adelaide short-term trading gas markets (STTMs) for June, July and August 2012 respectively. The reports, which analyse drivers of higher price gas days in these gas markets, note that:

- June 2012 saw the highest ever ex-ante price in the Adelaide and Sydney STTM hubs, as well as close to the highest price in the Brisbane STTM hub. Victoria had the highest ever daily price since November 2008. Consistently higher price gas days occurred in all markets across the month leading to a sharp incline in the 30 day average price.
- July 2012 saw the highest ever ex-ante price in the Adelaide STTM hub and the highest ever daily price in the Victorian wholesale gas market since November 2008. Both were higher than the June 2012 records. Consistently higher prices, which began in June, continued in all markets over July and led to a steady incline in the 30 day average price.
- The average ex-ante prices in August 2012 were significantly higher than August 2011. Sydney, Victoria, and Adelaide exceeded the August 2011 average prices by 98, 42, and 60 per cent respectively. These increases were caused in part by reductions in lower priced gas being offered to the market. The AER identified that demand was under-forecast on 25 of the 31 August 2012 gas days in the Sydney market. Under-forecasting of demand by participants usually results in higher ex-post prices relative to the ex-ante price.

On 21 December 2012, the AER published a guideline outlining what a significant price variation in the gas STTM will mean. The AER will report on gas market outcomes when there is a significant price variation as defined in the guideline.

The AER released a report on 10 December 2012 on congestion and associated disorderly bidding by generators, focusing on their response to congestion in central Queensland, New South Wales and Victoria. It highlights how such bidding affects market efficiency by limiting interregional trade, distorting economic dispatch and creating price volatility. The AER called for reforms to market processes to reduce the ability of disorderly bidding to affect market outcomes. In the AER's view, the report was important in the context of the Australian Energy Market Commission's Transmission Frameworks Review and the Productivity Commission's inquiry into energy network regulation.

The AER published wholesale energy markets quarterly compliance reports in July 2012, October 2012, February 2013 and April 2013. The reports summarise the AER's compliance monitoring and enforcement activities during the preceding quarter and results of investigations, compliance audits and targeted compliance reviews.

One focus of the AER's compliance and enforcement activities in 2012–13 was the quality of data for the gas short-term trading market. It accordingly set up a project aimed at reducing the amount of missing, late or incorrect data submitted by pipeline operators in this market. Poor data can lead to inefficient pricing and market outcomes, resulting in random wealth transfers between participants. The AER's efforts to improve the quality of pipeline data, and companies' positive response to those efforts, led to a marked reduction in the number of data errors, with no errors found in the final two quarters of 2012.

In its compliance report for the quarter to 31 March 2013, the AER launched a range of strategic compliance initiatives designed to investigate and address issues in the wholesale electricity market including:

- whether businesses paid to maintain the balance between supply and demand through the ancillary service markets are actually delivering these services
- the quality of metering data supplied by energy businesses to the Australian Energy Market Operator and whether these businesses test and upgrade consumers' meters as required
- trends in the performance of network businesses and generators in responding to supply incidents/disruptions—prompt response being vital to system security
- the accuracy of information from generators on their future availability, with high level accuracy essential to ensuring sufficient generation capacity in coming years and assisting shorter-term outage planning.

Retail markets and the National Energy Retail Law

The National Energy Retail Law commenced on 1 July 2012 in Tasmania and the Australian Capital Territory and on 1 February 2013 in South Australia. It commenced in New South Wales on 1 July 2013. The AER's roles include:

- monitoring and enforcing compliance with the law
- managing market entry and exit by authorising retailers to sell energy or granting an exemption from this requirement
- developing a retailer of last resort scheme to protect customers if a retailer fails
- reporting on the performance of the market and energy businesses, including energy affordability and trends in disconnection of customers for non-payment of energy bills
- approving energy retailers' policies for assisting residential customers experiencing financial hardship and requiring assistance to manage their energy bills
- developing and managing an energy price comparison website to assist small energy customers to compare generally available energy offers.

Energy Made Easy website

On 1 July 2012, the AER launched its energy price comparison website, Energy Made Easy (www.energymadeeasy.gov.au), to help customers find the best energy offers for their needs.

It provides a free and independent service for residential and small business customers in the Australian Capital Territory, Tasmania, New South Wales and South Australia to view and compare all available energy offers in their area.

All residential electricity customers can use the consumption tool to understand how their electricity usage compares with households of a similar size in their area.

The website also includes information and tips about how to save energy and save money on energy bills.

Retailer authorisation

The AER can authorise an energy retail business to sell electricity and/or gas under the National Energy Retail Law if the business has demonstrated the capacity and suitability that the law requires. It must publish all applications received on its website, seek public submissions on the applications and consider submissions in deciding whether to grant a retailer authorisation. The AER granted the following authorisations in 2012–13:

- **Metered Energy Holdings Pty Ltd**—on 20 July 2012, the AER approved applications from the business for electricity and gas retailer authorisation. Metered Energy Holdings operates as an energy on-seller in Queensland, providing electricity, gas, and other services in medium-high density and mixed use buildings. It was granted electricity and gas licences in New South Wales in 2011 and intends to expand to other major cities across the national electricity market.
- **EDL Retail Pty Ltd**—on 9 August 2012, the AER approved their application for electricity retailer authorisation. EDL Retail is currently licensed to sell electricity in Queensland.
- **ERM Power Retail Pty Ltd**—on 14 December 2012, the AER approved an application from the business (a wholly owned subsidiary of ERM Power Limited) for gas retailer authorisation.
- **Infigen Energy Holdings Pty Ltd**—on 1 March 2013, the AER approved their application for electricity retailer authorisation. Infigen Energy Holdings is a wholly owned subsidiary of Infigen Energy Limited, a specialist renewable energy business that develops, builds, owns and operates wind and solar farms across Australia. The latter plans to expand its business through its subsidiary and retail electricity to large customers only.
- **WINenergy Pty Ltd**—On 21 June 2013, the AER approved its application for electricity retailer authorisation. WINenergy is a private company limited by shares which operates as an agent for organisations selling electricity in medium-high density and mixed use buildings. It proposes to retail electricity to large customers, including buildings in which it operates an embedded network. WINenergy was granted a retail electricity licence by the Independent Pricing and Regulatory Tribunal of New South Wales (IPART) in 2011.

Compliance and performance monitoring and reporting

The National Energy Retail Law and Rules protect customers with medical life support equipment. Protection ensures continuity of energy supply for them, and advance notice from their distributor where supply interruptions are necessary or unavoidable. Energy retailers and distributors must identify their life support customers and take steps to keep them safe.

In October 2012, the AER took enforcement action over incidents where customers known to require life support equipment had unexpectedly lost energy supply due to distributor errors. After reporting these incidents, Aurora and ActewAGL started to review and strengthen internal processes to meet their obligations to life support customers. On 13 December 2012, Aurora also paid penalties totalling \$40 000 for conduct the AER considered was in breach of those obligations.

The AER issued quarterly retail energy market updates for July to September and October to December 2012. The reports summarise key market and retail performance indicators for the Australian Capital Territory and Tasmania (where the Retail Law had commenced), including customer switching levels, customers experiencing payment difficulties, hardship, disconnections and reconnections and complaints.

The AER published its first update on retail market compliance, which discussed levels of compliance in the Australian Capital Territory and Tasmania from July to December 2012 and the AER's compliance and enforcement activities in that time. On the same day it also launched a complementary update for consumer caseworkers and intermediaries with background information on those areas of the National Energy Retail Law and Rules covered in the compliance update.

Publicising outcomes

The AER's website (www.aer.gov.au) has up-to-date links to all the AER's regulatory, monitoring, reporting and enforcement activities, including access arbitrations, arrangements, undertakings and inquiry findings. Other forums the AER uses to communicate with energy stakeholders include:

- *State of the energy market* report. On 20 December 2012, the AER published its sixth report, which gives an overview of Australia's electricity and gas markets in the preceding 12 months. It supplements the AER's extensive technical and compliance reporting on the energy sector and is designed to meet the needs of a wide audience, including government, industry and the broader community. The 2012 report aimed to explain the factors that have driven up energy prices and the range of policy and regulatory initiatives implemented to address the problem.
- Quarterly compliance reports summarising AER compliance and enforcement activities in the gas and electricity sectors.
- Compliance bulletins drawing attention to particular regulatory requirements and outlining the AER's expectations regarding participants' compliance.
- Consumer and business guidance and hard copy publications, including seven new consumer factsheets and materials on exempt selling.

Timely assistance to governments and other agencies

On 17 September 2012, the AER made a submission to the Senate Select Committee on Electricity Prices inquiry into the cause of high energy bills, and the options for bringing them down. The submission emphasised the importance of energy market reforms, including the Australian Energy Market Commission's (AEMC) draft decision on the regulatory framework, and the benefits of uniform adoption of the National Energy Customer Framework. Later that month the AER appeared before the Senate Committee in Melbourne, where it outlined the reforms needed to deliver greater benefits for energy consumers, and highlighted the importance of competitive energy markets, which will allow greater customer participation, competitive prices and innovation in consumer offerings.

On 28 August 2012, the AER made its second submission to the expert panel convened by the Standing Council on Energy and Resources responsible for the review of the limited merits review regime in the National Electricity Law and the National Gas Law. The regime allows those interested to apply to the Australian Competition Tribunal for a limited review of the AER's electricity network revenue and pricing determinations and gas pipeline access arrangement determinations. The AER submission argued that there are significant weaknesses in the regime which should be addressed, but supported the retaining of the Australian Competition Tribunal as the review body.

The AER made its fourth submission on 22 March 2013 to the Productivity Commission's review of the regulatory framework for electricity networks. The submission recommends an interim solution to disorderly bidding, namely National Electricity Rule changes so that generators must include in their bids the rate at which they can move their energy output up or down (the ramp rate).

On 13 August 2012, the AER made a submission to the AEMC's review of distribution reliability outcomes and standards. The review has two separate parts: a review of the distribution reliability outcomes in New South Wales, and a review of the frameworks across the national electricity market for expressing, delivering and reporting on these outcomes. The AER's submission related to the latter.

The AER made a submission on 9 August 2012 to the AEMC on the proposed change to the distribution planning and expansion framework rule. The draft rule outlines significant roles for the AER including: developing the regulatory investment test for distributors and

the related application guidelines; assuming responsibility for considering disputes on the application of the test; and undertaking periodic reviews of the appropriateness of certain test cost thresholds.

On 12 October 2012, the AER provided a submission to the AEMC on its draft report on the Power of Choice review. The submission broadly supports the AEMC's recommendations aimed at enabling more interaction by both ends of the electricity supply chain to better balance demand and supply in the national electricity market. It also makes a number of suggestions to ensure that demand-side participation outcomes are as efficient as possible and deliver the lowest cost to consumers.

The AER also made a range of other submissions to the commission, Australian Energy Market Operator and other policy bodies as detailed in the AER annual report.

Enhanced use of data analysis and intelligence to inform our regulatory approaches and interventions

AER data management

The AER continued to refine and standardise processes for collecting information from regulated businesses, developing and applying annual reporting requirements to all electricity businesses and most gas businesses. It will further consider information needs as part of the Better Regulation Reform Program, and make the necessary changes to improve reporting in each industry sector.

The AER began a project aimed at more efficient management of information from regulated gas and electricity businesses, and established protocols for data storage and cataloguing. One of the project results will be increased data accessibility, reliability and validity for decision making through the creation of a central repository where all information is stored in a consistent format.

In an important step, an interim database has already been developed and will assist the AER in monitoring determination outcomes, performance reporting and making determinations for network businesses. The project is expected to finish in 2014.

Modelling and benchmarking network business expenditure

Following changes to the National Electricity and National Gas rules, the AER must develop guidelines on its approach to assessing forecast expenditure by transmission and distribution network businesses. The *Expenditure Forecast Assessment Guidelines* to be published by 29 November 2013, will describe the techniques and associated data requirements for the AER's approach to determining efficient capital and operating expenditure allowances in accordance with the rules.

A key feature of our work on the guidelines is the development of benchmarking techniques both at aggregated and disaggregated levels of analysis. Benchmarking has been relatively underused in our decision making to date but should be more effective than relying largely on detailed, 'bottom-up' assessments. The guidelines will also include models to assess businesses' replacement capital programs (as used recently by the AER) as well as augmentation expenditures.

The techniques used and data collected under the guidelines will form the basis of our annual benchmarking reports. The AER must publish the first benchmarking report by 30 September 2014 and the second by 30 November 2015, with subsequent reports published at least every 12 months. The reports will add to existing published performance data and help stakeholders understand the expenditure allowances set in transmission and distribution determinations.

Wholesale market compliance initiatives

The AER has been developing new data analysis and intelligence gathering techniques to inform its compliance and enforcement activities. New datasets on metering errors will assist the AER in detecting systemic metering data breaches. Datasets developed with the Australian Energy Market Operator will track generators' provision of frequency control services to ensure that they are supplying the services paid for.

In wholesale gas markets, the AER has been monitoring gas demand forecasts using new in-house tools. Follow up with companies demonstrating poor demand forecasting has led to an improvement in demand forecasts and the efficiency of gas markets.

Improving regulatory practices

In line with recent reforms to the framework for energy sector regulation and its Better Regulation Reform Program (see page 129), the AER is seeking to enhance its internal governance and decision making processes to optimise regulation of energy markets. It continued to improve its regulatory approach in 2012-13 by:

- extensively consulting on new regulatory guidelines
- improving internal technical expertise and systems, and engagement and communication with stakeholders to help develop and implement new regulatory approaches
- improving data systems, information requirements, analysis techniques and metrics to better inform regulatory decisions
- ensuring the necessary internal structures to make timely, evidence based, independent decisions and appropriately manage risks.

3.3 Increasing the efficiency of Murray-Darling Basin water markets

2012–13 Strategy: *Improve the workability of emerging markets by enforcing market rules and monitoring market outcomes*

Measures:

- Reasonable access terms and conditions (including prices) determined for nationally significant infrastructure services in a timely and transparent manner after appropriate consultation with stakeholders.
- Industry-specific laws (technical, pro-competitive, consumer protection) monitored and enforced in a transparent and consistent way.
- Prices and quality of particular goods and services monitored and reported on to provide relevant information to the community about the effects of market conditions.
- Relevant information disseminated to assist stakeholders in understanding the regulatory frameworks and the structure and operation of infrastructure markets so that they can more effectively engage in the regulatory process.
- Timely advice provided to governments and policy agencies on how efficient regulatory outcomes and competitive, well-functioning markets can be achieved.

The *Water Act 2007* (Water Act) regulates arrangements to address the sustainability and management of water resources in the Murray-Darling Basin (the basin). It includes reforms aimed at a number of objectives, including protecting the environment, addressing water scarcity, freeing up water markets and ensuring the viability of the irrigation industry. These were introduced because of concerns about the impact on the environment of water extraction through irrigation, over allocation of water and increasing water scarcity.

Under the Water Act, the ACCC is responsible for regulating and monitoring water charges. It must also monitor and enforce compliance with four sets of Commonwealth Water Rules, which aim to free up water markets by reducing barriers to trade faced by irrigators, and to promote the economically efficient use of water resources and infrastructure assets. The rules are:

- Water Market Rules 2009 (market rules)
- Water Charge (Termination Fees) Rules 2009 (termination fee rules)
- Water Charge (Infrastructure) Rules 2010 (infrastructure rules)
- Water Charge (Planning and Management Information) Rules 2010 (planning and management information rules).

The market rules facilitate irrigators' ability to transform their irrigation right into a separately held water access entitlement. The termination fee rules regulate the maximum fees that can be imposed on irrigators terminating their access to the irrigation network. The infrastructure and the planning and management information rules aim to increase pricing and investment transparency for irrigators by requiring operators and governments to publish information about their charges.

Water reform continued during 2012–13 as further aspects of the infrastructure rules took effect. The ACCC commissioned an independent review of the network service plans prepared by the Tier 2 operators in 2010–12 and provided the findings to operators. Tier 2 operators are member-owned operators servicing more than 125 gigalitres (GL) of water access entitlements and non-member-owned operators servicing between 125 GL and 250 GL of water access entitlements from managed basin water resources. In general, the independent reviewer found that network service plans were prudent and efficient, although some areas for improvement were identified. In 2012–13, the ACCC began work on the first determination of regulated water charges of a Tier 3 operator, State Water.

The ACCC also continued to assist the Murray-Darling Basin Authority (MDBA) in developing the water trading rules component of the Murray-Darling Basin Plan, as required by the Water Act. The Basin Plan was made on 22 November 2012.

Monitoring prices

Under the Water Act, the ACCC monitors regulated water charges, transformation arrangements and compliance with the Commonwealth Water Rules across the basin.

The ACCC presented its third *Water Monitoring Report* to the Minister for Sustainability, Environment, Water, Population and Communities in March 2013, publishing it the following month. The report sets out the ACCC's findings on regulated water charges, transformation arrangements and rule compliance for 2011–12, and examines the impact of the recent reform program on water markets and water infrastructure more generally.

In highlighting the success of water market reform, the ACCC noted in the report that:

- Water markets have facilitated the movement of water resources to their highest value use. For example, annual crop farmers have taken advantage of low water prices by purchasing additional allocations and increasing production. In drier years, they responded to higher water allocation prices by selling allocations to growers of long-lived plantings and shifting other resources to dryland farming.
- Along with water markets, high storage levels in basin dams have given irrigators flexibility in managing their on-farm water requirements.
- Most irrigators transforming irrigation rights in 2011–12 did not immediately terminate any water delivery rights afterwards. In 2011–12, the volume of irrigation rights transformed decreased by 25 per cent, while the volume of terminations increased by 58 per cent.
- In 2011–12, water access entitlement trade increased by 22 per cent, representing a 41 per cent increase in water purchases registered by the Australian Government. Trade in water allocations also increased by 23 per cent, facilitated by high water availability due to increased rainfall.
- Irrigation charges were generally stable, with an average increase of approximately 5 per cent for gravity-fed networks across the basin although, for many customers, total bills were likely to be higher than previous years due to significant increases of approximately 97 per cent in the volume of water delivered.
- Irrigation infrastructure operators generally complied with the rules administered by the ACCC.

Enforcing industry-specific laws

Over 2012–13, the ACCC generally observed improved levels of compliance with the Commonwealth Water Rules it enforces. However, it continues to receive complaints from irrigators and to identify concerns with the compliance of irrigation infrastructure operators under the market and termination fee rules. The ACCC agreed to the administrative resolution of a number of investigations into the transformation application fees and transformation practices of several operators.

The ACCC continued to monitor compliance by state departments and water authorities with the planning and management information rules, observing that a number have yet to comply and did not publish the requisite information on activities and costs in 2012–13. A number of other agencies also failed to comply with the rule requirement for timely updates of water planning and management information.

Infrastructure operators and state departments and water authorities received help from the ACCC to comply with Commonwealth Water Rules. Assistance took the form of a revised guide to the market and the termination fee rules, individual information sessions and tailored guidance on specific areas of concern.

In October 2012, the Minister for Sustainability, Environment, Water, Population and Communities registered amendments to the market and the termination fee rules. The ACCC prepared a guideline explaining the purpose and effect of the amendments to assist stakeholders and promote compliance.

The ACCC provided responses to ministerial and public correspondence within agreed timeframes.

In 2012–13, the ACCC also provided advice and assistance to the MDBA on the development of their enforcement and compliance role for the water trading rules.

Access terms, conditions and prices

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

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

The ACCC is responsible for approving or determining the charges levied by State Water for its customers in the basin from 1 July 2014 to 30 June 2017 and will assess its regulatory proposal in 2013–14.

The IPART continued to regulate State Water's charges outside the basin.

Timely advice to government and agencies

The ACCC advised the MDBA on the development of the water trading rules. The rules are part of the Basin Plan made on 22 November 2012. The ACCC also continued to assist the MDBA on the development of guidelines for the water trading rules.

The ACCC also provided the third *Water Monitoring Report* in March 2013 (see page 146).

Informing stakeholders

In October 2012, the ACCC released updated versions of *A guide to the water charge (termination fees) rules* and *A guide to the water market rules and water delivery contracts* to coincide with ministerial amendments. The ACCC also released a guideline on amendments to the Commonwealth Water Rules as part of the series *Compliance with the Water Rules: Information for Irrigation Infrastructure Operators*. All guidelines are available on the ACCC website.

Irrigation infrastructure operators covered by the infrastructure rules were required to submit a network service plan to the ACCC by 1 June 2012. The plan must include details on the levels of service an operator plans to deliver over five years, the costs it expects to incur and the charges it expects to levy. The objective of the plans is to improve transparency for customers of large operators. The ACCC commissioned an independent review of the plans by Deloitte-Aurecon and later provided the findings on operators' prudence and efficiency to the operators.

ACCC staff met with State Water customers in regional New South Wales between November 2012 and March 2013. The purpose was to discuss the ACCC's new regulatory role to approve or determine State Water charges in the basin and the review process for 2014–17 prices. Staff presented an indicative timeline and milestones for the upcoming review and sought feedback on key issues likely to arise.

In addition to the third *Water Monitoring Report*, the ACCC also reached out to help infrastructure operators and other interested parties to understand the Commonwealth Water Rules by:

- supplying information to professional advisors to irrigators, including publishing an article in the *Law Society of South Australia Bulletin*
- holding information sessions for the basin's irrigation infrastructure operators, law firms, government agencies and water brokers
- holding meetings with State Water and IPART to prepare for the transition to ACCC regulation of State Water charges in the basin.

Data analysis and intelligence to inform regulatory approaches and interventions

The ACCC gathered data and other intelligence for analysis to inform its regulatory approaches as well as to disseminate to stakeholders.

The ACCC made a series of information requests to irrigation infrastructure operators, bulk water service providers and relevant state government departments and water authorities in July 2012, as it has annually since 2009. The information sought related to network characteristics, regulated water charges, transformation and termination activity, and compliance with the Commonwealth Water Rules. The data obtained formed the basis for the ACCC *Water Monitoring Report* 2011–12 and will flow into future compliance and enforcement strategies and action.

Case study

Water Monitoring Report

The ACCC released its third annual *Water Monitoring Report* for the basin in April 2013.

Under the Water Act, the ACCC is required to monitor and enforce rules which promote water trade in the basin. The Water Act was part of a broad package of reforms to the rural water sector in the basin. The reforms had a number of objectives, primarily environmental in focus, but also included achieving efficiencies through freeing up water markets and ensuring the viability of the irrigation industry. Introduced during a period of severe drought, the reforms responded to concerns about the impacts of water extraction on the environment, over allocation of water, and restrictions on water trade imposed by operators of water infrastructure and state governments.

The *Water Monitoring Report* provides details of:

- changes in rural water charges across the basin
- the ability of irrigators to 'transform' irrigation rights into statutory water access entitlements so they can trade their water outside of their irrigation network (mostly applicable in New South Wales and South Australia)
- the ease and the cost with which irrigators can terminate access to an irrigation network
- the impact of water reforms on water markets
- compliance by water operators with the water market rules and charge rules.

The report highlighted the success of the water reform process to date and the benefits that have flowed from the operation of water markets in the basin. It found:

- well-functioning water markets have allowed irrigators to take advantage of high storage levels and deepening markets to increase their water use and increase agricultural production
- the majority of irrigators transforming their irrigation rights continued to irrigate rather than exit the industry
- irrigator terminations are, relative to other factors, not driving increases in operator charges. Fees received from irrigators who terminate their water delivery service have been sufficient to date to mitigate increases in access charges on irrigators who remain
- customers of large water operators were consulted on proposed network service plans which were also the subject of an independent review commissioned by the ACCC. These plans are a transparent process used by operators to determine future water charges based on their investment plans. These large water operators are now required to develop network service plans in consultation with customers and provide them with details of price changes in advance of the charges being imposed or changed
- compliance with the water rules amongst water operators continues to improve.

While noting the success of these reforms, the report highlighted that barriers to water trade still remain in the basin. It provides examples of how some state governments continue to cap trading opportunities and intervene in the market, and noted how this creates uncertainty and limits trading options for water users.

3.4 Monitoring of petrol prices

2012–13 Strategy: *Respond to government requests to provide monitoring reports on industries in highly concentrated and newly de-regulated markets*

Measures:

- Prices and quality of particular goods and services monitored and reported on to provide relevant information to the community about the effects of market conditions.
- Relevant information disseminated to assist stakeholders in understanding the regulatory frameworks and the structure and operation of infrastructure markets so that they can more effectively engage in the regulatory process.
- Timely advice provided to governments and policy agencies on how efficient regulatory outcomes and competitive, well-functioning markets can be achieved.

Introduction

The Australian Government has directed the ACCC to monitor the downstream petroleum industry including the refining, importing, wholesale and retail sectors under Part VIIA of the *Competition and Consumer Act 2010*. In performing this function, the ACCC is able to keep abreast of industry developments and also to formulate timely advice to the government and the public.

The ACCC forwarded its fifth monitoring report on the Australian downstream petroleum industry to the Minister on 6 December 2012. Key findings from the report are discussed below.

Prices

- In 2011–12, movements in the retail price of petrol in Australia continued to be heavily influenced by movements in international prices.
- Weak economic conditions in developed countries and slower growth of Asian economies were not enough to offset the effects of Middle East unrest and continued depletion of low cost, conventional crude oil supplies which kept crude oil prices at their highest annual levels ever during 2011–12.
- The international price of petrol plus taxes account for 88 per cent of the retail price of petrol.
- During 2011–12, average Australian retail petrol prices in the five largest cities increased to around 143 cents per litre, and over the period these prices closely tracked the international benchmark price for refined petrol (Singapore's Mogas 95 unleaded benchmark price).
- Price cycles in major metropolitan markets and relatively higher prices in regional centres continue to cause consumer concern. Petrol price cycles are not caused by changes in cost but are the result of the pricing policies of major fuel retailers. Prices in regional areas generally tend to be higher than in major cities due to lower levels of competition, lower volumes of retail petrol sales and higher transport costs. Lags between changes in prices in regional locations and capital cities sometimes accentuate the country-capital city divide.

- The relatively high Australian dollar during 2011–12 provided some protection to Australian motorists from higher international prices.

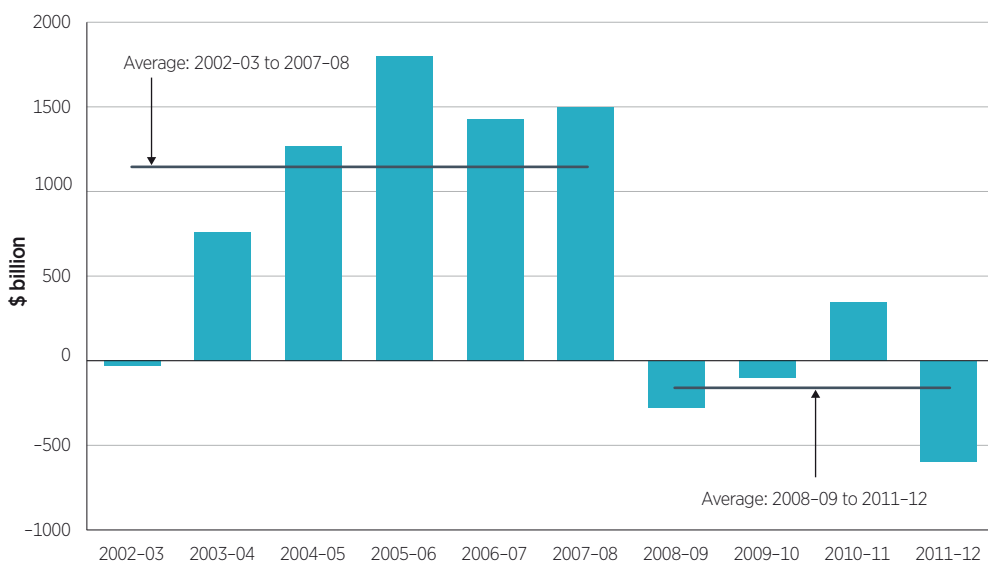
Profits

- Profits in the Australian downstream petroleum industry across all products in 2011–12 were \$408 million or around 0.5 cents per litre, a decrease of 81 per cent compared with 2010–11.
- Lower industry profits in 2011–12 reflect poor financial results in the refinery and total supply sectors.
- Overall profits do not appear to be excessive, particularly when compared to other Australian industries.

Domestic refining

- The refining sector incurred losses of around \$600 million during 2011–12 compared with a net profit of \$348 million in 2010–11.
- This sector has in general recorded comparatively low net profits and rates of return since the global financial crisis (see figure 3.4).
- Competition from modern and more efficient Asian refineries seems to have had a major impact on Australian refineries during 2011–12.
- The vulnerability of Australian refineries to overseas competition is evident in Mobil's decision to close its Port Stanvac refinery in Adelaide in 2009 after mothballing it in 2003, and Shell's closure of the refinery at Clyde in Sydney in 2012. The Caltex Kurnell refinery in Sydney will close in 2014.

Figure 3.4: Refinery sector net profit, all products 2002–03 to 2011–12



Source: ACCC calculations based on data obtained from firms monitored through the ACCC's monitoring process.

On 6 July 2012, the Australian Government directed the ACCC to monitor industry prices, costs and profits for a further 12 months and report back by 17 December 2013.

Price monitoring

The ACCC's monitoring of fuel prices covers:

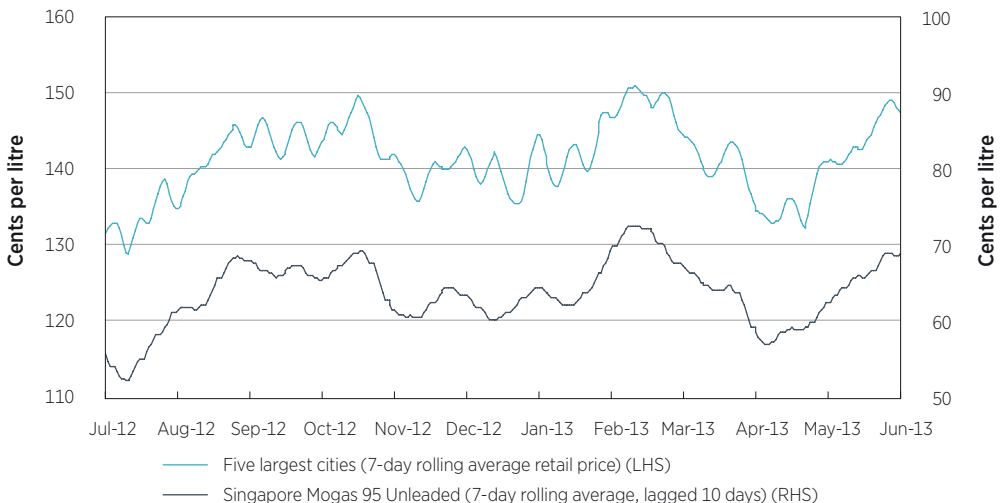
- retail prices of unleaded petrol (including regular and premium unleaded petrol and E10 petrol), diesel and automotive liquefied petroleum gas (LPG) in all capital cities and around 180 regional locations
- movements in the international benchmark prices for the above fuels, international crude oil prices, published wholesale prices, the price differential between E10 petrol and unleaded petrol, and the price differential between capital cities and regional locations
- ethanol supply and pricing.

Petrol prices

The average retail price of regular unleaded petrol across the five largest cities (Sydney, Melbourne, Brisbane, Adelaide and Perth) in 2012–13 was 141.3 cpl, which was 1.5 cpl lower than in 2011–12. As can be seen in figure 3.5, average retail prices ranged from a low of around 128 cpl in early July 2012 to a high of around 151 cpl at the end of February 2013. As in previous years, movements in domestic retail petrol prices in 2012–13 were primarily influenced by movements in international refined petrol prices (Singapore Mogas 95 Unleaded) and the Australian/US dollar exchange rate.

International refined petrol prices increased between July and October 2012, influenced by ongoing optimism of monetary easing in the United States, the internal conflict in Syria and decreased supply of crude oil from the North Sea. The decrease in international refined petrol prices in March and April 2013 was due to a downturn in global demand for crude oil and refined petrol, and economic uncertainty in Europe, China and the United States. The subsequent increase in refined petrol prices in May and June 2013 was due to the ongoing geopolitical concerns about Syria and improved economic conditions in the United States and Europe.

Figure 3.5: Regular unleaded petrol price movements, 2012–13



Source: ACCC calculations based on Informed Sources, Platts and Reserve Bank of Australia (RBA) data.

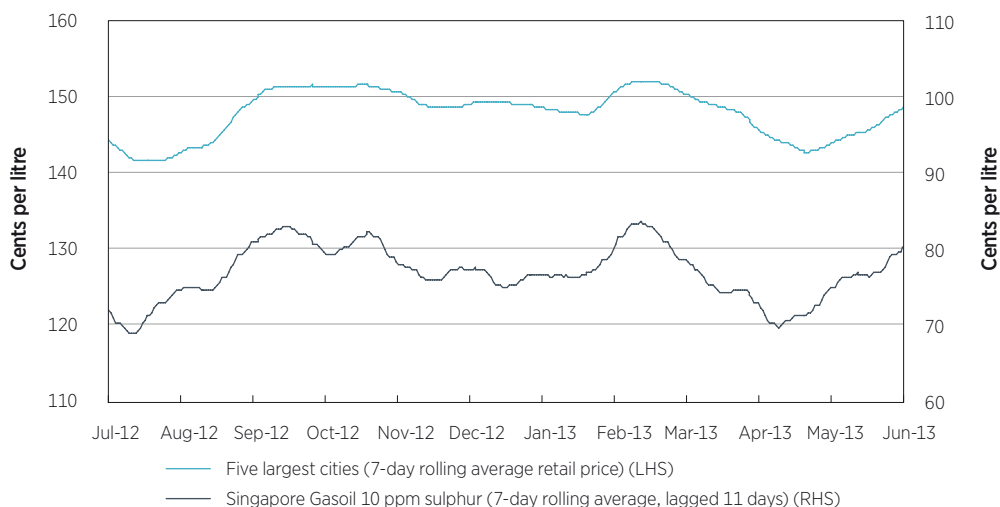
Diesel prices

Average retail diesel prices across the five largest cities were broadly stable for much of 2012–13 (see figure 3.6). Monthly average diesel prices ranged from a low of around 141 cpl in July 2012 to a high of around 151 cpl in October 2012, a range of 10 cpl. Diesel prices

in Australia broadly followed movements in the relevant international refined diesel price (Singapore Gasoil 10 parts per million sulphur content), however, they tended not to move up or down as much as international prices in the short run.

The average retail diesel price in the five largest cities in 2012–13 was 147.4 cpl, which was 0.5 cpl lower than in 2011–12.

Figure 3.6: Diesel price movements, 2012–13



Source: ACCC calculations based on Informed Sources, Platts and RBA data.

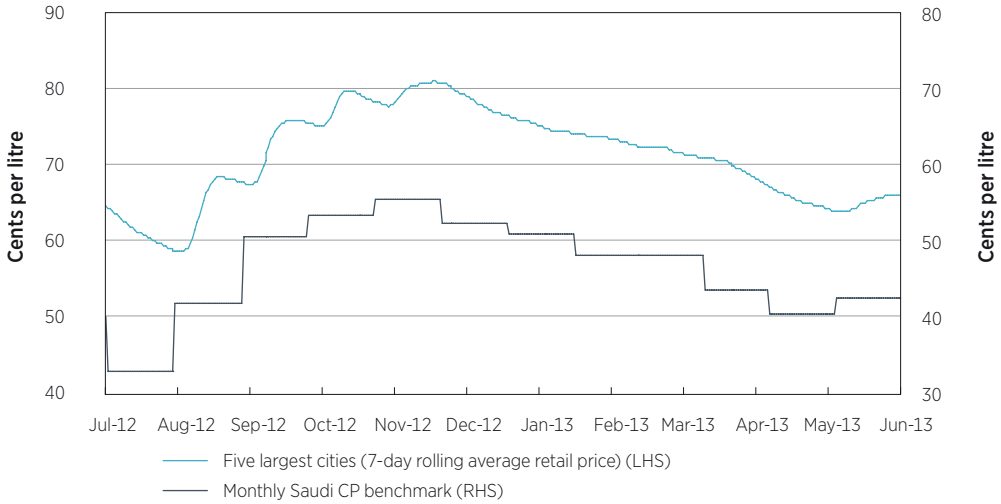
Automotive LPG prices

The average retail automotive LPG price across the five largest cities in 2012–13 was 70.7 cpl, which was 2.2 cpl higher than in 2011–12. Monthly average retail prices ranged from a low of around 61 cpl in July 2012 to a high of around 79 cpl in November 2012 (see figure 3.7).

In December 2011, excise of 2.5 cpl was imposed on automotive LPG. This was increased to 5.0 cpl on 1 July 2012 and then to 7.5 cpl on 1 July 2013.

The appropriate international benchmarks for automotive LPG in Australia are the Saudi Aramco contract prices for propane and butane, which are issued on the first day of each month. The Saudi international benchmark prices reached a yearly high of 54.0 cpl in November 2012, as a result of high demand for heating fuels in the northern hemisphere, higher crude oil prices and a tightening of propane and butane supplies from the Middle East. The subsequent decrease in prices was due to ample supplies of LPG across Asia and Europe, and falling demand for heating fuel.

Figure 3.7: Automotive LPG price movements, 2012–13



Source: ACCC calculations based on Informed Sources, Gas Energy Australia and RBA data.

Informing stakeholders

The ACCC released the 2012 *Monitoring of the Australian petroleum industry* report in December 2012, distributed hard copies to key stakeholders and contributors in January and February 2013 and published the report on our website, www.accc.gov.au.

The ACCC regularly updated the website's fuel pages, which are a feature of the site's re-design and among the most-visited web pages on the website, and published petrol prices daily. The site also shows how the price of unleaded petrol in the five largest cities has been tracking against the international benchmark price for refined petrol.

During 2012–13, the ACCC received around 900 consumer inquiries and complaints about fuel, many relating to high prices and price differences between city and regional locations, as did most of our ministerial correspondence.

The ACCC's Fuel Consultative Committee, which met twice in 2012–13, enabled stakeholders in the Australian fuel industry and the ACCC to discuss key issues.

3.5 Enhancing our regulation of national infrastructure

2012–13 Strategy: *Improve our regulatory practices and processes by further developing our thinking on how we regulate*

Measures:

- Reasonable access terms and conditions (including prices) determined for nationally significant infrastructure services in a timely and transparent manner after appropriate consultation with stakeholders.
- Industry-specific laws (technical, pro-competitive, consumer protection) monitored and enforced in a transparent and consistent way.
- Prices and quality of goods and services monitored and reported on to provide relevant information to the community about the effects of market conditions.
- Relevant information disseminated to assist stakeholders in understanding the regulatory frameworks and the structure and operation of infrastructure markets so that they can more effectively engage in the regulatory process.
- Timely advice provided to governments and policy agencies on how efficient regulatory outcomes and competitive, well-functioning markets can be achieved.

Transport and prices oversight

Introduction

The ACCC has responsibilities in industry regulation including promoting efficient investment in rail infrastructure, access to wheat ports, monitoring prices and assessing authorisations for Australia's five major airports and providing information on the performance of Australia's container stevedoring industry.

In the area of rail the ACCC's responsibilities include:

- assessing undertakings by rail access providers on rail track infrastructure
- monitoring and administering relevant provisions of accepted undertakings
- carrying out functions under accepted undertakings, including arbitrating access disputes.

In the area of Australia's five major airports the ACCC:

- monitors and publishes information about prices, costs, profits and service quality of aeronautical services and facilities
- monitors prices, costs and profits and quality of car parking
- assesses notifications of proposed price increases from Sydney Airport in relation to regional air services
- assesses notifications of proposed price increases from Airservices Australia, a business that provides air traffic control and aviation fire-fighting and rescue services to airports and airlines.

In the area of Australia's container stevedoring industry, the ACCC:

- monitors the performance of the industry, including prices, costs and profits
- provides information to the government and the community on our findings.

The ACCC also investigates complaints about international liner cargo shipping conference agreements.

Airports and air services

Monitoring of airport services including car parking

The ACCC monitors the prices, costs and profits of aeronautical and car parking services at Adelaide, Brisbane, Melbourne (Tullamarine), Perth and Sydney (Kingsford Smith) airports under the *Competition and Consumer Act 2010*, while the *Airports Act 1996* requires it to report on their finances and quality of service. After compiling and analysing the required information, the ACCC disseminates the annual *Airport Monitoring Report*.

On 1 July 2012, the Australian Government announced a new monitoring direction which will see the ACCC monitor Brisbane, Melbourne, Perth and Sydney airports until June 2020 with a review of its work by the Productivity Commission in June 2018.

ACCC monitoring provides information to the government, industry and public that otherwise would not be available. The aim is to increase the transparency of airport performance to discourage airport operators from increasing prices excessively and lowering standards of services and facilities.

The *Airport Monitoring Report 2011–12* was released in April 2013 and its conclusions are summarised below.

Aeronautical services and facilities

- Growth in passenger numbers except at Adelaide Airport continued to drive demand for airport services during 2011–12, which increased by a combined 2.5 per cent for all airports. This was due to growth in international travel and despite a drop in domestic passenger numbers at all airports except Brisbane and Perth airports.
- Despite continued investment in aeronautical services and facilities since 2001–02, system-wide congestion across the monitored airports appears evident and may be one of the factors responsible for increasing numbers of delayed aircraft movements.
- Additional investment will be needed to cope with expected increases in airport throughput in the medium to long term, meet passenger needs, and avoid even more congestion in the future.
- Total aeronautical revenues for all monitored airports increased by 4.5 per cent during 2011–12. All airports except Adelaide Airport earned higher aeronautical revenues than in the previous financial year while net profit from aeronautical services increased 2.2 per cent across all monitored airports.
- Average aeronautical revenue per passenger, which the ACCC uses as a proxy for average prices charged by airport operators, increased by 1.9 per cent. Melbourne, Brisbane and Sydney airports earned higher average revenues per passenger in 2011–12.
- Overall average ratings for quality of service indicators fell slightly at all monitored airports during 2011–12. For the first time since 2007–08, no airport achieved an overall rating of at least good. All airports were rated as satisfactory in 2011–12.
- Lower ratings from airline surveys on the standard and availability of airside services and facilities, such as runways, taxiways and aprons, affected overall ratings for quality of service at some airports. Most airports also reported slightly lower ratings from passenger surveys.

Car parking and landside services and facilities

- Total car parking spaces increased by 7.3 per cent during 2011–12. All airports increased the number of car park spaces except Melbourne. The largest increase was at Brisbane airport, up 31.7 per cent since 2010–11.
- Total combined airport car parking revenue increased in 2011–12. All airports other than Adelaide Airport recorded higher revenues from their car parking businesses. However, the combined margin per car park space decreased by 6.7 per cent across monitored airports.
- Brisbane, Sydney and Adelaide airports recorded decreases in margin per car park space. Brisbane experienced the largest drop with a reduction of 33.0 per cent, which was due to the opening of a new car park.
- Brisbane, Perth and Sydney airports increased a small number of landside access charges. Melbourne and Adelaide airports left charges unchanged in 2011–12.
- Airports generally earned higher revenues from taxi and private car operations in 2011–12, particularly Melbourne, Perth and Sydney airports. Melbourne and Brisbane also earned higher revenues from private bus and off-airport car parking services.

Review of airport quality of service monitoring

The ACCC set out its approach to quality of service monitoring in a guideline published in October 2008.

In 2012, it began a review of both the quality of service monitoring program and the guideline, which will apply to Brisbane, Melbourne (Tullamarine), Perth and Sydney (Kingsford Smith) airports. Following the 2011 Productivity Commission inquiry into the economic regulation of airport services, the government accepted the PC recommendation to remove Adelaide Airport from the regulatory regime. The ACCC review considered whether changes in technology, users' expectations, market conditions and industry structure are adequately reflected in the monitoring program and whether the information collected sufficiently supports the ACCC's monitoring objectives.

The ACCC consulted widely during the review and gave interested parties an opportunity to provide submissions. In November 2012, the ACCC sought responses to its *Discussion paper for quality of service monitoring* and, in March 2013 after further consultation, released the discussion paper *Proposed changes to the guideline for quality of service monitoring at airports*. Submissions received in response to both papers informed the ACCC's approach to quality of service monitoring.

Following the review the ACCC made major changes to the guideline, most importantly:

- discontinuation of the surveys of border agencies
- consultation with landside operators
- changes to indicators used to monitor:
 - check-in services and facilities
 - baggage system and baggage handling
 - public amenities
 - aerobridges
 - runways, taxiways and aprons
 - airport access facilities
- reporting requirements (timelines) on airports.

The revised guideline was released on 26 June 2013 and will take effect for data collected and reported on from 2013–14 onwards. In revising the guideline, the ACCC recommended that the Department of Infrastructure and Transport consider amending certain provisions in

the Airports Regulations to give legislative support to the ACCC's proposed changes. These largely relate to changes in the data that airport operators are required to keep and provide to the ACCC for the new indicators.

Industry fact—airports

There were more than 106 million passengers and almost one million aircraft movements at the five monitored airports in 2011–12.

Airservices Australia price notifications

The terminal navigation, en route navigation and aviation rescue and fire-fighting services which Airservices Australia supplies are declared services under the Competition and Consumer Act, meaning that Airservices must notify the ACCC of proposed increases in service prices.

The ACCC assesses Airservices's price notifications, keeping in mind our statutory obligation to promote economically efficient investment and employment throughout the economy. It then decides whether to object to, or accept, the proposed price increases.

Regardless of the ACCC decision, Airservices can legally implement the proposed prices. However, the ACCC has the option of recommending an inquiry to the relevant Minister where it considers the outcome to be unsatisfactory.

The ACCC assessed one formal price notification in 2013 and did not object to Airservices' proposed prices for terminal navigation, en route navigation and aviation rescue and fire-fighting services in 2013–14.

2013 price notification

In September 2011, the ACCC did not object to the Airservices's long-term pricing agreement that outlined a price progression for declared services for five years from 2011 to 2016. The agreement came into effect on 1 October 2011.

In reaching this decision, the ACCC required Airservices to commit to consulting better with industry stakeholders on both its capital expenditure and measures to drive internal efficiency. The ACCC noted that its decision covered only the first year of the agreement and that Airservices was legally required to submit a price notification before increasing prices in the remaining years.

Airservices submitted the second of its subsequent annual price notifications to the ACCC on 30 May 2013. The notification proposed prices for declared services from 1 July 2013 that were the same as those outlined in the agreement. In addition, it included a new rescue and fire-fighting service at Port Hedland and out-of-hours fees for this and terminal navigation services.

In its assessment, the ACCC consulted with targeted stakeholders to decide the extent to which Airservices had made reasonable progress on implementing its agreement commitments, specifically to improve consultation on capital expenditure and key performance indicators.

Although stakeholders noted the scope for further improvement, they were supportive of progress to date and outlined a range of improvements. They recognised that it would take time to find the right balance of information and consultation and that Airservices was taking positive steps.

The ACCC was satisfied that Airservices had made sufficient progress on implementing its commitments in the second period of the agreement to ensure that its prices reflect an efficient cost base and promote efficient provision and use of services. It noted that ongoing implementation of commitments would be important in the assessment of Airservices's future price notifications.

On 12 June 2013, the ACCC decided to not object to Airservices's proposed price increases, which took effect from 1 July 2013.

Stevedoring and shipping

Container stevedoring monitoring

The ACCC oversees the Australian container stevedoring industry under the Competition and Consumer Act and must monitor prices, costs and profits of container terminal operator companies at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney. Container stevedoring involves lifting shipping containers on and off ships. The ACCC established its industry monitoring program in January 1999 as part of the 1998 waterfront reforms.

The ACCC publishes a monitoring report each year that informs the government and wider community about the performance of Australia's container stevedoring industry.

In November 2012, it released the 14th *Container stevedoring monitoring Report*, which highlighted some of the positive industry developments since the reforms of the late 1990s. Since then, container volumes have more than doubled, while the real costs of providing stevedoring services have decreased by 45 per cent. Much of this cost saving has been passed on to service users, with unit revenues falling by 38 per cent.

However, the report identified some challenges in moving towards a more competitive and productive industry. In 2011–12, industrial disputes, including strike action and 'go slow' strategies, disrupted stevedoring activities. As noted in the report, if this sort of disruption were to continue, it could undermine expected future gains from greater capacity and competition.

The entry of a third stevedore and plans for capacity expansion are welcome developments in the industry and should result in greater competition and productivity. However, the ACCC report noted that both are likely to increase the complexity of landside arrangements at ports. Appropriate planning and action from stevedores, ports, governments and other operators will therefore be required.

Industry fact—container ports

As an island trading nation, Australian container ports are important gateways for the movements of goods. The ACCC's container stevedoring monitoring program has shown that, since 1998, the volume of container cargo passing through our major ports has more than doubled while the cost of using container stevedoring services has fallen and service standards have generally improved.

Case study

ACCC container stevedoring monitoring: shining a light on an industry in transition

Historically in Australia, container stevedoring—the lifting of containers on and off ships—performed poorly compared with many overseas ports. Stevedoring charges were generally higher, ship loading and unloading was slower, and service less reliable. Container stevedoring work practices were inefficient and prescriptive, and led to delays at the terminal landside interface.

In 1998, the Australian Government implemented waterfront reform to improve productivity and reliability, lower costs and encourage a better managed workforce. Then, in 1999, the Treasurer directed the ACCC to monitor prices, costs and profits for the services of container terminal operators at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney.

The ACCC publishes annual monitoring reports which provide information to the government, industry stakeholders and the community about progress to a more efficient, competitive container stevedoring industry. The monitoring reports promote transparency in an industry where competition concerns have arisen from time to time as a result of a duopoly between Patrick Stevedores and DP World Australia and identify need for further reform.

The ACCC's monitoring program has shown that Australian stevedoring performance has improved significantly since the reforms. The latest report examined stevedoring performance up to June 2012, finding that:

- more containers are processed through terminals—more than doubling from 2.9 million 20-foot equivalent units in 1998–99 to 6.6 million in 2011–12
- stevedoring productivity has increased—the net crane rate (a commonly used productivity measure) for the five major ports was up from 18.7 containers per hour in the June quarter 1998 to 30.1 containers per hour in the June quarter 2012
- real unit costs and unit revenues are lower—improved capital and labour productivity levels and higher volumes have resulted in lower unit costs for the stevedores, and lower per unit charges that benefit users of stevedoring services
- stevedores have invested heavily in new capacity—since 1998–99, the value of the stevedores' assets (excluding effects of changes in corporate ownership) is estimated to have almost trebled
- industry profitability is higher than before the waterfront reforms—measured by a rate of return on average tangible assets.

In competitive industries, high returns, strong demand growth and substantial capital investment could be expected to attract new entrants. Yet, the Australian stevedoring industry has largely remained a duopoly, possibly reflecting impediments to new entry.

However, the structure of the stevedoring industry is changing, with a new entrant (Hutchison Ports Australia) in Brisbane and Sydney, and plans for a new stevedore at Australia's largest container port in Melbourne. New entry should exert pressure on the stevedores to improve efficiency and pass more of the gains to customers through better service and lower prices.

Future ACCC monitoring reports will shine a light on transitional and long-term outcomes of new entry as the Australian stevedoring industry evolves.

Shipping

The ACCC investigates complaints from parties adversely affected by shipping conference agreements and by the conduct of conference lines and non-conference lines with substantial market power. A 'liner conference' or 'shipping conference' is an agreement between two or more shipping companies to operate a scheduled cargo service on a particular trade route, with particular shipping rates and terms of carriage that apply to the conference members. During 2012–13, the ACCC did not complete any formal investigations regarding the conduct of shipping conference agreements.

Wheat export port terminal services

Access undertakings

Following abolition of the single desk export arrangements, wheat exporters who also own and operate port terminal facilities are required by law to pass an access test. This can involve having a port terminal service access undertaking accepted by the ACCC under the Competition and Consumer Act.

The access undertakings ensure competition in the market for bulk wheat export through a framework under which infrastructure owners and access seekers can negotiate commercial access terms, conditions and prices. By allowing flexibility for commercial negotiation, the undertakings serve the interests of both port terminal operators and exporters. The undertakings include:

- obligations on port operators not to discriminate or hinder access in providing port services
- clear and transparent port loading protocols for managing demand for port terminal services
- obligations on port operators to negotiate in good faith with eligible wheat exporters on access to port terminal services
- recourse to arbitration in the event that negotiations fail.

In addition to assessing new undertaking applications, the ACCC has an ongoing role in monitoring compliance with, and investigating potential breaches of, the existing undertakings. It also assesses applications to vary the undertakings and associated port terminal rules or protocols.

Viterra Operation Ltd's 2011 undertaking required it to replace its 'first in, first served' port terminal capacity allocation system with an auction system. In April 2012, the ACCC objected to Viterra's initial auction system on the basis that it was unlikely to efficiently allocate capacity. On 6 September 2012, the ACCC withdrew its objection following modifications made by Viterra, which has since auctioned available port capacity.

On 30 November 2012, the ACCC decided not to object to GrainCorp Operation Ltd's proposal to offer long-term port access agreements to users of its port terminals, which came into effect the following month. In March 2013, GrainCorp made further changes to the protocols to refine the long-term agreement conditions and allow customers to transfer allocated port capacity to each other. On 28 March 2013, the ACCC decided not to object to these changes. GrainCorp then signed three-year port access agreements with some customers but must leave at least 40 per cent of capacity available to exporters on an annual basis.

On 22 March 2013, Co-operative Bulk Handling Limited (CBH) applied to the ACCC to vary its 2011 undertaking, primarily to make changes to its auction capacity allocation system and to introduce a buyback process. The ACCC released an issues paper seeking stakeholder comments on 30 April 2013. Submissions were received in May and June 2013.

On 3 July 2013, the ACCC issued a draft decision proposing to accept the changes to the auction capacity allocation system but seeking industry's views on a revised buyback process proposed by CBH.

On 26 March 2013, Emerald Logistics Services Pty Ltd submitted a proposed undertaking to cover the period from 30 September 2013, when its existing undertaking expires, to 30 September 2014. The proposed undertaking seeks to carry over the arrangements under the existing undertaking subject to introducing some operational requirements to improve the efficiency of the port. The ACCC released an issues paper on Emerald Logistics' proposed undertaking for stakeholder comments on 30 April 2013.

Legislative amendments

In December 2012, amendments to the *Wheat Export Marketing Act 2008* (WEMA) gave the ACCC responsibility for monitoring compliance with continuous disclosure rules set out in the Act, a task previously carried out by Wheat Exports Australia. The rules require port terminal operators to state on their websites how they manage demand for port terminal capacity, and publish a forward shipping program for each port. The amendments also require port terminal operators to include an obligation to comply with the rules in their undertakings.

On 5 December 2012, the ACCC agreed to a minor variation to CBH's 2011 undertaking to include an obligation on rule compliance so that the company could meet the requirements of the amended access test. The undertakings of GrainCorp, Viterra and Emerald already included this obligation.

In addition to changing the access test, the amending legislation also allows, from 1 October 2014, the full repeal of the WEMA if the Minister for Agriculture, Fisheries and Forestry approves a mandatory code of conduct under the Competition and Consumer Act. The Minister must be satisfied that the code:

- deals with fair and transparent exporter access to port terminal services
- requires compliance with rules
- is consistent with the operation of an efficient and profitable wheat export marketing industry that supports the competitiveness of all sectors through the supply chain.

The ACCC is currently working with the Department of Agriculture, Fisheries and Forestry and Treasury, together with industry, to develop the code of conduct. Once it is in place, the ACCC will ensure compliance and take enforcement action when appropriate. If there is no mandatory code in place by 1 October 2014, the existing arrangements continue.

Industry fact—wheat export

While Australia produces around 3 per cent of the world's wheat, we account for around 12 per cent of world wheat exports.

Rail

The ACCC has an ongoing role in assessing and monitoring compliance with Part IIIA access undertakings submitted by rail access providers in relation to rail track infrastructure ('below-rail' services). To date, only one rail infrastructure provider, the Australian Rail Track Corporation (ARTC), has submitted access undertakings under Part IIIA of the Competition and Consumer Act. Two access undertakings are currently in place, one for ARTC's national interstate rail network and one for its Hunter Valley rail network in New South Wales.

Hunter Valley access undertaking

The Hunter Valley access undertaking, accepted by the ACCC in 2011, regulates access to the rail network in the Hunter Valley region leased by ARTC. The network is predominantly used to transport export coal from the region's mines to the Port of Newcastle in the world's largest coal export operation, but it is also used for non-coal freight and domestic coal.

Industry fact—coal export

The Hunter Valley Coal Chain is the world's largest coal export operation. Coal is the top New South Wales merchandise export in value terms, worth \$14.1 billion in 2010–11 (source: NSW Minerals Council, Coal specific statistics 2011).

The access undertaking requires ARTC to annually submit documentation to the ACCC demonstrating its compliance with the financial model and pricing principles specified in the undertaking. On 1 June 2012, ARTC submitted documentation for the six months from 1 July to 31 December 2011. On 13 July 2012 and 8 March 2013, it submitted revisions to its compliance documentation.

The ACCC consulted with stakeholders on the compliance documentation. On 4 April 2013, it made a determination that ARTC had complied with the relevant provisions of the access undertaking and that ARTC's total 'over-recovery' of \$0.73 million should be refunded to the above-rail operators using the Hunter Valley rail network.

Throughout 2012–13, the ACCC also assessed proposals by ARTC to vary the access undertaking. Following an earlier application to the ACCC, ARTC submitted a revised application to vary the access undertaking on 7 September 2012. This related to the initial determining of a coal train configuration that will deliver the most efficient use of the Hunter Valley rail network.

The ACCC consulted with stakeholders on the variation application, producing two consultation papers and a position paper setting out its preliminary views. In the early consultations, stakeholders raised concerns that ARTC's proposed access charges did not promote efficient use of, and investment in, coal chain infrastructure and that there was a lack of transparency on how the various charges were determined. Further, stakeholders were concerned that ARTC had not clearly explained how its proposed dispute resolution provisions would apply. On 17 October 2012, the ACCC agreed to the revised application on the basis that the early concerns had been addressed but flagged a number of other issues for resolution in stage two of the process.

On 3 August 2012, ARTC made a separate variation application to the ACCC that sought to incorporate into the access undertaking incentives for it to improve operating, maintenance and capital expenditure efficiency through financial reward. The ACCC consulted publicly on the variation application. A number of the submissions received took issue with the timing of the application, which was made when the industry was working through coal chain capacity issues. In light of these submissions, ARTC withdrew its application on 24 December 2012 but indicated its intention to reconsider performance incentives in 2013.

Interstate access undertaking

The interstate access undertaking, accepted by the ACCC in 2008, facilitates competition by regulating access for freight and passenger services on the interstate rail network leased by ARTC.

On 4 September 2012, ARTC submitted a variation application to extend the coverage of the undertaking to include the Southern Sydney Freight Line and associated access charge. The ACCC consulted with stakeholders on the variation application through a consultation paper released in September 2012 and a draft decision to agree to the application in February 2013. Stakeholders raised some concerns that the proposed access charge was high in comparison to alternative road and rail-based transport.

The ACCC agreed to the variation application on 10 April 2013 noting that, because transport alternatives are available, the Southern Sydney Freight Line is subject to some degree of competition and hence there are incentives for ARTC to negotiate on price. The ACCC further noted that the approved access charge is at the upper limit of what ARTC can offer parties wanting to run trains on the line and was the starting point for negotiations.

Industry fact—rail access

ARTC is responsible for the access management of over 10 000 km of standard gauge track in South Australia, Victoria, New South Wales and Western Australia. Access management entails the planning, scheduling and transit of trains through the network and associated commercial arrangements with train operators. ARTC was created after the Commonwealth and state governments agreed in 1997 to the formation of a 'one-stop-shop' for all operators seeking access to the national interstate rail network.

Clearing and settlement of cash equities

In September 2011, the Council of Financial Regulators invited the ACCC to join a working group to develop analysis on competition for the clearing and settlement of securities. The other members of the working group were the Australian Securities and Investments Commission (ASIC), the Reserve Bank of Australia and the Treasury.

In 2012, the working party released a discussion paper and held extensive consultations with, among others, financial market infrastructure operators, stockbrokers, 'back office' service providers, end-users and industry associations.

On 18 December 2012, the council delivered its final report to the Treasurer. There were three key recommendations:

- A decision on any licence application from an equities clearing facility seeking to compete in the Australian market should be deferred for two years.
- The Australian Stock Exchange should be required to develop a code of practice on clearing and settlement with key stakeholders.
- At the end of the two years, there should be a review of code's operation and effectiveness. Granting a licence to a competing central counterparty, or pursuing other regulatory outcomes, should also be considered.

While the council recognised that competition would deliver efficient outcomes, it also took into account extensive stakeholder feedback that the timing was not right for further changes with further cost implications for the industry, given market conditions and the magnitude of regulatory change already underway.

On 11 February 2013, the Treasurer announced full acceptance of the council's recommendations.

Postal services

The ACCC has three key responsibilities in regulating postal services:

- 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-subsidies between reserved and non-reserved services.

Australia Post cross-subsidy assessment

The ACCC scrutinises Australia Post's regulatory accounts and reports annually to determine whether or not the organisation is cross-subsidising its competitive services with revenue from its monopoly services.

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

Guide to ACCC inquiries into bulk mail disputes

Regulations made under the *Australian Postal Corporation Act 1989* allow the ACCC to inquire into disputes about the terms, including price of access to Australia Post's bulk mail services. These provisions aim to ensure that people using bulk mail services have them supplied on fair and reasonable terms.

On 14 December 2012, the ACCC released a guide on how it would inquire into potential disputes between Australia Post and users of its bulk mail services. The guide was published following consideration of submissions received in response to a draft ACCC guide released for public comment on 10 August 2012.

The guide, in addition to informing the public and stakeholders, should support the holding of timely and efficient inquiries.

Industry fact—postal services

In 2011–12 Australia Post delivered 4.8 billion mail articles.

Copyright

Licence fees

Under the *Copyright Act 1968*, the ACCC can join cases brought by businesses before the Copyright Tribunal regarding the price they paid for intellectual property licensed by copyright collection societies. In 2012–13, the ACCC was not involved in any such proceedings.

Law Reform Commission submission

The Australian Law Reform Commission (ALRC) is currently conducting a review of copyright and the digital economy, considering whether exceptions and statutory licences in the *Copyright Act 1968* are adequate and appropriate in the digital environment and whether further exceptions should be recommended. On 16 November 2013, the ACCC made submission to the ALRC's inquiry. The ACCC's submission:

- considered the extent to which current copyright law may hinder the potential economic benefits and efficiencies that have arisen as a result of the digital economy
- recommended that intellectual property rights should be fully subject to the competition provisions in the Act by repealing section 51(3) of the Act. Section 51(3) of the Act currently provides an exemption for certain copyright licence conditions from certain competition provisions of the Act.

The ALRC subsequently released a discussion paper in June 2013. The ACCC is continuing to engage with the ALRC's inquiry.

Productivity Commission inquiry into the National Access Regime

The Productivity Commission is holding an inquiry into the National Access Regime, a national system for the economic regulation of significant infrastructure, including ports and railways. The inquiry aims to assess the role and performance of the regime and propose operational improvements to ensure efficient access to essential infrastructure, thereby encouraging market competition. The commission released its draft report in May 2013 and will make its final report to the Australian Government in October 2013. The ACCC has participated in the process, providing submissions and contributing to public hearings. See *Assistance to parliamentary inquiries and government agencies* on page 186 for more information.

3.6 Improving regulatory practices

2012–13 Strategy: *Improve our regulatory practices and processes by further developing our thinking on how we regulate*

In performing its functions, the ACCC makes a number of information requests to businesses, including requests for data. Given the considerable effort usually involved in supplying this information, the ACCC strives to analyse and use it as effectively as possible to better fulfil its functions. In 2012–13, it progressed a number of initiatives to improve data and intelligence management.

Fuel

The ACCC analyses data to determine whether pricing behaviour in a particular fuel market may indicate potentially anti-competitive activity. The data also allows the ACCC to keep abreast of emerging issues in the marketplace and to inform environment scanning and enforcement activities. It is widely used in merger reviews, enforcement activities and market surveillance work.

Transport

Our airport monitoring role involves gathering data on prices, costs, profits and service quality to inform our observations about the performance of Australia's five major airports, including whether further inquiry may be needed.

The annual monitoring of six container ports enables the ACCC to make observations about the role of competition to achieve more efficient operation of, use of, and investment in Australian container stevedoring services.

Postal services

The ACCC analyses the regulatory accounts of Australia Post annually in assessing whether or not the organisation is cross-subsidising its competitive services with revenue from its monopoly reserved services.

Regulatory Development Branch

To further develop our thinking on regulation, the Regulatory Development Branch offers a seminars program which features internal and external presenters speaking about regulatory economics and finance topics. This is in addition to the various other initiatives set out in the case study below.

Case study

How we incorporate the latest thinking in regulatory economics into our work

The ACCC/AER is responsible for economic regulation in a number of sectors including energy, communications, water and transport. Economic regulation of infrastructure is a relatively new area of activity in Australia and was integral to the implementation of the National Competition Policy. The purpose of economic regulation is to put monopoly infrastructure service providers under some of the pressures that competition imposes in order to achieve the main benefit of competition: greater efficiency for the long-term interests of consumers.

The Regulatory Development Branch (RDB) was established in 2006 to increase the quality of economic analysis available to the ACCC/AER and promote the consistent use of economic principles across the different sectors which the ACCC/AER regulates. RDB economic specialists provide advice; research and develop best practice regulatory techniques; and contribute to economic discussion, debate and training on regulatory issues.

It is important to incorporate the latest thinking in regulatory economics into the ACCC/AER's work and one of the ways RDB facilitates this is by organising an annual Regulatory Conference. Held in Brisbane every July with over 400 delegates attending, this conference brings a number of staff together with industry participants, policy makers, academics, and regulators from around the world to hear and discuss the latest ideas about the theory and practice of regulation.

In 2012, the conference looked back at the major changes in regulatory economics over the past 30 years. It reflected on what lessons had been learned, how technological change had affected regulation and what new regulatory approaches and challenges were expected in the future.

- The themes for the 2013 conference will be customer involvement in the regulatory process and pricing.
- Besides the Regulatory Conference, there are many other ways in which RDB ensures that the ACCC/AER remains at the forefront of thinking in regulatory economics. A regular external publication, *Regulatory Observer*, provides information and updates about international and Australian regulatory developments and decisions. The ACCC and the AER belong to the Utility Regulators Forum, which was established in 1997 to encourage cooperation between Australian, state and territory based regulators. RDB edits *Network*, the publication of the Utility Regulators Forum, and distributes it quarterly.
- The branch also publishes an ACCC/AER staff working paper series to disseminate information on work likely to make a valuable contribution to public policy debate in areas of competition law, economic regulation and consumer protection.

Targets and results for goal 3: Promote the economically efficient operation of, use of and investment in monopoly infrastructure

Measures and Targets—Goal 3

Measure: Reasonable access terms and conditions (including prices) determined for nationally significant infrastructure services in a timely and transparent manner after appropriate consultation with stakeholders.

Targets	Results
Make regulatory determinations within statutory timeframes.	<p>AER made seven energy network pricing determinations and approved total revenue allowances of over \$5.1 billion.</p> <p>AER made decisions for gas transmission and distribution for Victoria and transmission for Queensland.</p> <p>AER made decisions on cost pass throughs and annual tariff variations for nearly 30 network businesses within statutory timeframes.</p>
Make price notification decisions within statutory timeframes.	Released a decision to not object to Airservices' proposed 2013–14 prices for terminal navigation, en route and aviation rescue and fire-fighting services within the statutory timeframe.
Review of declarations of declared services under the telecommunications access regime within statutory timeframes.	<p>See Reasonable access terms on page 117.</p> <p>The ACCC began its review of declaration for the fixed-line service, the mobile terminating access service and DTCS.</p> <p>The ACCC issued final access determinations for the local bitstream access service and wholesale ADSL.</p> <p>The ACCC made final determinations in relation to 13 access disputes concerning the internal interconnection cable charge paid in connection with Telstra's supply of the ULLS/LSS under the transitional provisions in the Act.</p>
Make access undertaking decisions and access determinations within statutory timeframes.	<p>AER access determinations and revenue determinations completed within statutory timeframes.</p> <p>Approved in October 2012, within the statutory timeframe, the varied 2011 Hunter Valley access undertaking from the Australian Rail Track Corporation, which incorporates new services and associated charges into the undertaking.</p> <p>Approved, in April 2013, within the statutory timeframe, a variation to the above corporation's interstate access undertaking to include the new Southern Sydney Freight Line, including terms and conditions of access to the interstate rail network.</p> <p>Assessed applications, within statutory timeframes, to vary access undertakings and associated port terminal rules or protocols from Viterro, GrainCorp, Co-operative Bulk Handling and Emerald.</p>

Make arbitration determinations within statutory timeframes.	<p>In November 2012, made final determinations on 13 access disputes relating to the line-sharing service and unconditioned local loop service.</p> <p>In December 2012 the ACCC established a commission to arbitrate three facilities access disputes lodged under the <i>Telecommunications Act 1997</i>.</p>
Establish initial access arrangements for the NBN.	<p>Assessed NBN Co's draft Special Access Undertakings lodged in September and December 2012.</p> <p>Conducted consultation with interested parties, including an industry forum.</p> <p>In April 2013, issued a draft decision which stated that the ACCC was not satisfied that the Special Access Undertaking met the legal criteria for acceptance.</p> <p>In July 2013, issued a draft notice to vary, specifying variations to the Special Access Undertaking, which allows NBN Co to lodge an amended undertaking.</p> <p>See <i>National Broadband Network Special Access Undertaking</i> on page 118.</p>
Inform relevant stakeholders in relation to ACCC functions under Part IIIA of the Competition and Consumer Act.	Made a comprehensive submission to the Productivity Commission's review of the National Access Regime.

Measure: Industry-specific laws (technical, pro-competitive, consumer protection monitored) and enforced in a transparent and consistent way.

Targets

Compliance with statutory reporting requirements to the Minister for Broadband, Communications and the Digital Economy (including annual reports on telecommunications competitive safeguards and retail prices, and Telstra's compliance with the retail price control arrangements).

No specific target.

Results

Complied with its statutory reporting requirements. See *Industry-specific codes and rules* and *Monitoring prices* on pages 123 and 124 respectively.

Continued to assess whether Telstra's migration plan complies with the Telecommunications (Migration Plan) Determination 2011.

Made a final decision to vary the Facilities Access Code.

Contributed to the review of local number portability issues.

Undertook annual monitoring of prices, costs, profits and quality of service at the five major airports under the *Airports Act 1996*.

Released the 14th *Container stevedoring monitoring* report examining prices, costs and profits at six Australian container ports.

Completed annual monitoring report of cross-subsidy in Australia Post as directed under the *Australian Postal Corporation Act 1989*.

Measure: Prices and quality of goods and services monitored and reported on to provide relevant information to the community about the effects of market conditions.

Targets	Results
Publish <i>Price Monitoring and Quality of Service</i> report for five major airports on an annual basis.	In April 2013, released the airport monitoring report with the results of monitoring of prices, financial reporting and quality of service for aeronautical services and airport car parking at Australia's five largest airports.
Provide annual monitoring report to the Minister for Sustainability, Environment, Water, Populations and Culture on compliance with water rules in the Murray-Darling Basin.	Provided the 2011-12 <i>Water Monitoring Report</i> to the Minister on 8 March 2013 and released it publicly on 3 April.
Publish weekly electricity and gas reports and wholesale market high-price reports in accordance with statutory timelines; publish <i>State of the energy market</i> report.	AER weekly energy reports and high-price event reports prepared and published in accordance with relevant statutory timelines. <i>State of the energy market</i> report published, with hard copies sent to key stakeholders and an electronic version available on the AER website.
Publish <i>Australia Post cross-subsidy report</i> on an annual basis.	In May 2013, released the report <i>Assessing cross-subsidy in Australia Post in 2011-12</i> .
Provide <i>Container stevedoring monitoring</i> report to Treasurer on an annual basis.	In November 2012, released the 14th <i>Container stevedoring monitoring</i> report examining prices, costs and profits at six Australian container ports.
Complete petrol monitoring report in order to provide to the Minister on an annual basis.	In December 2012, released the fifth <i>Monitoring of the Australian petroleum industry</i> report.

Measure: Relevant information disseminated to assist stakeholders in understanding the regulatory frameworks and the structure and operation of infrastructure markets so that they can more effectively engage in the regulatory process.

Targets	Results
Timely and accessible regulatory reports, determinations and issues papers.	<p>Consulted with Australian Rail Track Corporation stakeholders on corporation compliance documentation under the Hunter Valley access undertaking.</p> <p>Published decisions relating to variations of wheat export port terminal services access undertakings.</p> <p>Released dispute resolution guidelines for Australia Post's bulk mail service.</p> <p>ACCC regulatory reports, determinations and discussion papers accessible in a timely fashion on the website.</p> <p>AER regulatory reports, determinations and issues papers accessible in a timely fashion on the website.</p> <p>AER consulted extensively on the Better Regulation Reform Program, publishing consultation and issues papers and holding over 30 stakeholder workshops.</p> <p>Published the quarterly accounting separation-imputation report and non-price terms and conditions report.</p> <p>Published the current cost accounting report for the second half and full year ended 30 June 2012 and the first half of 2012-13.</p>

Measure: Timely advice provided to government and policy agencies on how efficient regulatory outcomes and competitive, well-functioning markets can be achieved.

Targets

Assistance to parliamentary inquiries and government agencies to develop policies and processes.

Results

The ACCC provided timely assistance to government and other public agencies.

Made a comprehensive submission to the Productivity Commission's review of the National Access Regime.

Assistance in telecommunications matters listed in Timely assistance to government agencies in the Communications section on page 126.

The AER made over 30 submissions on issues impacting on the national energy regulatory framework, including to the Australian Energy Market Commission, Productivity Commission and Senate Select Committee inquiry into electricity prices.

Provide responses to ministerials within 14 days and public correspondence within 28 days.

The ACCC and AER provided timely responses to ministerial and other correspondence.

Measure: Enhanced use of data analysis and intelligence to inform our regulatory approaches and interventions.

Targets

No specific target.

Results

The ACCC's monitoring work under Part VIIA of the Competition and Consumer Act involves gathering data and information on prices, costs and profits of particular services in monitored industries. The ACCC uses the information to prepare high quality analysis for inclusion in its monitoring reports.



Goal 4: Increase our engagement with the broad range of groups affected by what we do

Significant outcomes in 2012-13

- A number of significant initiatives were implemented in 2012-13 to improve Infocentre service delivery.
- The Infocentre outsourced all telephone calls to the SCAMwatch hotline in an effort to increase its accessibility to non-scam contacts, specifically members of the public and small businesses seeking information on their rights and obligations.
- A new customer relationship management system was introduced in July 2012 to improve the efficiency with which Infocentre contacts can be handled.
- Co-developing and running the ASEAN-US Federal Trade Commission-ACCC workshop on enhancing cross-border consumer protection enforcement and redress in the ASEAN region.
- ACCC continued its engagement with the International Competition Network (ICN), presenting at ICN conferences and co-chairing the ICN Cartels Working Group.
- ACCC built on its existing engagement with our counterparts in Asia. For the first time, the ACCC was invited by its regional counterparts to attend the East Asia Top Level Officials meeting on competition policy in Manila in August 2013.
- The ACCC also cemented its relationship with the Competition Commission of India, signing a Memorandum of Understanding during a high level visit to Australia in June 2013.

Goal 4: Measures

	Collaboration and partnerships with international and domestic regulators and stakeholders
	Timely advice provided to governments and policy agencies on how efficient regulatory outcomes and competitive, well-functioning markets can be achieved
	Effective education and communication to inform businesses about their rights and obligations under the Competition and Consumer Act

4.1 Effective communication with our diverse audiences

2012–13 Strategy: *Implement a comprehensive strategy to ensure effective communication with our diverse audiences that supports our goals*

Measures:

- Collaboration and partnerships with international and domestic regulators and stakeholders.
- Effective education and communication to reduce product safety related injuries.

The ACCC's approach to engagement

The ACCC is applying a strategic approach to tailoring messages and using communications channels to increase our connection with:

- consumers
- community groups and peak bodies who represent and act as a conduit to various consumer sectors, including those who can help us reach vulnerable and disadvantaged consumers
- small to medium businesses
- industry sectors and associations that can help us reach small to medium businesses
- journalists who can help to spread compliance and consumer rights messages and provide publicity for successful legal action that will deter other businesses from illegal conduct
- infrastructure industries and regulated industries
- our state and territory counterparts and other relevant regulators
- legal and business support professionals
- international forums and groups.

The ACCC's aim is to inform and educate so that consumers and small businesses feel confident to exercise their rights and businesses have the knowledge and skills to comply with the law.

The ACCC also provides regulatory information to large businesses, their suppliers and consumers so they understand the ACCC and AER's role in infrastructure and the measures we take to ensure competition and fair trading in these sectors.

The channels the ACCC and AER provide for engagement include:

- the ACCC website and associated websites dedicated to product safety, product recalls, scams, the Australian Energy Regulator and freedom of information. Visitors are able to submit online enquiries and complaints and subscribe for regular email updates
- mainstream media
- social media

- the ACCC Infocentre telephone lines, with general enquiries and complaints line and numbers specifically for
 - Indigenous consumers
 - small businesses
 - unit pricing
 - carbon claims
- education guides, DVDs, online learning modules and interactive apps
- information translated into languages other than English
- face-to-face education outreach for small businesses and compliance
- webinars
- speeches by the Chairman and commissioners
- consumer and business consultative committees that meet regularly
- meetings with businesses to assist them implement compliance programs
- the annual ACCC/AER Regulatory Conference
- publications and guides on a wide range of topics.

Infocentre

The ACCC's Infocentre is the initial contact point for telephone and written enquiries and complaints on competition, consumer and fair trading issues. Infocentre officers, who are required to have a good working knowledge of all ACCC functions and current issues, record information received from businesses and consumers in the ACCC complaints and enquiries database. The majority of contacts are by consumers seeking information or wishing to make a complaint about business conduct they believe may represent a breach of the Competition and Consumer Act.

All complaints are assessed against the ACCC compliance and enforcement policy and, where appropriate, escalated for further assessment or investigation. Information in the complaints and enquiries database is available to all staff for analysis of complaint trends, identification of issues for further inquiry, and development of compliance responses.

Responding to enquiries and complaints

For a number of years, the Infocentre has found it difficult to respond to telephone and written contacts in a timely manner as consumer and business demand has increased year on year. A number of significant initiatives were implemented in 2012-13 to improve service delivery.

The Infocentre has outsourced all telephone calls about scams to the SCAMwatch hotline in an effort to increase its accessibility to non-scam contacts, specifically members of the public and small businesses seeking information on their rights and obligations.

The main benefit from outsourcing to the SCAMwatch hotline is the increased number of non-scam contacts served by our highly trained in-house team. In 2011-12, 60 per cent of all calls served related to scam reports. Now 90 per cent of calls served-in-house were non-scam contacts, meaning the ACCC handled over 20 000 more individual exchanges on Competition and Consumer Act and Australian Consumer Law matters compared to the last financial year. The benefit of this is also seen in the quality of matters being escalated for further consideration. Calls to the SCAMwatch hotline continue to be entered into the ACCC database and are regularly assessed.

The change in business model does have an impact on reporting and the comparison that can be drawn to previous years. In particular, it would appear as though call volumes have dropped. However, this is in part attributable to a more accessible service as fewer customers

are hanging up when asked to wait in a queue. Another impact on volumes we continue to monitor closely is the new website, which enables customers to more readily self-serve. In addition, a new customer relationship management system replaced an earlier system in July 2012. It improves Infocentre contact-handling efficiency. Web forms, which have grown both in number and as a proportion of contacts, have particularly benefited from the introduction of the new system as work-flows and template responses can now be managed within the new system. It will also be possible over time to enhance the system to help provide the most accurate and up-to-date information to consumers.

Other initiatives implemented during the year included introducing a revised management report, increasing the transparency of Infocentre reporting, improvements to the quality management processes and improvements to the telephony system, including introducing an interactive voice response system, allowing more efficient management of telephone contacts. For example, recognising that callers to the ACCC's Indigenous hotline rarely wait on line, it is now possible to transfer callers on this line directly to a trained and available staff member.

The call statistics for 2012-13 show:

- 133 077 contacts were served by telephone or received a written response
- 50 per cent of calls were answered within 60 seconds
- 38 per cent of emails and web forms were answered within 15 working days
- 61 per cent of letters were responded to within 15 days.

Where a contact via web form provides us with information but does not seek a response or ask a specific question, we record the information in our database but we don't necessarily respond. The new service charter published in March specifically sets the expectation that not all contacts will receive a response.

Figure 3.8: Infocentre contacts

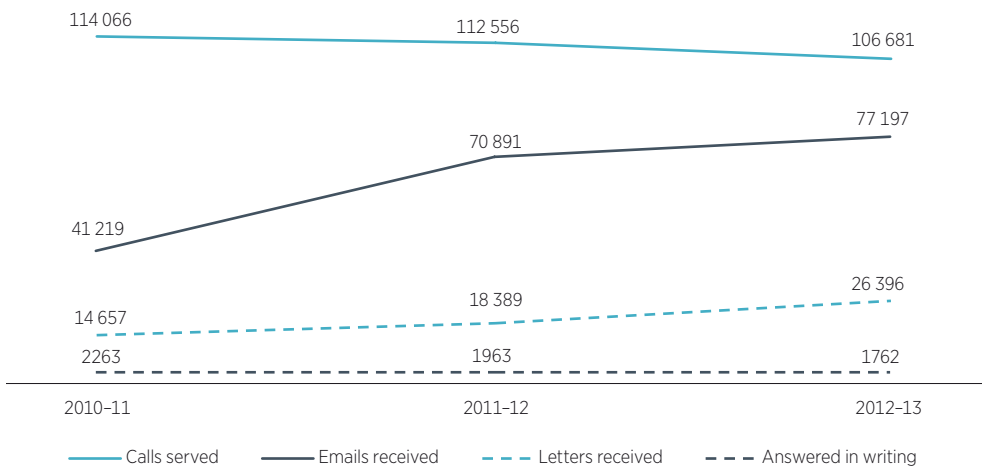
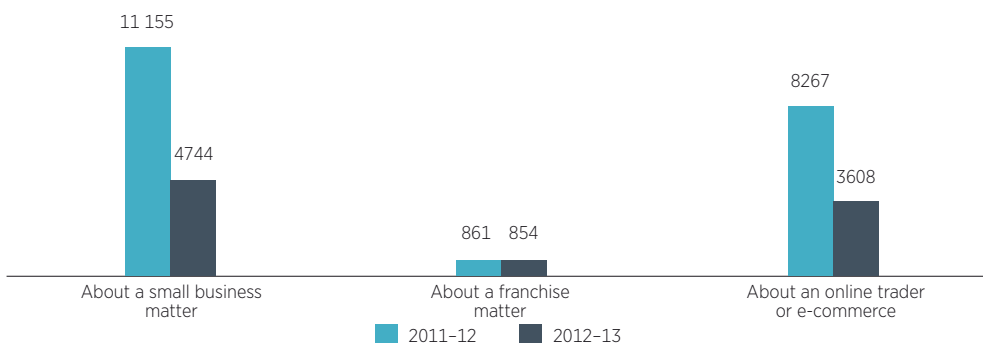


Figure 3.9: Business contacts



Escalation to investigations

Some complaints that may require further investigation are placed under assessment and reviewed by senior enforcement and compliance staff. Review may result in a decision to take no further action or to progress the matter to an initial investigation.

An initial investigation is the first stage of a detailed complaint assessment by Enforcement Operations staff. An initial investigation may be further escalated to an in-depth investigation, alternatively, it may be resolved administratively or the decision made to take no further action. The most serious matters may become in-depth investigations. Although the ACCC may decide to take no further action in relation to an in-depth investigation, these resource-intensive cases may involve the use of the ACCC's coercive investigative powers and may be resolved with court-enforceable undertakings or infringement notices or by the institution of proceedings.

The different investigative stages help ensure appropriate resource allocation and consistent handling of matters, and balancing matters with regard to ACCC's Compliance and Enforcement Policy. Table 3.5 charts the number of matters created at each of these stages in the financial year.

Table 3.5: Complaint actions

Category	2011-12	2012-13
Contacts received (phone, email & letters)	185 410	185 640
Contacts recorded in the database	148 098	163 796
Under assessments commenced	2 591	2 361
Initial investigations commenced	562	442
In-depth investigations commenced	145	146
Litigation commenced	26	27

Table 3.6: Top 10 industries excluding scams for complaints and enquiries

Industry	Contacts
Other personal services	84 294
Other interest group services	24 117
Non-store retailing	3 889
On selling electricity and electricity market operation	2 534
Other store-based retailing	1 895
Wired telecommunications network operation	1 629
Other auxiliary finance and investment services	1 599
Car retailing	1 543
Motor vehicle manufacturing	1 209
Air and space transport	1 085
Fair trading and consumer protection including Australian Consumer Law	Contacts
Guarantee as to acceptable quality	11 793
Guarantee as to due care and skill	2 703
Guarantee relating to the supply of goods by description, sample or demonstration	1 283
Guarantee as to fitness for any disclosed purpose etc.	1 245
Guarantees as to fitness for a particular purpose etc.	926
Consumer guarantees total	17 950
Misleading or deceptive conduct	15 141
Wrongly accepting payment	3 683
False representation price	1 234
False representations goods—standard, quality, value, grade, composition, style etc.	809
False representations total	2 043
Harassment and coercion	619
Effective competition and informed markets part IV and IVB	Contacts
Contravention of industry codes	457
Exclusive dealing	209
Misuse of market power	173

Table 3.7: Geographic location of contacts recorded in the national database

State	ACL	Scams		Consumer protection		Restrictive trade practices		Industry codes		Other		Total
		This Year	Last Year	This Year	Last Year	This Year	Last Year	This Year	Last Year	This Year	Last Year	
New South Wales	14 507	22 369	40 519	36 876	738	718	146	124	4 125	5 882		43 600
Queensland	11 931	18 379	34 739	30 310	463	516	113	110	2 757	3 961		34 897
Victoria	14 436	17 246	31 732	31 682	579	608	114	87	3 688	5 667		38 044
Western Australia	5 184	8 802	14 263	13 986	181	235	59	56	1 222	1 970		16 247
South Australia	4 640	6 747	12 453	11 387	159	178	35	34	966	1 917		13 516
Australian Capital Territory	3 280	4 680	6 131	7 960	80	100	9	13	664	1 381		9 454
Tasmania	1 061	2 130	3 470	3 191	34	41	12	10	217	387		3 629
Other	2 482	9 473	1 624	11 955	9	108	2	21	271	1,111		13 195
Northern Territory	498	744	1 493	1 242	23	19	2	2	111	195		1 458

Intelligence, analysis and reporting

The ACCC continues to invest in developing its intelligence capability to inform our strategic enforcement and compliance priorities, for example, by analysing emerging issues arising from complaint data and broader analysis of specific issues.

In particular, efforts were focused on improving intelligence processes and developing a range of intelligence products to provide timely information to guide further enforcement and compliance action. To this end a number of *Information Briefs* were produced addressing specific areas of trader misconduct and non-compliance with areas of the ACL. As a result of this intelligence, a number of industries and traders were identified for further compliance and/or enforcement action.

The ACCC is also working with state and territory consumer agencies to further develop all ACL regulators' intelligence capabilities and enhance cooperation. This is occurring under the auspices of the Compliance and Dispute Resolution Advisory Committee using the ACLINK portal. Engagement is also occurring with intelligence counterparts at an international level to assist and inform our understanding of both consumer and competition issues more widely while strengthening our understanding of the emerging environment and its likely impact on the ACCC.

Case study

ACCC commits to clearer communication in plain English

With the ACCC Infocentre answering over 26 000 pieces of correspondence in 2012–13, we have renewed our commitment to clear communication in plain English.

We initially identified the need for easy-to-read communication from feedback received during consultations for the ACCC's Service Charter review in 2013. The review found that our readers struggled to understand highly legal and technical terms and long explanations.

Improving our communication included training our staff in using plain English when writing correspondence. We also learned from best practice examples of Australian Government communication.

Specific improvements to our written correspondence include:

- answering the question posed to the Infocentre up-front
- using everyday English
- including helpful links to relevant information and resources on the ACCC's website.

Stakeholders reacted positively to our use of plain English, particularly to clear, up-front answers to questions. As a result, the number of people seeking more information from the ACCC after receiving a letter from the Infocentre fell by 3.5 per cent. There were internal gains as well, with the productivity of the Infocentre correspondence team going up by 20 per cent.

4.2 Consultative committees and government liaison

2012–13 Strategy: *Undertake an active program of stronger and managed partnerships with a broad range of organisations that can assist us deliver outcomes that impact favourably on consumer welfare*

Measure:

- Collaboration and partnerships with international and domestic regulators and stakeholders.

Introduction

We host and participate in a wide range of consultative committees and forums to encourage discussion around consumer, competition, and regulatory issues relevant to our work.

The ACCC has developed deep knowledge, expertise and experience in a range of matters that we deal with. Consequently, the ACCC is an authoritative voice on many issues, speaking on the workability of proposals and advocating on behalf of those without a voice, for example, vulnerable consumers. The ACCC uses its expertise to input to government and related inquiries.

Collaboration and partnerships with Australian regulators

In 2012–13, the ACCC participated in ongoing consultation with various government agencies and external stakeholders. In particular, the ACCC liaised with Australian Government agencies on the operation of the Competition and Consumer Act and Australian Consumer Law, and proposed legislative amendments. The ACCC also works closely with state and territory fair trading agencies to ensure the one law multi-regulator model remains effective in producing positive outcomes for business, consumers and the community.

Collaboration with ACL regulators

The ACCC engaged with Australian Consumer Law regulators through various committees of the Council of Australian Governments Legislative and Governance Forum on Consumer Affairs. These included: the Policy and Research Advisory Committee, Compliance and Dispute Resolution Advisory Committee and the Education and Information Advisory Committee.

Labelling of olive oil

Extensive work has been undertaken nationally by consumer agencies to respond to concerns raised about the labelling of olive oil in Australia. This included the release in October 2012 of new guidance for consumers, *The good oil*, providing information about the different labels used on olive oil products.

The ACCC and other ACL regulators also conducted a national compliance and enforcement operation to test claims made on olive oil packaging, buying over 350 olive oil products nationwide.

Based on surveillance work, a number of traders (both local producers and importers/distributors) were issued substantiation notices asking them to verify claims made on their olive oil packaging. Following assessment by consumer agencies, the majority of these traders have been found to comply with the requirements of the ACL. This work has now concluded and has identified minimal evidence of consumer detriment in the market in terms of false or misleading representations in the labelling of olive oil. The ACCC will continue to monitor food claims, including olive oil.

Country-of-origin food labelling

The ACCC worked with the state and territory Australian Consumer Law (ACL) regulators to consider a range of consumer protection concerns about food labelling practices, including country-of-origin food labelling.

The ACCC is also part of an Australian Government working group which is reviewing existing guidance for industry and consumers on country-of-origin food labelling. The group was formed on the recommendation of the Legislative and Governance Forum on Food Regulation that consumer agencies review existing country-of-origin materials and, if appropriate, develop an education campaign to clarify labelling.

The working group includes agencies responsible for policy and/or enforcement of country-of-origin labelling.

In October 2012, the ACCC released the consumer guide on country-of-origin food labelling, *Where does your food come from?*, following consultation with the Australian Government working group, ACL regulators, representatives of industry and consumers. The ACCC also commenced updating its guidance to business on these issues.

The ACCC released a smartphone app in early December 2012 which outlines common terms used in country-of-origin labelling.

In November 2012, Australian Government regulators issued a number of substantiation notices to businesses, asking them to substantiate country-of-origin claims to determine if these claims were genuine and whether further investigation was necessary. The work found minimal evidence that the representations were false or misleading.

Forum on food sector relationships

The Forum on Food Sector Relationships, set up by the Minister for Agriculture, Fisheries and Forestry and the Assistant Treasurer, agreed in September 2012 to an industry-led approach to dealing with supply chain issues in the food and grocery industry, such as misuse of their superior bargaining position by larger supermarket chains in supply contracts.

One of the forum's initiatives has been to establish an industry working group to develop a voluntary industry code of conduct, enforceable under the Act. The ACCC has been engaging with the working group and other government agencies on approaches to address behavioural issues in the industry through a prescribed voluntary code.

Communications

The ACCC attends a quarterly regulatory roundtable in the telecommunications sector, which is also attended by the Australian Communications and Media Authority (ACMA) and the Telecommunications Industry Ombudsman (TIO). The roundtable ensures that upcoming issues in the telecommunications sector can be dealt with in a consistent manner by all regulators operating in the area.

The ACCC has also made submissions to ACMA about its review of the Telecommunications Service Provider (Premium Services) Determination 2004 (No. 1) and developing an international mobile roaming standard. Both of these projects are ongoing.

The ACCC has also liaised with ACMA about in-app purchases prior to ACMA's release of an occasional paper entitled *Mobile Applications: Emerging Issues in media and communications*.

Utility Regulators Forum

The Utility Regulators Forum was established to encourage cooperation between Commonwealth, state and territory based regulators. The ACCC provides secretariat services for the forum as well as editing and publishing its quarterly newsletter, *Network*. The forum met twice in 2012–13 to discuss a range of regulatory issues common across Australia and New Zealand.

Council of Financial Regulators

The ACCC participated in a Council of Financial Regulators working group with other Australian regulatory agencies on competition in markets for the clearing and settlement of securities. See *Clearing and settlement of cash equities* on page 164.

Assistance to parliamentary inquiries and government agencies

The ACCC advises and assists parliamentary inquiries and government agencies in developing policy and legislation. In addition to those matters listed under the heading *Timely assistance to government and agencies* in goal 3, the ACCC undertook the activities detailed below in 2012–13.

It tabled its 14th report on anti-competitive and other practices by health funds and providers relating to private health insurance in the Senate. The report focused on the insurer practice of not recognising certain types of allied healthcare provider who offer the same or similar services as other 'recognised' providers. Tabled in the Senate on 21 March 2013, the report is available on the ACCC's website at www.accc.gov.au/publications/private-health-insurance-reports/private-health-insurance-report-2011-12.

The ACCC made a submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into potential reforms of National Security Legislation concerning amendment of the law enforcement provisions of the *Telecommunications (Interception and Access) Act 1979* and which features of the existing regime should be retained.

Productivity Commission

Productivity Commission inquiry into regulator engagement with small business

The Australian Government directed the Productivity Commission to undertake a nine-month benchmarking study into regulator engagement with small business. The purpose was to identify best practice in regulator engagement and determine whether it could be adopted to reduce the compliance burden on small business while sustaining good regulatory outcomes. A draft report should be released in July 2013.

The ACCC made a submission to the Productivity Commission's small business survey regarding the rights and responsibilities that all small businesses operating in Australia have under the *Competition and Consumer Act 2010*. Small businesses are treated as consumers under various ACL provisions, for example, they also have the protection of the consumer guarantees. The ACCC goes to great lengths to emphasise these rights in its educational activities.

Productivity Commission inquiry into the National Access Regime

The Productivity Commission is inquiring into the National Access Regime to assess the role and efficacy of the regime and propose ways of improving its operation to ensure the efficient operation and investment in infrastructure, thereby encouraging competition in dependent markets. The commission released its draft report at the end of May 2013; its final report is due in October 2013.

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

The ACCC made an initial submission to the inquiry in February 2013. The ACCC's position, as set out in its submission, is that:

- the National Access Regime is an important part of Australia's regulatory framework and should be retained with some changes to enhance its effectiveness
- the economic rationale for infrastructure access regulation is to redress market failure caused by the natural monopoly characteristics of certain infrastructure operators
- criterion (b) of the declaration criteria should be defined as a 'natural monopoly' test rather than the 'privately profitable' test endorsed by the High Court.

The ACCC will continue to engage throughout the inquiry process through public submissions, attendance at public hearings, participating in staff-level workshops and informally liaising with Productivity Commission staff.

Productivity Commission inquiry into electricity network regulation

The purpose of the inquiry was to inform the Australian Government about any practical or empirical constraints on the use of benchmarking of electricity network businesses, and provide advice on how benchmarking could deliver efficient outcomes consistent with the National Electricity Objective. The inquiry also considered whether the regulatory regime is delivering efficient levels of interconnection. The commission tabled the final report in April 2013 and published it on its website in June 2013. The AER made three submissions to this review during the year:

- on 30 November 2012, the AER's submission emphasised that the Productivity Commission's draft report made a considered contribution to the debate relative to the terms of reference, but questioned content on corporate governance and the operation of the regulatory regime
- on 22 February 2013, the AER provided a submission on AER resourcing and our views on the use of price caps versus revenue caps
- on 22 March 2013, the AER provided a further submission on potential interim solutions to disorderly bidding.

Joint Parliamentary Committee on the National Broadband Network

The Joint Parliamentary Committee on the NBN was established in March 2011. It reports every six months on matters it determines relevant, such as:

- progress of the NBN rollout
- reporting against the financial business plan
- key performance indicators
- assessment of risk management processes.

In 2012–13, the ACCC contributed to committee reviews:

- appearing at the committee hearing for its Fourth Review in August 2012
- making a submission to the Fifth Review in response to questions on notice in April 2013.

Contribution to other inquiries

In addition to the contributions detailed above, in 2012–13 the ACCC:

- gave evidence and a private briefing to an inquiry by the House Standing Committee on Infrastructure and Communications into information technology price discrimination
- made a submission and gave evidence to an inquiry by the Select Committee on Electricity Prices
- made a submission to an inquiry by the South Australia House of Assembly Select Committee on the Grain Handling Industry into the access obligations imposed on Viterra Ltd
- gave evidence to an inquiry by the House Standing Committee on Economics into Australia's oil refinery industry
- gave evidence to an inquiry by the Senate Environment and Communications Legislation Committee into the package of media reform bills
- made a submission to an independent review of the Franchising Code of Conduct
- made a submission to the *Review of the Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*.

Consulting with stakeholders

The ACCC's consultative committees continued to engage with stakeholders in 2012–13. Consultation with these committees has informed the compliance and enforcement activities of the ACCC, in particular our work in topical areas such as energy, telecommunications, carbon, door-to-door sales, online retailing, small business and franchising. Additionally, these committees have fed into the ACCC's activities in relation to potentially disadvantaged and vulnerable groups such as Indigenous Australians, senior Australians and young persons. Activities of the ACCC and AER's consultative committees are outlined below.

Consumer Consultative Committee

The committee meets three times a year to discuss issues affecting consumers and to achieve tangible outcomes for consumers through work by its members and the ACCC. Members provide comment on issues affecting consumers relating to the Act. The committee also advises on consumer research and education projects.

Committee members include representatives from: CHOICE, Financial Counselling Australia, the Indigenous Consumer Assistance Network, the Council on the Ageing, and Consumer Law Action Centre. The ACCC recently appointed three new members who represent the Australian Council of Social Services, Youth Action and Policy Association and Australian Multicultural Education Services.

Small Business Consultative Committee

The ACCC's Small Business Consultative Committee is a forum where competition and consumer law concerns related to the small business sector can be discussed by industry and government. Meetings are held twice a year and are chaired by ACCC Deputy Chair, Dr Michael Schaper.

Members of the committee are drawn from a range of areas including small businesses, industry associations and business advisory groups.

Franchising Consultative Committee

The committee is a forum through which competition and consumer law concerns relating to the franchising sector and other franchising issues can be considered and addressed collaboratively. The committee met three times in 2012–13, including an out-of-session meeting attended by the 2013 Franchising Code reviewer, Mr Alan Wein, to discuss issues being considered as part of the Franchising Code review.

Fuel Consultative Committee

The ACCC chairs the Fuel Consultative Committee, established in 2010 to provide an opportunity for meaningful dialogue between the ACCC, the fuel industry, and motoring organisations. The meetings provide an opportunity for the ACCC to increase its understanding of fuel industry issues and helps the ACCC fulfil its role on issues related to competition and consumer protection in the fuel industry. The ACCC hosted and chaired two meetings of the Fuel Consultative Committee in November 2012 and May 2013.

Infrastructure Consultative Committee

The committee meets twice a year to discuss the broad issues of infrastructure regulation. It is an important mechanism for the ACCC and AER to gain feedback from stakeholders in the sector, and allows infrastructure representatives to learn about issues affecting the regulation of other areas.

Committee members represent a variety of infrastructure sectors including energy, telecommunications, water, rail, port and airports.

The first meeting of 2012–13 examined how to increase customer involvement in the regulatory process. The second meeting of 2012–13 examined the results of a review of the committee and its future activities. Recent critical issues for the ACCC/AER and other members were also discussed at both meetings.

Wholesale Telecommunications Consultative Forum

The forum focuses on implementation of and compliance with Telstra's structural separation undertaking and migration plan. Participation allows the ACCC to identify and assist in resolving current and emerging issues in the forum's area of interest, and facilitate open communication between Telstra, wholesale customers and the ACCC. The ACCC chairs the forum, which was established in June 2012.

AER consultation

The AER meets regularly with a broad range of stakeholders to discuss key issues impacting on consumers in the energy market.

It established the Customer Consultative Group to advise on consumer issues in the retail market. There were three committee meetings in 2012–13, with discussions ranging from energy marketing to door-to-door selling, billing, affordability and hardship.

A Consumer Reference Group was also established in January 2013 to assist consumer groups to contribute to the development of the AER's Better Regulation Reform Program guidelines and allow for coordinated and informed consumer input to future regulatory processes.

The AER is developing a stakeholder engagement framework, which will cover all its activities and ensure that the AER consistently and meaningfully considers stakeholder needs and interests. The framework will be finalised and published by August 2013.

Consultation on water-related issues

The ACCC participates (as an observer) in the Murray-Darling Basin Authority's Trade Working Group and Trade Operators' Panel, both of which discuss interstate water trade issues in the basin.

In 2012-13, the ACCC also advised the Australian Department of Environment, Water, Sustainability, Population and Communities on water-related issues, for example, issues associated with water market intermediaries.

International partnerships and collaboration

The ACCC and AER continued to engage closely with competition and consumer protection counterparts around the world. The need for international cooperation has grown as trading across borders has become more frequent and consumers have become exposed to more complex transactions across multiple jurisdictions. From an economic regulatory perspective it is important to learn from different regulatory regimes and given the nature of investment flows to determine whether Australian regimes are on a similar or different path to those of our international counterparts.

The ACCC and AER undertake a range of activities with their international counterparts, including cooperation on specific cases and discussions on international best practice and convergence. Cooperation is facilitated by groups such as the ICN, International Consumer Protection Enforcement Network, OECD, International Consumer Product Health and Safety Organisation, the East Asia and Pacific Infrastructure Regulatory Forum and the Energy Intermarket Surveillance Group. The ACCC and AER participate actively in such networks to help promote effective policies and enforcement around the world.

Bilateral engagement

The ACCC regularly engages and exchanges information with other regulators internationally. In 2012-13, the ACCC:

- received and responded to 63 requests for information from agencies in Canada, Denmark, European Union, India, Israel Japan, Malaysia, New Zealand, Papua New Guinea, Philippines, Singapore, Taiwan, Thailand, Turkey, the United Kingdom, the United States of America, Vietnam and Zambia. Sharing evidence of contraventions, experience in best practices and providing capacity building assistance strengthens relationships with regulators enhancing ACCC and AER enforcement capability and improving the effectiveness of global competition and consumer protection networks
- made 34 requests for information, to assist ACCC activities, to various countries including: Canada, European Union, France, Germany, Hong Kong, Japan, New Zealand, Singapore, United Kingdom and the United States of America. Receipt by the ACCC of this information and assistance increased the efficiency of merger and enforcement investigations
- hosted study visits by officials from Bangladesh, Cambodia, Chile, China, India, Indonesia, Kenya, Malaysia, Mexico, Namibia, Papua New Guinea, Singapore, South Korea and Thailand
- prepared reports and made presentations on Australian competition, consumer and regulatory law developments at various international events, including at competition, consumer protection and regulatory forums organised by Asia-Pacific Economic Cooperation (APEC), Association of Southeast Asian Nations (ASEAN) under the ASEAN-Australia-New Zealand Free Trade Agreement, ICN, International Consumer Protection and Enforcement Network (ICPEN) and the OECD

- the ACCC was particularly active in the South East Asian region, sharing information about best practices, influencing the development of the emerging competition regimes and promoting regime harmonisation to increase the effectiveness of international enforcement cooperation.

The ACCC signed a Memorandum of Understanding (MoU) with the China State Administration for Industry & Commerce. The MoU promotes cooperation and coordination between the two agencies, particularly in regard to law enforcement, information sharing and staff training.

The ACCC also signed a MoU with the Competition Commission of India. The MoU is designed to facilitate coordinated and effective responses to cross border conduct affecting Australian markets and consumers.

Staff from the AER also participated in personnel exchanges with international regulators such as the Office of Gas and Electricity Markets in the United Kingdom, the Energy Market Authority of Singapore and the Market Surveillance Administrator in Alberta Canada. A staff member of the ACCC participated in an exchange with the Commerce Commission of New Zealand. The exchanges both enhanced the skills of staff involved and forged stronger inter-agency relationships.

Regional engagement

Recognising the value of effective competition and consumer protection regulation and regional cooperation in building effective regional enforcement and compliance, the ACCC continues to engage with the Asia-Pacific region, and beyond. This engagement included:

- co-developing and running the ASEAN-US Federal Trade Commission-ACCC workshop on enhancing cross-border consumer protection enforcement and redress in the ASEAN region
- participating in the OECD-Korea Policy Centre training seminars
- participating in the ASEAN Experts Group on Competition Capacity Building Workshop
- participating in the APEC Competition Policy and Law Group Conference
- providing a three-day training course for officials of the Hong Kong Customs & Excise Department
- hosting an official from the Japan Fair Trade Commission to study Australia's cartel investigation framework
- hosting an official from the Taiwan Fair Trade Commission on a three-month secondment
- hosting regional participants at the ACCC's investigations skills training courses
- commencing a one-year secondment to the Competition Commission of Singapore
- participating in the East Asia and Pacific Infrastructure Regulatory Forum Strategic Planning Workshop, which focuses on capacity building and knowledge exchange among infrastructure regulators in the East Asia-Pacific Region.

The ACCC continued a major research project, Better Economic Regulation of Infrastructure: International Insights. The project will assist both ACCC staff and the broader community in understanding diverse regulatory practices. Staff are liaising with overseas regulatory agencies and institutions in order to complete it.

The ACCC/AER again hosted its annual Regulatory Conference to bring together industry participants, policy makers, academics, and regulators from around the world to consider the latest ideas about regulatory theory and practice. The theme of the 2012 conference was 'Lessons learned and new approaches'. Topics included governance for different organisational structures, critical issues in competition in communications markets, and minerals supply chain investment in Australia.

ICN

The ACCC continued its long engagement with the ICN, presenting at conferences and co-chairing the Cartels Working Group. This work included:

- preparing and presenting at international workshops and tele-seminars on competition issues including mergers, cartels and unilateral conduct
- coordinating the work of the International Competition Network as the network Horizontal Coordinator and participating in the ICN Steering Group
- streamlining information sharing in cartel investigations by co-developing an information sharing project and identifying the information sharing mechanisms and contact points among competition regulators
- promoting a better understanding of economic analysis in merger reviews through a series of discussions and exchanges of practical techniques in the economic analysis of mergers.

OECD

As the current chair of the OECD Product Safety Working Party, the ACCC contributed to several working party projects, including the OECD extranet portal for sharing information among product safety regulators and enforcement bodies globally. The working party also launched the OECD global portal on product recalls, www.globalrecalls.oecd.org, which lists product safety recalls from countries across the world, including Australia. It continues to investigate the development of a global injury data base and international alignment of risk assessment processes.

At the OECD Competition Committee meetings the ACCC advocated for increased mechanisms to support international cooperation in competition investigations, including combating cross border cartels and contributed to numerous Australian papers on competition issues impacting Australia and the region. In February 2013, Commissioner Dr Jill Walker was elected a member of the OECD Competition Committee Bureau.

The ACCC also attended two meetings of the OECD Regulatory Policy Committee, which included roundtables examining how countries identify, prioritise and combine regulatory reforms to remove structural bottlenecks and support their growth and welfare agendas.

International Consumer Protection Enforcement Network

The ACCC continued its long engagement with the ICN, presenting at conferences, co-chairing the Intelligence Steering Group and sitting on the ICPEN Advisory Group. ICPEN work during the past year included:

- gathering intelligence on consumer protection priority areas of focus from members, collating, analysing, and preparing the twice yearly intelligence report
- participating in the ICPEN international sweep of the internet to identify non-compliant and/or fraudulent online activity.

The ACCC is collaborating with the US Federal Trade Commission on developing and writing an enforcement training manual for the ICPEN. The manual will identify and bring together best practice enforcement methodologies and tools that regulators use in conducting investigations of consumer protection matter.

International Consumer Product Health and Safety Organization

As the current chair of the OECD Product Safety Working Party, the ACCC is focusing on improving information sharing across national borders. The ACCC also participates in the International Consumer Product Health and Safety Organization forum for the exchange of ideas and information on health and safety issues related to consumer products manufactured and marketed in the global marketplace.

Energy Intermarket Surveillance Group

The AER is a founding member of the Energy Intermarket Surveillance Group, the sole international group promoting coordination between energy market surveillance and enforcement bodies. The group's purpose is:

- to provide a forum for the private exchange of ideas about issues, techniques, procedures and other matters by monitors of wholesale energy markets
- to develop common ideas on the information requirements, market performance indicators and type of conduct that should be subject to monitoring, mitigation or sanction.

Group members represent 17 electricity markets from North and South America, South East Asia, Australia and New Zealand. Behind the scenes, the AER manages the private extranet for participants to exchange ideas between meetings. In April 2013, AER staff attended a group meeting hosted by the Market Surveillance Administrator in Calgary, Atlanta. The AER is preparing to host the 28th meeting of the group in Adelaide in October 2013, which will be only the fourth time the meeting has been hosted outside North America.

Targets and results for goal 4: Increase our engagement with the broad range of groups affected by what we do

Measures and Targets—Goal 4

Measure: Collaboration and partnerships with international and domestic regulators and stakeholders.

Targets

No specific target.

Results

Actively participated with international organisations and forums, enhancing the effectiveness of the ACCC and AER in the short and medium term.

AER staff participated in staff exchanges with international agencies and attended international events on energy regulation.

Measure: Timely advice provided to governments and policy agencies on how efficient regulatory outcomes and competitive, well-functioning markets can be achieved

Targets

Assist parliamentary inquiries and government agencies to develop policies and processes.

Results

Assisted a range of different inquiries. See pages 186–8 for the ACCC and page 142 for the AER.

Measure: Effective education and communication to inform businesses about their rights and obligations under the Competition and Consumer Act

Targets

Accessible websites with relevant, up-to-date information.

No specific target.

Results

Published up-to-date information on all AER regulatory, monitoring, reporting and enforcement activities on www.aer.gov.au.

The AER launched the Energy Made Easy website, www.energymadeeasy.gov.au to help consumers compare energy prices in participating state jurisdictions. The site meets WCAG 2.0 'AA' accessibility requirements.

