PART 3
REPORT ON PERFORMANCE

Performance reporting framework

This part reports on the ACCC's and the AER's performance for 2011–12, based on the performance reporting framework provided in the 2011–12 Treasury portfolio budget statements (PBS). The ACCC and the AER jointly report against one program and one outcome, as shown in Table 3.1.

To increase the transparency and quality of its performance reporting, provide greater consistency with its corporate plan, and to set a basis for more consistent reporting into the future, the ACCC has updated its goals, strategies and measures from those in the portfolio budget statements 2011–12. The updated goals, strategies and measures provide a greater level of detail in describing the work we undertake and how it relates to our role, to more accurately reflect the responsibilities and functions of the agency. These changes provide greater transparency and allow for increased scrutiny. The Outcome is the same, an additional goal is being reported against, and the targets (or Key Performance Indicators) are the same.

Table 3.1: Performance reporting framework

Drivers	*Competition and Consumer Act 2010* 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	1. Promote vigorous, lawful competition and informed markets 2. Encourage fair trading, protection of consumers and product safety 3. Regulate national infrastructure and other markets where there is limited competition 4. Deliver results through the ACCC's investment in its people and systems*

* Although not listed in the PBS, the ACCC is reporting against this goal to provide greater transparency in its performance reporting consistent with its corporate plan and as 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 in the main content of Part 3 Report on Performance. 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: Promote vigorous, lawful competition and informed markets

Strategies

1.1 Deter, detect, pursue and stop anti-competitive conduct

1.2 Assess mergers efficiently and take action where a merger presents competition concerns

1.3 Deliver consistent, informed and efficient authorisation and notification decisions to ensure competition laws do not prevent arrangements that are in the public interest

Goal 2: Encourage fair trading, protection of consumers and product safety

Strategies

2.1 Promote fair trading and minimise harm to businesses from unfair trading practices

2.2 Tackle unfair trading practices and deliver increased consumer welfare through the Australian Consumer Law

2.3 Minimise harm to consumers from unsafe consumer products and services

Goal 3: Regulate national infrastructure and other markets where there is limited competition

Strategies

3.1 Provide robust and independent regulation of natural monopoly markets

3.2 Monitor and advise on industries where market structures are changing

3.3 Monitor prices and quality of specified goods and services to assess and advise on effect of market conditions

Goal 4: Deliver results through the ACCC's investment in its people and systems

Strategies

4.1 Increase the efficiency and effectiveness of our operations

Goal 1: Promote vigorous, lawful competition and informed markets

Significant outcomes in 2011–12

- Korean Air Lines Co Ltd and Malaysian Airlines Cargo Sdn Bhd were penalised $5.5 million and $6 million respectively for price fixing as a part of an air cargo cartel. Korean Air Lines and Malaysian Airlines were the eighth and ninth international airline respectively to settle proceedings against it, bringing the total penalties to a record $58 million to date.
- Penalties totalling $1.3 million secured against three Queensland-based construction companies in the TF Woollam and Sons Pty Ltd & Ors case for engaging in illegal price controlling known as cover pricing.
- Ticketek penalised $2.5 million for misusing its market power by refusing, on four occasions, to set up ticket deals because they were being promoted by a new rival.
- Asahi, the maker of Schweppes products, agreed to divest certain soft drink and cordial businesses in response to ACCC concerns raised by Asahi's proposed acquisition of rival P&N Beverages.
- FOXTEL—Reducing restrictions on the access to certain key content for new and existing competitors in metropolitan and regional telecommunications and subscription television markets was a significant factor in the ACCC's decision to clear FOXTEL's acquisition of Austar subject to undertakings limiting FOXTEL's ability to acquire exclusive online content.
- ALH—Competition in local markets retailing takeaway liquor was the ACCC's focus on ALH's (in which Woolworths has a 75 per cent interest) acquisition of 31 hotels in NSW resulting in the ACCC opposing the acquisition of five sites due to competition concerns with the remainder cleared.

Overview

The ACCC is Australia's peak competition and consumer protection agency. Its role is to use its powers under the *Competition and Consumer Act 2010* to enhance the welfare of Australians by:

- promoting competition
- promoting fair trading
- providing for the protection of consumers.

In enforcing the provisions of the Competition and Consumer Act, the ACCC's primary aims are to:

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

The Act provides the ACCC with a range of enforcement tools and powers and the ACCC uses these to obtain appropriate remedies, including court-based outcomes, court enforceable undertakings and other undertakings and administrative resolutions.

The ACCC's role is to focus on widespread consumer detriment and it exercises discretion to direct resources to the investigation and resolution of matters that provide the greatest overall benefit for consumers.

The ACCC revised its compliance and enforcement policy in February 2012. The policy, available on the ACCC's website, sets out the principles adopted by the ACCC to achieve compliance with the Act.

Where the ACCC considers conduct that raises serious competition concerns under the competition provisions of the Act (Part IV), its principal tools and remedies are taking legal action through the courts and accepting court enforceable undertakings under section 87B of the Act.

Section 87B enforceable undertakings

The ACCC generally uses its section 87B powers in two ways, to remedy competition concerns with a proposed merger or acquisition allowing these mergers to proceed, and in relation to its enforcement activity in situations where there is evidence of a breach, or a potential breach, of the Act that might otherwise justify litigation. These undertakings are kept on a public register.

If an undertaking is breached, the ACCC may seek to have it enforced in the Federal Court of Australia. Parties that give such undertakings may withdraw or vary them only with the consent of the ACCC.

Court cases

Legal action is taken where, having regard to all the circumstances, the ACCC considers litigation is the most appropriate way to achieve its enforcement and compliance objectives.

1.1 Stopping anti-competitive conduct

Strategy: Deter, detect, pursue and stop anti-competitive conduct

Measures:

- Timely and effective identification, investigation and action responses to address instances of anti-competitive conduct
- Effective remedies achieved though court action
- Effective remedies achieved though non-court action
- Effective education and communication about anti-competitive conduct

Competitive markets lead to lower prices, innovation, greater efficiencies and more choice as market participants each try to win custom. Anti-competitive behaviour, such as cartel conduct, misuse of market power, resale price maintenance and agreements that lessen competition, including exclusive dealing, can significantly harm consumer welfare. In this section we describe the actions taken to identity, prevent and stop this conduct, including the remedies gained through court action in 2011–12.

CARTELS AND OTHER ANTI-COMPETITIVE AGREEMENTS

The Competition and Consumer Act prohibits contracts, arrangements or understandings between two or more parties that have the purpose, effect or likely effect of substantially lessening competition in a market.

In 2011–12 the ACCC took actions against cartels and price fixing agreements, a type of anti-competitive agreement prohibited by section 45 of the Act.

Cartels cover a range of agreements that are horizontal arrangements between competitors relating to price and markets. The Competition and Consumer Act also makes it a criminal offence under section 44ZZRF for a corporation to make an agreement or arrive at an understanding that contains a cartel provision.

Identification of cartel conduct

Cartels and other anti-competitive price agreements threaten the effective operations of markets. They create an illusion of competition. However by conspiring to control markets through price fixing, bid rigging, allocating markets and output restrictions, cartels protect and reward their inefficient members while penalising honest, innovative and well-run companies.

The ACCC relies heavily on players in the marketplace to alert it to cartel activity—including participants in cartel activity, who can seek immunity from civil and criminal proceedings by self reporting their involvements to the ACCC under its *Immunity Policy for Cartel Conduct*.

To inform its enforcement and compliance work, the ACCC has enhanced its intelligence-gathering, specifically to identify higher-risk industries and look for anomalies that may indicate cartel conduct or motivation that might lead to cartel conduct. The ACCC has also stepped up information gathering and intelligence sharing activities across international borders.

Effective remedies through court action

Prosecuting cartel activity and other forms of anti-competitive agreements remains a priority for the ACCC, with the following cases finalised in 2011–12:

- **Air cargo—Korean Air Lines Co Ltd** and **Malaysian Airlines Cargo** (Mascargo) were ordered to pay a $5.5 million penalty and $6 million penalty respectively for price fixing in respect of fuel and security surcharges and customs fees on international freight carriage. This brings the total

penalties to more than $58 million imposed on cartel participants since the ACCC's investigation into alleged cartel activity in air cargo services began in 2006 (see Air Cargo case study, page 34).

- **TF Woollam & Son Pty Ltd**—three Queensland-based construction companies were ordered to pay penalties totalling $1.3 million for engaging in illegal conduct known in the construction industry as cover-pricing (see Woollams case study, page 34).

At year's end, the ACCC had nine proceedings still before the courts alleging cartel conduct or price agreements between competitors. Seven of these cases relate to the alleged air cargo cartel and proceedings against Prysmian Cavi E Sistemi Energia SRL. The two other cases currently before the courts are against ANZ and Flight Centre concerning alleged anti-competitive price agreements.

In March 2012, the ACCC instituted proceedings against **Flight Centre Limited**, alleging that Flight Centre attempted to induce competitors to enter into price fixing arrangements, in contravention of section 45 of the Competition and Consumer Act. It is alleged that on six occasions between 2005 and 2009, Flight Centre attempted to induce international airlines Singapore Airlines, Malaysian Airlines and Emirates to agree to stop offering their international airfares directly to the public at prices less than Flight Centre offered. It is alleged that the purpose and likely effect of the attempted arrangements sought by Flight Centre was to stop the airlines undercutting Flight Centre so that it was able to maintain the level of commissions it received from the airlines. The ACCC's case remains before the court.

In August 2007, the ACCC instituted proceedings against **Australian and New Zealand Banking Group Limited** (ANZ) over an alleged price fixing agreement. The ACCC alleges that ANZ sought to limit the level of refund Mortgage Refunds could provide to customers in respect of ANZ home loans, in contravention of section 45A of the Trade Practices Act (now the Competition and Consumer Act). Mortgage Refunds was a mortgage broker which refunded to its customers a part of the commission it received from lending institutions. It is alleged that ANZ required Mortgage Refunds to enter into an agreement to limit its refunds to customers as a condition of it continuing to deal with the bank. The ACCC's case remains before the court.

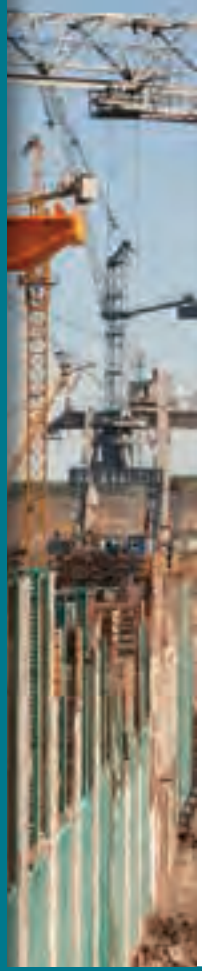
Effective education and communication about anti-competitive conduct

As well as taking direct enforcement action, the ACCC seeks to detect and deter cartel conduct by working with businesses and government agencies to raise awareness of cartel activity, the risks and consequences for individuals involved, and how cartels can be detected and stopped.

For example, the ACCC has identified several industries where historical and international experience indicates a greater susceptibility to cartel conduct and has written to almost 2500 executives in those industries, reminding them that cartel conduct is criminal and advising them of the ACCC's immunity policy. The ACCC is also undertaking an initiative with public sector procurement managers at all levels of government to increase their ability to identify and report cartel conduct, and also the ability of people such as auditors and procurement officers and advisers who are working in and for the public sector to do this.

MISUSE OF MARKET POWER

Firms with a substantial degree of power in a market are prohibited from using it for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into that or any other market, or deterring or preventing a person from engaging in competitive conduct in any market. Misuse of market power is detrimental to competition and is prohibited under section 46 of the Act.



Court action

Air cargo cartel pays the penalty

The ACCC commenced proceedings against 15 international airlines between 2008 and 2010 for alleged collusion on fuel and other surcharges for air cargo services. To date, nine airlines have settled with the ACCC resulting in penalties totalling $58 million. Proceedings against PT Garuda Indonesia Ltd, Singapore Airlines Cargo Pte, Cathay Pacific Airways Ltd, Emirates, Air New Zealand Limited and Thai Airways International PCL remain before the courts.

These outcomes demonstrate the ACCC's determination to pursue cartel arrangements made here or overseas by foreign corporations where they impact on Australian prices and consumers.

Woollams case highlights an illegal practice in the construction industry

On 18 September 2009, the ACCC instituted proceedings against three Queensland based construction companies for engaging in 'cover pricing' between 2004 and 2007 in relation to tenders for four Queensland Government construction projects. The respondents were: TF Woollam & Son Pty Ltd and its managing director; JM Kelly (Project Builders) Pty Ltd and its construction manager; and Carmichael Builders Pty Ltd.

'Cover pricing' involves a company asking one of its competitors (who intends to make a genuine bid) to provide them with a 'cover price'. Both companies understand that this 'cover price' will be higher than the tender price for the genuine bid. The company who received the 'cover price' (should it choose to tender) will submit a tender price that is at or above the 'cover price'. As the 'cover price' is higher than the tender price for the genuine bid, it is highly unlikely that the company who submits the 'cover price' will win the contract.

Cover pricing creates an illusion as to a range of prices and to the existence of a particular level of competition. Undermining a tender process for government work will defeat the purpose of a competitive tender—to deliver the best value for taxpayers' money.

On 24 August 2011, the Federal Court found that this conduct, while not an obvious cartel practice 'amounts to controlling of the price at which services are to be supplied'. The companies were also found to have engaged in misleading and deceptive conduct as a result of the cover pricing conduct.

The Court awarded penalties totalling $1.3 million against the companies, as well as penalties totalling $80 000 against the individuals involved.

Effective remedies through court action

In December 2011, the ACCC finalised proceedings brought against **Ticketek Pty Ltd** for taking advantage of its market power. Ticketek was held to have misused its market power by refusing, on four occasions, to set up ticket deals because they were being promoted by a new rival. The Federal Court imposed a $2.5 million penalty against Ticketek.

In September 2008, the ACCC instituted proceedings against **Cement Australia Pty Ltd**, **Pozzolanic Enterprises Pty Ltd** and two related companies in the Federal Court for alleged misuse of market power. The ACCC alleges that Cement Australia and Pozzolanic 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 Pozzolanic 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.

RESALE PRICE MAINTENANCE

Suppliers may try to impose a resale price to maintain brand positioning or to give resellers attractive profit margins. An arrangement between a supplier and a reseller that means the reseller will not advertise, display or sell the goods the supplier supplies below a specified minimum price is illegal.

It is also illegal for a supplier to cut off, or threaten to cut off, supply to a reseller (wholesale or retail) because they have been discounting goods or advertising discounts below prices set by the supplier. 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.

Effective remedies through court action

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

Effective remedies through non-court action

The ACCC also accepted four section 87B undertakings from companies that had engaged in resale price maintenance.

- In July 2011, the ACCC accepted a court enforceable undertaking from **Aqua Depot Imports** after admitting they engaged in resale price maintenance in relation to the supply of aquarium products. The company undertook to refrain for engaging in this conduct for three years, notify their retailers, arrange corrective notices and undergo a trade practices compliance training annually for three years.
- In February 2012, the ACCC accepted a court enforceable undertaking from **Edwards Essences Pty Ltd**, a manufacturer and distributor of essences for alcoholic products, in respect of resale price maintenance. Edwards has undertaken to not engage in the conduct, write to their distributors and provide trade practices compliance training for its director.
- **Paul Maloney Fashion Agency Pty Ltd** and **Under the Wing Pty Ltd** provided separate undertakings to the ACCC for resale price maintenance after each attempted to induce an on+line reseller not to sell handbags below the recommended retail prices specified buy the handbag designer. Paul Maloney and Under the Wing undertook to not engage in the conduct, write to its clients to alert them to the undertaking and implement a trade practices compliance program.

1.2 Assessing mergers to maintain competition

Strategy: Assess mergers efficiently and take action where a merger presents competition concerns

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

The impact on competition of proposed and completed mergers and acquisitions is assessed by the ACCC under section 50 the *Competition and Consumer Act 2010*, which prohibits mergers and acquisitions that would have the effect, or likely effect, of substantially lessening competition.

The ACCC does this by providing the merger parties with its view on whether a particular proposal is likely to breach section 50 of the Act. This process is generally known as the 'informal clearance' process. Businesses may also apply to the ACCC for formal clearance of mergers.

The ACCC monitors media daily for news of proposed or actual mergers to identify any transactions that may potentially raise competition issues. Where proposals are identified in the media that have not yet been notified to the ACCC, the ACCC may investigate further.

The ACCC deals with matters by pre-assessment when it determines they do not require review because the risk of competition concerns being raised is considered low.

This pre-assessment process enables the ACCC to respond quickly where there are no significant concerns.

The ACCC considered 340 matters for compliance with section 50 of the Act in 2011–12.

- 250 were assessed as not requiring a public review
- 90 underwent a public (74) or confidential (16) review.

This represented an increase this year in the number of matters that were pre-assessed, with 250 pre-assessments completed compared with 236 in 2010–11. Most of the 250 matters assessed as not requiring review were dealt with in less than two weeks.

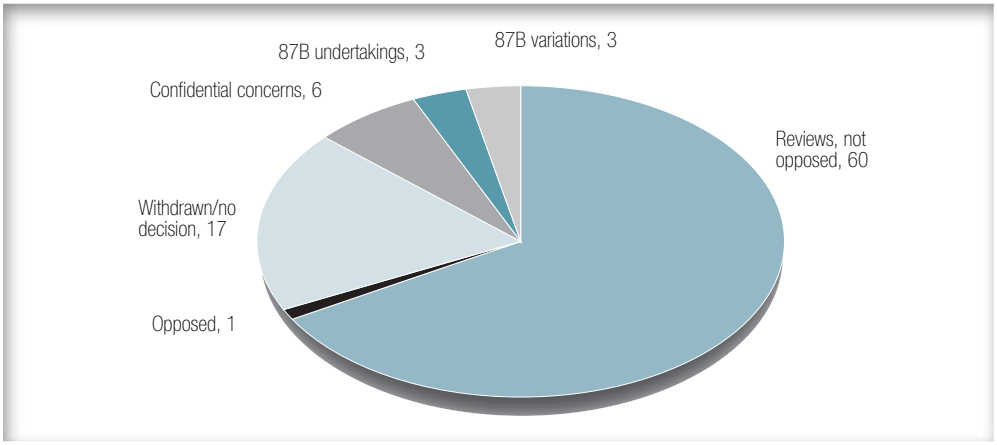
In reviewing proposed mergers, the ACCC aims to deal with matters in a timely but effective way, having regard to the commercial imperatives of the parties involved. The ACCC also seeks to inform the public, businesses and their advisers on its merger review process, which is conducted as transparently as possible, with matters under public consideration placed on the ACCC's mergers online register. Companies may also request a confidential review, in which case they are not placed on the mergers register, nor are market inquiries conducted.

Of the 90 reviews conducted in 2011–12:

- one merger was publicly opposed by the Commission
- confidential opposition or concerns were expressed in six mergers
- three 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
- 17 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
- 60 mergers were not opposed and no conditions were sought
- variations to existing undertakings were accepted in relation to three matters.

The ACCC unconditionally cleared 67 per cent of those mergers that underwent a public or confidential review and 91 per cent of all mergers (including pre-assessments). In nine matters the ACCC used its formal information-gathering powers.

Figure 3.1: Merger reviews assessed in 2011–12

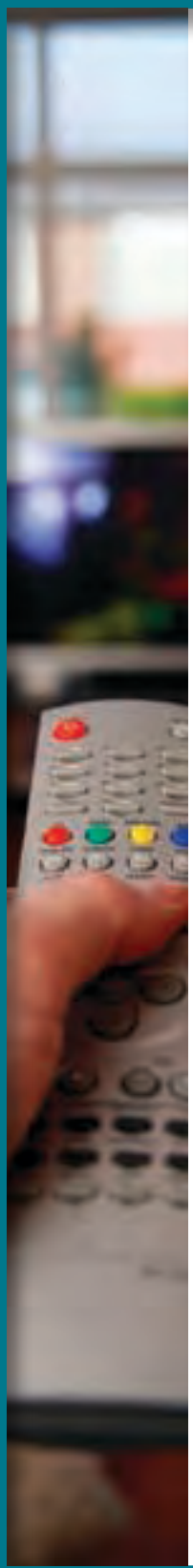


Of the 90 reviews conducted by the ACCC, 37 were completed in less than eight weeks and 27 took more than eight weeks. The review time is not reported for the remaining 26 on the basis that the ACCC did not reach a final decision (such as where the parties decided not to pursue the transaction before the ACCC concluded its review); the reviews involved completed acquisitions; and variations to existing undertakings.

The outcomes of all mergers publicly reviewed and decided on were published on the ACCC's website, as were six public competition assessments setting out the ACCC's decisions in relation to matters of public interest.

The ACCC accepted three section 87B undertakings to address competition concerns that it had identified, allowing these mergers to proceed. These undertakings are carefully monitored by the ACCC to ensure compliance for the duration of the undertaking. They are listed in Appendix 9 on page 283.

Significant merger matters assessed and reviewed in 2011–12 are listed in Appendix 13 (and details are published on the ACCC website).



ACCC accepts undertaking in FOXTEL's acquisition of Austar

On 26 May 2011 FOXTEL announced its intention to acquire its major competitor in subscription television, Austar, subject to regulatory approval.

FOXTEL is Australia's largest subscription television company. Prior to the proposed acquisition it had approximately 1.6 million residential subscribers in metropolitan Australia. FOXTEL's ultimate shareholders include Telstra (50 per cent) and News Corporation (25 per cent). Austar operated in regional areas and had approximately 750 000 residential subscribers.

The ACCC's review of the proposed acquisition began in May 2011. Although the proposed acquisition involved merging Australia's only two large-scale subscription television providers, long-standing content distribution arrangements meant that they did not directly compete in the same geographic regions (except on the Gold Coast). The ACCC was required to assess whether the evolving nature of the subscription television industry, and the related telecommunications industry, meant that FOXTEL and Austar were likely to meaningfully compete in the future in the absence of the proposed acquisition.

Following widespread consultation with the merger parties and market participants as well as an extensive review of documents supplied by the parties, the ACCC formed the view that without the proposed acquisition, there would have been greater potential for competition between Austar and FOXTEL (including its shareholder, Telstra) in the subscription television market (particularly in relation to the developing Internet Protocol Television or IPTV field) and a number of regional telecommunications markets.

After this view was communicated by the ACCC to the merger parties, FOXTEL offered the ACCC court-enforceable section 87B undertakings to address the ACCC's concerns. The ACCC conducted market inquiries on the undertakings and, following further negotiations, decided on 10 April 2012 not to oppose the proposed acquisition subject to the undertakings accepted.

The core obligations in the undertakings restrict FOXTEL's ability to acquire certain online rights to channels supplied by independent content suppliers and certain movies on an exclusive basis. The ACCC expects that as telecommunications networks develop, the undertaking will give existing and future competitors the opportunity to develop differentiated and more affordable subscription television offerings that are attractive to consumers. These offerings, which could be bundled with other telecommunications services, would be likely to improve competition in both subscription television and telecommunications markets as retailers increasingly seek to bundle IPTV services with other telecommunications products.

AGL Energy Limited—proposed acquisition of Great Energy Alliance Corporation Pty Ltd

On 24 May 2012, the ACCC decided not to oppose the proposed acquisition by AGL Energy (AGL) of the remaining 67.46 per cent interest in Great Energy Alliance Corporation (GEAC) that it did not already own. GEAC owns the Loy Yang A power station, which is the largest power station in Victoria.

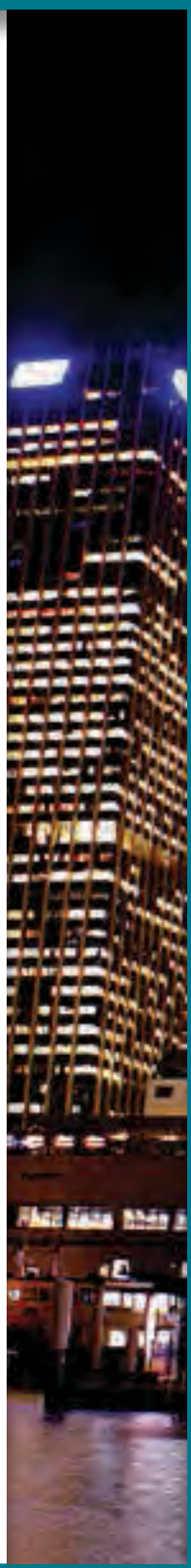
When, in 2003, AGL proposed to acquire an interest of up to 35 per cent in Loy Yang A, the ACCC indicated that it would oppose that acquisition on the basis that it was likely to have the effect of substantially lessening competition in relation to the supply of electricity by generators. This was primarily because the ACCC considered that, even though AGL would hold only a 35 per cent interest or less in the Loy Yang A power station, the alignment of Loy Yang A with AGL's substantial retail business would lead to a less competitive market structure, resulting in higher prices and increased barriers to entry.

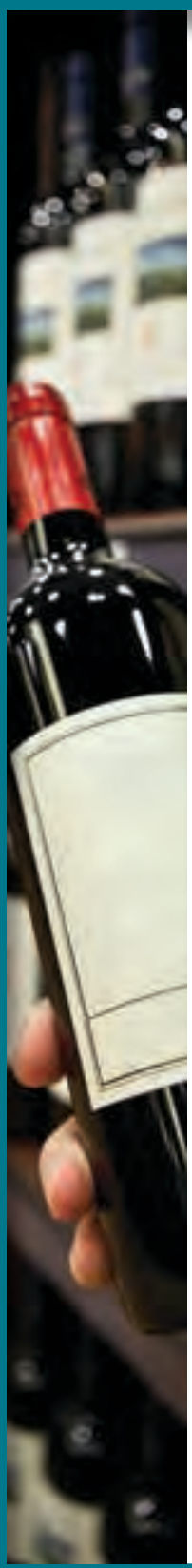
However, AGL successfully sought a declaration from the Federal Court that the acquisition would not breach section 50, subject to undertakings that AGL would not acquire more than a 35 per cent interest in Loy Yang A and would not be involved in the contracting, dispatch or bidding of electricity produced from Loy Yang A. These undertakings therefore meant that Loy Yang A effectively acted as an independent generator in Victoria, with AGL retaining only a financial interest.

On 24 February 2012, the ACCC commenced a comprehensive review of the proposed acquisition by AGL of the whole of GEAC, including the removal of the undertakings that AGL gave in 2003. Two primary issues arose: the impact of combining the Loy Yang A power station with AGL's other generation assets and the impact of Loy Yang A ceasing to act as an independent generator and instead becoming aligned with AGL's substantial retail presence. The ACCC worked closely with the Australian Energy Regulator and undertook extensive inquiries with a range of interested parties, including competing retailers, generators and prospective new entrants.

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

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





ACCC opposes part of ALH's proposed acquisition of hotels and takeaway liquor outlets in NSW

Australian Leisure and Hospitality Group Pty Limited operates a number of licensed venues and retail liquor outlets across Australia. Woolworths Ltd has a direct 75 per cent interest in ALH.

On 22 December 2011 the ACCC commenced a review of the proposed acquisition by ALH of 31 hotels (some with attached bottleshops) and one standalone takeaway packaged liquor licence, all located in NSW. These sites were to be acquired from three different vendors—the Laundy Hotel Group, the Waugh Hotel Group and the De Angelis Hotel Group.

A key issue for the ACCC was the likely effect of the proposed acquisition on local markets surrounding the target hotels and bottleshops. The ACCC considered the effect of the proposed acquisition on competition for the sale of takeaway packaged liquor, and competition for the provision of entertainment, gaming and liquor for on-site consumption, in each of these local markets.

The ACCC considered that the proposed acquisition of five takeaway packaged liquor retailers (operating under three hotel licences and the one standalone packaged liquor licence) would be likely to substantially lessen competition in the relevant local markets. These retailers were the Chittaway Tavern in Chittaway Bay, the Albion Park Hotel in Albion Park, and the Ocean Beach Hotel, Ocean Beach Cellars and the Umina Foodtown all in Umina Beach.

The ACCC considered that the proposed acquisition by ALH of these five takeaway packaged liquor retailers would lead to a significant increase in concentration and loss of competitive tension between takeaway packaged liquor retailers in the Chittaway Bay, Umina Beach and Albion Park areas. The ACCC also concluded that the acquisitions would result in a loss of choice for customers in those local markets, and the differentiated offering of the targets, including their promotional offers, would be eliminated by the proposed acquisition.

The ACCC considered that the acquisition of the remaining sites was unlikely to substantially lessen competition in local markets, either for the sale of takeaway packaged liquor, or for hotel services. For each of these local markets the ACCC identified a number of remaining competitors which would be likely to competitively constrain ALH/Woolworths post acquisition.

On 28 June 2012 the ACCC announced its decision to oppose ALH's proposed acquisition of five packaged liquor retailers in NSW, and not to oppose the acquisition of the remaining properties

1.3 Authorisations and notifications to allow arrangements in the public interest

Strategy: Deliver consistent, informed and efficient authorisation and notification decisions to ensure competition laws do not prevent arrangements that are in the public interest

Measures:

- Authorisation and notification decisions made within statutory timeframes
- Collective bargaining notification decisions made within statutory timeframes

Under the authorisation and notification provisions, where there is sufficient public benefit, the Competition and Consumer Act allows businesses to obtain protection from legal action for conduct that might otherwise raise competition concerns under Part IV of the Act.

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

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

In 2011–12, the ACCC issued 20 final authorisation decisions (excluding minor variations), including 10 for collective bargaining arrangements across a range of industries including tomato growers, health care, dairy farmers, financial services and newsagents (see Table 3.2 below).

Table 3.2: Authorisations

	Opening balance	New applications	Applications withdrawn	Applications decided	Balance
Authorisation applications	4(6)	24(41)	1(3)	15(19)	12(25)
Minor variation applications	0(0)	2(13)	0(0)	2(13)	0(0)
Revoke and substitute authorisation applications	1(1)	4(6)	0(0)	5(7)	0(0)
Revocations	0(0)	0(0)	0(0)	0(0)	0(0)
Total	5(7)	30(60)	1(3)	22(39)	12(25)

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

EXCLUSIVE DEALING NOTIFICATIONS

Exclusive dealing (where a business trading with another imposes restrictions on the other's business's freedom to choose with whom, in what or where it deals) is prohibited under the Competition and Consumer Act in certain circumstances. Third line forcing is a type of exclusive dealing conduct which involves the supply of goods or services subject to a condition that the buy must also acquire certain goods or services from a third party.

The exclusive dealing notification process provides protection from legal action for potential breaches of the exclusive dealing provisions of the Competition and Consumer Act where the ACCC assesses there is sufficient public benefit. Lodging a notification with the ACCC provides automatic legal protection from the lodgement date (or soon after in the case of third line forcing conduct), 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 conduct if it is satisfied that the likely public benefit from the conduct will not outweigh the likely detriment. To revoke a notification for other exclusive dealing conduct the ACCC must be satisfied that the conduct is likely to result in a substantial lessening of competition and the likely benefit to the public will not outweigh the detriment.

Further information about the authorisation and notification process is available on the ACCC's website.

The ACCC received and assessed more than 505 exclusive dealing notifications in 2011–12.

COLLECTIVE BARGAINING ARRANGEMENTS

There are two ways by which businesses can seek immunity for collective bargaining arrangements:

- A group of businesses can lodge a collective bargaining notification, in which case immunity for the collective bargaining activity is automatic after 14 days unless the ACCC moves to revoke the notification. Notifications can be reviewed at any time.
- A group of businesses can seek authorisation from the ACCC for a collective bargaining agreement. The legal protection provided by an authorisation does not commence unless and until authorisation is granted. There is a six month time limit to consider all new applications for authorisation.

Businesses seeking to lodge a valid collective bargaining notification must satisfy a number of requirements—for example each member of the collective bargaining group must reasonably expect that they will make at least one contract with the target and that the value of each member's transactions with the target will not exceed $3 million per year (this figure differs for certain industries). These requirements do not apply to the authorisation process.

In 2011–12 the ACCC issued 10 final determinations authorising collective bargaining arrangements and allowed four collective bargaining notifications. The arrangements covered a range of small businesses including primary producers, newsagents, Mai Wiru Indigenous regional stores that operate in the north west of South Australia, and members of a paint retail store franchise. More information on collective bargaining outcomes is under Strategy 2, 'Allowing trading arrangements in the public interest' on page 52.

The case studies on tomato growers and coal producers (pages 44–5) provide examples of the range of the collective bargaining authorisations granted by the ACCC and the different factors and markets the ACCC considers in making its decision on whether the public benefits of the collective bargaining proposal outweigh the likely detriment.

CBH notification

In June 2011 the ACCC issued a notice revoking Co-operative Bulk Handling Limited's (CBH's) exclusive dealing notification.*

Under the notification CBH required West Australian grain growers and marketers who use its grain storage facilities to also use its transport services to deliver grain to port for export.

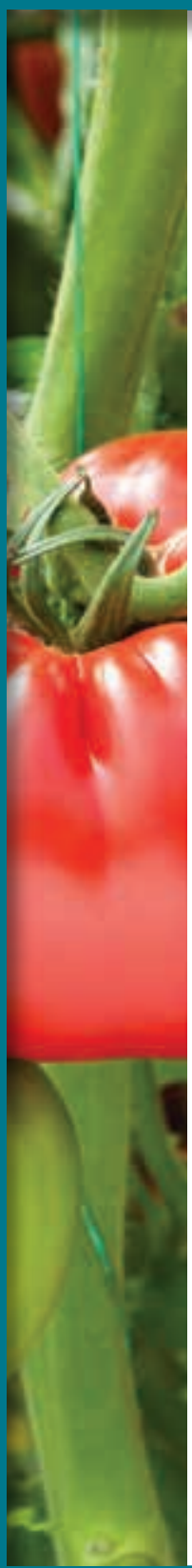
The ACCC revoked the notification as it considered that the notified conduct was likely to have the effect of substantially lessening competition in the market(s) for grain transport services in Western Australia. The likely substantial lessening in competition arose from CBH's ability to leverage its dominance in up-country storage and handling to foreclose competition in the supply of transport services for bulk export grain.

The ACCC also considered that the public benefits resulting from the notified conduct did not outweigh the public detriment constituted by this substantial lessening of competition. While there are efficiencies in CBH offering a bundled receipt, storage, handling and transport service, the ACCC considered the notified conduct (that is, forcing users to accept the bundled product) was not necessary to realise these benefits.

In the ACCC's view, revoking the notification would allow growers and marketers to explore other transport options that may better suit their individual needs. It would also creates competitive pressure on CBH in relation to the terms and conditions on which it supplies transport services.

On 19 July 2011 CBH applied to the Australian Competition Tribunal for review of the ACCC's decision to revoke the notification. The matter was heard in March 2012, with closing submissions in May 2012. The Australian Competition Tribunal has reserved its decision.

* See page 42 for an explanation of exclusive dealing, generally prohibited under the Competition and Consumer Act unless authorised or notified and not revoked by the ACCC.



Tomato Growers

The Competition and Consumer Act generally requires competitors to act independently in setting prices and other terms and conditions of doing business. However, allowing smaller businesses to get together to collectively negotiate with a larger firm, as in this case study, can be in the public interest.

Collective bargaining can provide more effective mechanism for productive contractual discussions between primary producers and food processors than if negotiations occurred on an individual basis.

On 24 February 2012, the ACCC granted authorisation to allow members of Australian Processing Tomato Growers, a branch of the Victorian Farmers Federation, to bargain collectively on the terms and conditions of their contracts with tomato processors.

The five-year authorisation provides the members of Australian Processing Tomato Growers, typically located in northern Victoria and southern New South Wales, with statutory protection to negotiate as a collective with tomato processors.

At the time of making the decision, the Echuca-based processor Cedenco Australia was likely to be the only buyer of tomatoes for processing from the growers in the group.

The ACCC has over many years authorised collective bargaining by growers with the processors they supply in industries including dairy, potatoes and other vegetables, grapes and chicken growing.

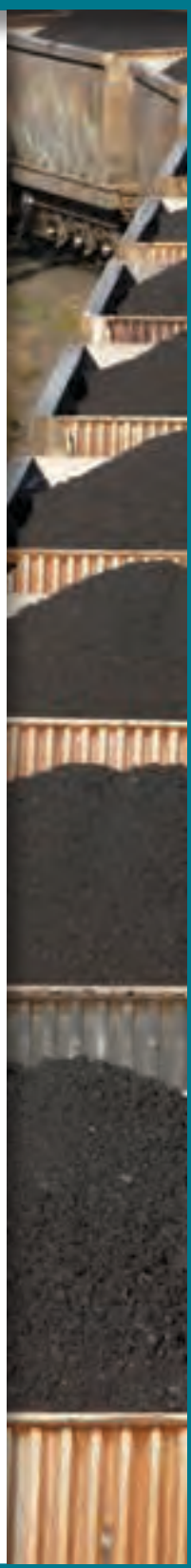
Abbot Point Coal Export Terminal Producers—Authorisation

The Abbot Point Coal Export Terminal Producers (APCP) is a group of coal producers, including a number of smaller producers, seeking to collectively develop a new coal terminal at Abbot Point on the Queensland coast. This development is part of a number of substantial coal infrastructure developments in the region, seeking to increase coal exports in response to high coal prices. The orderly and efficient development of these coal projects is expected to result in significant increases in Australian export income.

The development of APCP's terminal requires coordination with the development of the coal railway infrastructure, owned by QR Network, which is needed to supply the terminal. Frequently, development of coal infrastructure will occur most efficiently if all infrastructure users can collectively discuss their needs and proposed terms of use with the infrastructure owners. However, where these collective discussions involve competitors, they may lead to a breach of the Competition and Consumer Act unless the entities involved obtain authorisation from the ACCC.

On 7 September 2011, the APCP lodged an application to collectively bargain with QR Network over access to QR Network's coal rail infrastructure required to service APCP's terminal. The application was one of a number of authorisation applications lodged by coal producers who are seeking to collectively bargain with infrastructure owners.

Following a public consultation process, the ACCC concluded the likely public benefits of the collective bargaining would outweigh the likely detriments. Accordingly, the ACCC authorised APCP's collective bargaining. Having confirmed that key affected parties supported the application, the ACCC sought to fast track its assessment of the group of related applications to avoid any unnecessary delay. The ACCC also granted interim authorisation in order to allow the APCP to enter preliminary negotiations and continue to progress APCP's terminal project while the ACCC concluded its assessment.



Targets and results for goal 1: Promote vigorous, lawful competition and informed markets

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

TARGETS	RESULTS
No specific target	The ACCC escalated 2591 complaints for assessment. 562 progressed to initial investigations. 145 progressed to in-depth investigation. The ACCC stepped up its intelligence gathering in industries identified as high-risk for cartel activity. Thirteen cases on competition matters remain before the courts, including nine relating to cartel conduct and price agreements. See pages 32–5.

Measure: Effective remedies achieved though court action

Outcomes from an expected 20 court cases (covering goals 1 and 2, i.e. for competition, fair trading and consumer protection)	For Goal 1, the ACCC concluded positive outcomes from eight court cases for competition matters (goal 1) (see Appendix 10).

Measure: Effective remedies achieved though non-court action

Outcomes from an expected 40 court enforceable undertakings (predominately for consumer protection conduct that has breached or is likely to breach the CCA)	In 2011–12 for Goal 1, the ACCC accepted eight court enforceable undertakings in competition matters (see Appendix 10).

Measure: Effective education and communication about anti-competitive conduct

No specific target	The ACCC actively engages with the media to highlight its success in court cases where there are findings of anti-competitive conduct and in all matters where the ACCC has accepted court enforceable undertakings as a remedy for perceived anti-competitive conduct. See pages 32–5. The ACCC has undertaken a range of education initiatives in relation to cartel conduct including writing to 2500 executives in industries identified as more susceptible to cartel conduct.

Measure: Mergers assessed within statutory and organisational timeframes

TARGETS	RESULTS
Assessment of mergers within statutory and organisational timelines and in accordance with published guidelines	All mergers were assessed within organisational timelines and in accordance with published guidelines. See page 36 for further details of assessment timeframes. No applications for formal merger clearance were received in 2011–12.

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

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

Monitor media and industry on a daily basis for possible Mergers and Acquisition reviews	All relevant media were monitored on a daily basis and followed up where appropriate.

Measure: Authorisation and notification decisions made within statutory timeframes

Authorisation and notification decisions within statutory and organisational timeframes (assessment of validity within five days, authorisation within six months, majority of notifications within four weeks) and promptly communicated	100 per cent of applications for authorisation were assessed for validity within organisational timeframes. 100 per cent of authorisations were assessed within statutory timeframes. 100 per cent of notifications were assessed for validity within organisational timeframes. 88 per cent of notifications were assessed within four weeks consistent with timeframes. 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

Collective bargaining notification decisions within statutory timeframes (assessment of validity within five days, initial assessment within 14 days) and communicated promptly	100 per cent of collective bargaining notifications were accessed for validity within five days. 100 per cent of initial assessments of collective bargaining notification 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.