



Australian  
Competition &  
Consumer  
Commission

# *account*

A report of the Australian Competition  
and Consumer Commission's activities



1 October to 31 December 2011

Australian Competition and Consumer Commission  
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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# Contents

<b>Acronyms</b>	<b>4</b>
<b>Overview</b>	<b>6</b>
<b>1. Enforcement and compliance</b>	<b>8</b>
Complaints and inquiries	8
Scam contacts	9
Enforcing the Act for businesses and consumers	10
Litigation commenced	10
Proceedings concluded	13
Court enforceable undertakings accepted	15
<b>2. Communicating with businesses and consumers</b>	<b>16</b>
Liaison and education activities	16
Product safety	19
<b>3. Mergers</b>	<b>22</b>
Merger reviews undertaken in the December 2011 quarter	22
Time taken to assess mergers	24
Statement of Issues	24
Major matters	24
<b>4. Authorisations and notifications</b>	<b>28</b>
Authorisations	28
Notifications	30
<b>5. Regulatory affairs</b>	<b>31</b>
Communications	31
Australian Energy Regulator	34
Gas network regulation matters	34
Electricity network regulation matters	35
Energy wholesale markets	39
Energy retail markets	40
Transport and general prices oversight	41
Water	43
Fuel price monitoring	44
<b>6. International activities</b>	<b>47</b>
International fora	47
Information requests	48
Bilateral/multilateral meetings and visits	49
Free trade agreements	49
<b>Appendix</b>	<b>50</b>
Speeches	50
News releases	50
Publications	50

# Acronyms

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ACT	Australian Capital Territory
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
AMI	Advanced Metering Infrastructure
ANF	Australian Newsagents' Federation Ltd
ARTC	Australian Rail Track Corporation
BKIT	Bungunyah-Koraleigh Irrigation Trust
CBA	Commonwealth Bank of Australia
CCA	Competition and Consumer Act 2010
CCG	Customer Consultative Group
CDRAC	Compliance and Dispute Resolution Advisory Committee
CSG	Coal Seam Gas
CTTWG	Current Transformer Testing Working Group
DLF	Distribution Loss Factor
DTCS	Domestic Transmission Capacity Service
FAD	Final Access Determination
FTA	Free Trade Agreement
HFC	Hybrid Fibre-Coaxial
ICN	International Competition Network
LCS	Local Carriage Service
LNG	Liquefied Natural Gas
LPG	Liquefied Petroleum Gas
LSS	Line Sharing Service
MTAS	Mobile Terminating Access Service
NANA	Newsagents' Association of NSW and ACT Ltd
NBN	National Broadband Network
NER	National Electricity Rules
NERL	National Energy Retail Law
NSW	New South Wales
PSTN	Public Switched Telephone Network
PSTN OA	Public Switched Telephone Network Originating Access
PSTN TA	Public Switched Telephone Network Terminating Access
QCA	Queensland Consumers Association
RBP	Roma to Brisbane Pipeline

RoLR	Retailer of Last Resort
RULP	Regular Unleaded Petrol
SAU	Special Access Undertaking
SBCC	Small Business Consultative Committee
SSU	Structural Separation Undertaking
STTM	Short Term Trading Market
TVS	True Value Solar Pty Ltd
ULLS	Unconditioned Local Loop Service
UPC	Unit Pricing Code
WIRC	Water Charge (Infrastructure) Rules
WLR	Wholesale Line Rental

# Overview

The Australian Competition and Consumer Commission (ACCC) administers, enforces and ensures compliance with the *Competition and Consumer Act 2010* (CCA), including the Australian Consumer Law (ACL). This work enhances the welfare of Australians by promoting competition and fair trading, and protecting consumers from unfair business practices. The ACCC and Australian Energy Regulator (AER) also regulate national infrastructure services and other markets where there is limited competition and natural monopoly characteristics.

The ACCC obtained a penalty of \$1.25 million in Federal Court proceedings against Harvey Norman Holdings for two separate incidents of misleading advertising in catalogues it distributed. This included representations in September 2010 that created a misleading and deceptive impression that consumers in all places where the catalogue was distributed could buy and use a 3D television to watch the 2010 AFL and NRL grand finals in 3D format. Harvey Norman consented to further remedies in the form of declarations, injunctions and corrective advertising.

Judgment was delivered in proceedings against three construction companies in Queensland for illegal 'cover pricing' relating to tenders for state and local government projects. The ACCC was successful in obtaining penalties of \$1.3 million against the three companies and another \$80 000 against two individuals who were knowingly concerned in the conduct. Cover pricing is a form of anti-competitive conduct that creates false signals as to the price of a building works project and the level of competition for those works.

Korean Airlines became the eighth international airline to settle proceedings against it for a cartel to fix prices in relation to the carriage of air freight. The ACCC obtained a penalty of \$5.5 million, injunctions and costs.

Ticketek was penalised \$2.5 million for misusing its market power by engaging in conduct with the anti-competitive purpose of preventing Lasttix from supplying its ticketing and promotional services.

The ACCC released the 'Carbon Price Claims Guide for Business' to assist business understand their rights and obligations when making claims about the impact of a carbon price. The guide provides initial assistance to businesses preparing for the implementation of the Carbon Pricing Mechanism. The ACCC will continue to engage with the business community and will develop further guidance for consumers and industry.

In collaboration with ACL state and territory regulators, the ACCC achieved good outcomes for consumers through negotiation with Qantas airways. Qantas extended its offer of refunds and compensation for reasonable losses to any consumer that was affected by the grounding of its fleet in October.

Following concern that high concentrations of peroxides used in the teeth whitener products resulted in gum and mouth chemical burns, the ACCC took action to notify suppliers that products with high concentrations of peroxide should not be supplied to consumers. After negotiation with nine suppliers, 22 home use teeth whitening products were recalled from the marketplace. The ACCC is continuing to negotiate voluntary recalls of the remaining unsafe teeth whiteners.

Major merger matters decided during the December 2011 quarter included:

- Commonwealth Bank of Australia proposed acquisition of Count Financial—the ACCC did not oppose
- Arrow Energy Holdings Pty Ltd proposed acquisition of Bow Energy Limited—the ACCC did not oppose
- Woolworths Limited completed acquisition of Graystones Shopping Centre—the ACCC did not oppose

In its adjudication role, the ACCC granted a final authorisation in respect of an alliance between Virgin Australia and Singapore Airlines for a period of five years.

Structural reform of the telecommunications sector continued to be an area of significant focus for the ACCC in the December quarter.

The ACCC issued a notice to revoke authorisation given to Football Queensland in April 2008 for exclusive dealing in relation to its 'Teamwear' apparel and equipment licensing program. This decision was reached after submissions to the ACCC revealed that the proposed benefits did not outweigh the detriment of the anti-competitive conduct.

The ACCC is currently assessing an application from NBN Co to authorise an agreement with SingTel Optus to migrate Optus' high-fibre coaxial subscribers to the national broadband network.

The ACCC's regulatory activities during the December 2011 quarter included the commencement of public consultation on NBN Co's special access undertaking and the issuing of a discussion paper in relation to Telstra's revised structural separation undertaking. Final decisions on both of these matters are scheduled for release in early 2012.

In a related matter, the ACCC released draft guidelines on the non-discrimination provisions contained in Part XIC of the CCA. As part of the National Broadband Network reforms, NBN Co and other providers of superfast telecommunications services are prohibited from discriminating between their customers, except in limited circumstances.

The AER released a number of decisions including the final decision for the Advanced Metering Infrastructure (or 'smart meter') roll-out in Victoria from 2012.

A plan and Statement of Approach was also released for a new national Retailer of Last Resort (RoLR) framework under the National Energy Retail Law, designed to ensure that in the event of retailer failure, arrangements are in place to ensure that customers continue to receive electricity and/or gas supply. To support these functions, the Law provides wide ranging functions and powers to the AER to oversee the RoLR scheme.

During the December quarter the ACCC received an application for accreditation from the Essential Services Commission of Victoria to approve or determine rural water infrastructure charges levied by Goulburn-Murray Water and Lower Murray Water.

The ACCC released its latest petrol monitoring report in December. Key findings of the report included: that Australian retail petrol prices closely followed the international benchmark prices of refined petrol; and that structural changes to the petrol industry continued, including an increased share of refined petroleum product imports by independent operators.



# 1. Enforcement and compliance

Maintaining and enhancing compliance with the CCA, formerly the *Trade Practices Act 1974* (TPA), is a key objective of the ACCC. This is achieved by promoting competition and informing markets, encouraging fair trading and protecting consumers. The enforcement function of the ACCC, including litigation, is well supported by its liaison, analysis, outreach and compliance arms.

## Complaints and inquiries

During the December 2011 quarter the ACCC responded to 45 652 complaints and inquiries from businesses and consumers (email 16 829, telephone 28 419 and letter correspondence 404).

Of these, 37 129 complaints and inquiries were entered into the ACCC's database with 211 matters flagged for further consideration. Complaints and inquiries not entered into the ACCC's database were considered to raise issues that fall outside of the ACCC's role and responsibility.

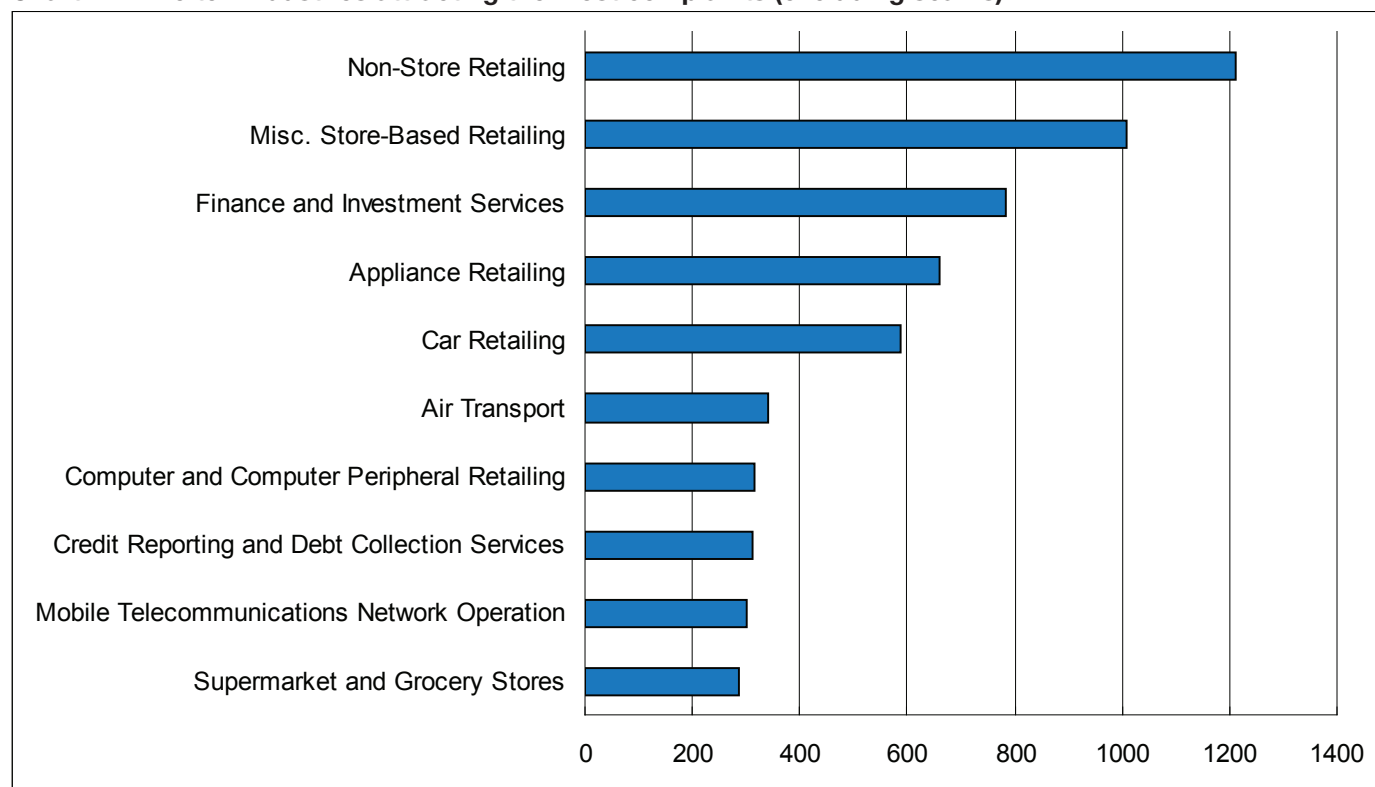
Scam-related contacts comprised 48 per cent of all contacts, the largest single category. After scams the significant areas of contact included complaints in relation to internet retailing operations and warranties and refunds.





# 1. Enforcement and compliance

**Chart 1.1: The ten industries attracting the most complaints (excluding scams)**



## Scam contacts

Contacts about scam activity continued to be significant, accounting for 21 811 or 59 per cent of the complaints and enquiries entered into the ACCC's database during the last quarter of 2011. The highest number of complaints was received in relation to advance fee fraud, and computer hacking scams (including the 'Microsoft scam').

Scam type	Number of reported scams
Advanced fee/up-front payment (Nigerian style)	9 249
Modem-jacking/key-logging (including computer hacking)	3 139
Lottery and sweepstakes	2 503
Banking and online account (including Phishing)	1 794
Online auction and shopping	1 272
Unexpected 'prizes'	884
Job and employment (including business opportunity)	801
Dating and romance (including adult services)	707
False billing (advertising, directories, domain names, office supplies)	583
Spam and 'free' offers on the internet	175



## 1. Enforcement and compliance

### Enforcing the Act for businesses and consumers

In undertaking its enforcement and compliance activity, the ACCC remains committed to working in the long-term interests of consumers. As Australia's national consumer protection and competition agency, the ACCC manages its enforcement and compliance processes to achieve effective and efficient outcomes that serve the public interest, in accordance with the ACCC's Enforcement and Compliance Policy, available at [www.accc.gov.au](http://www.accc.gov.au). The ACCC works with the Treasury, Australian Securities and Investments Commission and state and territory Australian Consumer Law (ACL) regulators and in the committees established to facilitate ACL cooperation.

### Litigation commenced

The ACCC commenced five first-instance litigation proceedings in the Federal Court of Australia during the December 2011 quarter for alleged breaches of the CCA or the former TPA. One appeal and one contempt matter were lodged in the Federal Court.

### FAIR TRADING AND CONSUMER PROTECTION

#### Cotton On Kids Pty Ltd and Cotton On Clothing Pty Ltd

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Federal Court Melbourne

Commenced 5 October 2011 | VID1093/2011

The ACCC instituted proceedings in the Federal Court against Cotton On Kids and Cotton On Clothing for alleged selling of children's nightdresses and pyjamas which did not comply with the mandatory consumer product safety standard for children's nightwear.

The ACCC alleges that between September 2010 and March 2011 Cotton On sold children's nightdresses composed of fabric which exceeded the level of flammability allowed under the standard. It is also alleged that between October 2010 and March 2011 Cotton On sold children's pyjamas that had attached an appliqué with some unstitched fabric wider than allowed under the flammability standard.

The ACCC also alleges that by offering the nightdresses and pyjamas for sale with a 'low fire danger' label attached Cotton On misrepresented that the garments were made from fabric of a low fire danger type or where otherwise styled to reduce fire danger.

#### BAJV Pty Ltd & Ors t/as Europcar

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Justice Marshall | Federal Court Hobart

Commenced 10 November 2011 | TAD64/2011

The ACCC instituted proceedings in the Federal Court against BAJV, trading as Europcar in Tasmania for alleged misleading or deceptive conduct and unconscionable conduct in relation to hire vehicle damage charges.

The ACCC alleges the BAJV overcharged customers for damage sustained to its hire vehicles and subsequently did not refund customers the overcharged amounts. The ACCC also alleges that the BAJV managing director, Brendon Ayers, and fleet controller, Teresa Carr, were involved in the alleged conduct of BAJV concerning overcharging on hire vehicle damage.



## 1. Enforcement and compliance

### Harvey Norman Holdings Ltd

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Justice Collier | Federal Court Brisbane

Commenced 25 November 2011 | QUD519/2011

The ACCC instituted legal proceedings in the Federal Court against Harvey Norman for misleading advertising.

The ACCC alleged that in September 2010 Harvey Norman promoted the sale of 3D televisions in the '3D Finals Fever' catalogue, which created the misleading and deceptive impression that consumers in all places where the catalogue was distributed could buy and use a 3D television to watch the 2010 AFL and NRL grand finals in 3D format.

The ACCC also alleged between October 2008 and July 2011 Harvey Norman made misleading representations in their advertisements for goods for sale in their catalogues and on their website. Harvey Norman admitted it had contravened the TPA and CCA and consented to remedies sought from the Court. Refer to page 13 for further details on the outcome of this proceeding.

### Excite Mobile Pty Ltd

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Justice Mansfield | Federal Court Adelaide

Commenced 7 December 2011 | SAD328/2011

The ACCC instituted proceedings against Excite Mobile alleging false and misleading conduct and unconscionable conduct in providing mobile phone services across Australia.

It is also alleged Excite mobile used undue coercion in attempts to obtain payment for mobile phone services.

### Safe Breast Imaging Pty Ltd and Breast Check Pty Ltd

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Justice Barker | Federal Court Perth

Commenced 21 December 2011 | WAD514/201, WAD515/2011

The ACCC instituted proceedings in the Federal Court against Safe Breast Imaging and Breast Check alleging misleading or deceptive conduct and false representations in relation to breast imaging services.

The ACCC has also instituted proceedings in the Federal Court against the sole director of Safe Breast Imaging, Joanne Firth and a former director of Breast Check, Dr Alexandra Boyd.



# 1. Enforcement and compliance

## COMPETITION

### **Ticketek Pty Ltd**

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Justice Bennett | Federal Court Sydney

Commenced 5 December 2011 | NSD2166/2011

The ACCC instituted proceedings in the Federal Court against Ticketek alleging misuse of market power.

The ACCC alleged that in 2009 and 2010 Ticketek, on three separate occasions, refused to implement discount price types to be published by Lastix when requested to do so by promoters or venue operators. It is also alleged that on one occasion Ticketek removed an existing price type because it was being published by Lastix. It is alleged that Ticketek took advantage their market power by this conduct and engaged in the conduct for the purpose of preventing or deterring Lastix from engaging in competitive conduct.

Ticketek admitted that they had engaged in conduct in contravention of the section 46 of the TPA and consented to remedies sought. Refer to page 14 for further details on the outcome of this proceeding.

## OTHER

### **Google Inc (appeal)**

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Justice Emmett | Full Federal Court Sydney

Commenced 12 October 2011 | NSD1759/2011

The ACCC filed an appeal in the Full Federal Court in relation to certain advertisements appearing on Google's website.

The ACCC had alleged that Google had engaged in misleading or deceptive conduct by publishing these advertisements on Google's search results page where a headline of the advertisement comprised a business name, product name or web address of a business not sponsored, affiliated or associated with advertiser.

### **Mr Peter Foster (contempt)**

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Justice Logan | Federal Court Brisbane

Commenced 11 November 2011 | QUD252/2001

The ACCC commenced proceedings against Peter Foster in the Federal Court alleging contempt of court.

The ACCC alleges that Peter Foster breached two orders made against him by Justice Lander in ACCC v Chaste Corporation Pty Ltd (in liquidation) & Ors in September 2005.



## 1. Enforcement and compliance

### Proceedings concluded

Three first-instance enforcement litigation proceedings relating to fair trading and consumer protection were finalised during the December 2011 quarter. One contempt matter was withdrawn.

Three first-instance competition proceedings concluded in the December 2011 quarter.

### FAIR TRADING AND CONSUMER PROTECTION

#### Sontax Australia Pty Ltd

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Justice Gordon | Federal Court Melbourne

Commenced 17 June 2011 | Concluded 21 October 2011 | VID633/2011

Proceedings related to Sontax supplying luggage straps that did not comply with the prescribed product safety standard between 2 July and 29 November 2010.

Outcome | Injunctions, corrective advertisements, institution of a compliance program, pecuniary penalty \$40 000 and contribution to ACCC costs.

#### Pippa Sampson

---

Justice Tracey | Federal Court Melbourne

Commenced 6 October 2010 | Concluded 17 October 2011 | VID852/2010

Proceedings under consumer protection provisions for alleged misleading or deceptive conduct relating to sending debt collection notices on behalf of video rental stores.

Outcome | Declarations, injunctions, corrective advertising, institution of a compliance program and ACCC costs.

#### Harvey Norman Holdings Ltd

---

Justice Collier | Federal Court Brisbane

Commenced 25 November 2011 | Concluded 8 December 2011 | QUD519/2011

Proceedings in the Federal Court against Harvey Norman for alleged misleading advertising in relation to two different matters. Harvey Norman admitted that it had contravened the TPA and CCA and consented to remedies sought from the Court.

Outcome | Declarations, injunctions, corrective advertising, pecuniary penalties \$1.25 million and ACCC costs.



## 1. Enforcement and compliance

### COMPETITION

#### **TF Woollam & Son Pty LTd, JM Kelly (Project Builders) Pty Ltd, Carmichael Builders Pty Ltd, John Murphy & Georgo Bogiatzis**

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Justice Logan | Federal Court Brisbane

Commenced 18 September 2009 | Concluded 21 October 2011 | QUD236/2009

Proceedings related to three Queensland-based construction companies for engaging in illegal price controlling conduct known in the construction industry as 'cover pricing'. Proceedings were also against managing director of TF Woollam & Son, George Bogiatzis and construction manager of JM Kelly, John Murphy.

TF Woollam & Son Outcome | Pecuniary penalty \$450 000 and ACCC costs.

JM Kelly (Project Builders) Outcome | Pecuniary penalty \$600 000 and ACCC costs.

Carmichael Builders Outcome | Pecuniary penalty \$250 000 and ACCC costs. Subject to appeal on the level of penalty.

John Murphy Outcome | Pecuniary penalty \$30 000 and ACCC costs.

George Bogiatzis Outcome | Pecuniary penalty \$50 000 and ACCC costs.

#### **Korean Air Lines Co Ltd**

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Justice Stone | Federal Court Sydney

Commenced March 2010 | Concluded 18 October 2011 | NSD220/2010

Proceedings related to price fixing as part of a cartel in relation to the carriage of air freight. Korean Air Lines is the eighth international airline to settle proceedings against it.

Outcome | Injunctions, pecuniary penalties \$5.5 million and \$200 000 ACCC costs.

#### **Ticketek Pty Ltd**

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Justice Bennett | Federal Court Sydney

Commenced 2 December 2011 | Concluded 22 December 2011 | NSD2166/2011

Proceedings related to alleged misuse of market power by Ticketek. Ticketek admitted that they had engaged in the conduct in contravention of section 46 of the Act and consented to the penalties imposed by the Court.

Outcome | Pecuniary penalties \$2.5 million, declarations and \$100 000 towards ACCC costs.



## 1. Enforcement and compliance

### OTHER

#### Mr Peter O'Brien (contempt)

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Justice Jacobson | Federal Court Sydney

Commenced 1 August 2011 & 30 September 2011 | Concluded 17 November 2011 | NSD1163/2011, NSD940/2011

Proceedings related to two instances of alleged contempt of court by Mr O'Brien in relation to Sensaslim Australia Pty Ltd. The ACCC acquired further information which indicated that parties other than Mr O'Brien were involved in the alleged conduct, therefore the charges were withdrawn.

Outcome | ACCC to pay Peter O'Brien's costs.

### Court enforceable undertakings accepted

The ACCC accepted two enforcement-related section 87B undertakings and one variation to an enforcement-related section 87B undertaking during the December 2011 quarter.

### FAIR TRADING AND CONSUMER PROTECTION

#### True Value Solar Pty Ltd (TVS)

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Undertaking given | 3 November 2011

Undertaking related to misleading and deceptive conduct and false or misleading representations it made in relation to solar panel systems.

Outcome | TVS has undertaken that it will refrain from engaging in similar conduct in the future; and establish and implement a trade practices compliance program.

#### Leanan Corporation Pty Ltd

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Undertaking given | 30 November 2011

Undertaking related to misleading or deceptive conduct in representations made to consumers that its 'Organix Ever Straight Brazilian Keratin Therapy' range of products did not contain formaldehyde, sodium or sulphates when that was not the case.

Outcome | Lenan has undertaken it will publish corrective notices, establish a consumer refund and exchange program and implement a trade practices compliance program.

#### Yarrabee Investments Pty Ltd

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Undertaking given | 30 November 2011

Variation dated | 14 December 2011

The variation to the undertaking was as a result of significant changes in operations of Yarrabee Investments business and other relevant factors. The variation is to remove from the undertaking the establishment of a compliance program and the implementation of this program for a period of three years.



## 2. Communicating with businesses and consumers

### **Liaison and education activities**

The ACCC works with other regulators, government departments, businesses, industry associations and consumer associations in monitoring emerging trade practices issues and educating relevant stakeholders.

The ACCC also engages with industry associations, professional associations and consumer associations to promote greater understanding of the CCA and to respond to issues identified by those organisations. In the December 2011 quarter these engagements included:

- a meeting of the ACCC's Small Business Consultative Committee (SBCC). Key issues discussed at this meeting included: mandatory reporting; carbon price representations; and the ACL's warranties against defects requirements that commenced on 1 January 2012
- a meeting of the ACCC's Franchising Consultative Committee (FCC). Key issues discussed at this meeting included the new random audit power, mandatory reporting and updates on proposed state-based franchising regulation
- the ACCC held its final Consumer Consultative Committee meeting for 2011 on 16 December in Sydney, at which emerging consumer issues and how to address them were discussed
- meetings with a range of industry associations including a number of accounting bodies and Business Enterprise Centres Australia, to discuss methods for promoting the rights and obligations provided by the CCA to the small business sector
- a meeting with Queensland Consumers Association (QCA) to discuss the ACCC's approach to the Unit Pricing Code (UPC). Key issues discussed at this meeting included the results of a recent survey conducted by QCA and CHOICE regarding consumer awareness of the UPC
- ACCC staff presented to over 90 accountants at the NSW Congress of the Institute of Public Accountants on business and consumer scams, and the ACL.

### **Product safety**

This quarter the ACCC released its Recalls Australia iPhone application (app) which provides access to the recalls database. To accompany this release, a short video was issued on YouTube highlighting the features of the app. The app can be downloaded from the Apple store by searching for 'ACCC Product Safety' and the video is available from the ACCC Product Safety YouTube channel.





## 2. Communication with business and consumers

The ACCC also launched its fourth online product safety campaign: #summersafe. Summer safety tips were posted to @ProductSafetyAU Twitter followers throughout the campaign, and followers were encouraged to share safety tips. The campaign runs into 2012.

This quarter the ACCC launched its first Facebook page: ACCC Product Safety. The page received over 100 'Likes' in the first three days alone. The eBook: *Keeping baby safe* was released and is available in Apple's iTunes store. The ACCC is exploring options to provide the eBook on other platforms.

### Australian Consumer Law

The ACCC continued to work with businesses, industry associations and consumer groups to promote awareness of the ACL and the rights and obligations that it provides. Key activities for the quarter included:

- participation in monthly meetings of the Compliance and Dispute Resolution Advisory Committee which is comprised of ACL regulators
- development of articles on consumer protection issues for inclusion in industry newsletters and journals, presentations at industry events and the dissemination of ACCC and joint-agency guidance material through the ACCC and other government agency networks including local government. The articles covered topics on the new law regarding warranties against defects, repair notices and consumer guarantees.

These activities enable the ACCC, together with state and territory counterparts, to deliver consistent guidance to business and consumers about their rights and obligations under the ACL.

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

- Indigenous consumer issue: addressing a number of issues identified in the National Indigenous Consumer Strategy as key to improving the trading practices of traders serving Indigenous consumers
- unfair contract terms: taking a proactive compliance review of standard form contracts and appropriate enforcement action for non-compliance
- environmental claims: compliance with energy efficiency measures that are potentially misleading, vague or false
- consumer guarantees: educating suppliers of goods on the consumer guarantee provision of the ACL.

This quarter the ACCC commenced work with other Australian consumer protection regulators to address consumer concerns regarding online group buying traders. The national project team is led by with Consumer Affairs Victoria and includes NSW Fair Trading and the ACCC with oversight from the Compliance and Dispute Resolution Advisory Committee (CDRAC). Online group buying websites offer goods and services in a broad range of areas including fashion, holiday accommodation, lawn mowing, golfing packages, restaurant meals and hair and beauty treatments.

The ACCC also worked with the ACL regulators' Education and Information Advisory Committee to develop a toolkit providing consumer information for new migrants on the Australian Consumer Law. The kit would be used by organisations involved in settling newly arrived migrants into the Australian community.

### Consumer protection issues in Indigenous communities

The ACCC's indigenous consumer protection strategy identifies and addresses consumer protection issues of concern to Indigenous consumers. The ACCC is consulting with the appropriate agencies to facilitate more effective information sharing. The ACCC is also contributing to the work undertaken with the National Indigenous Consumer Strategy to address specific areas of concern of Indigenous consumers, such as unfair trading practices and consumer literacy.

The ACCC hosted the annual National Indigenous Consumer Strategy Reference Group on 18 and 19 October 2011 in Sydney. The meeting provided an opportunity for the ACL regulators to discuss emerging issues impacting Indigenous consumers and consider ways to address them.



## 2. Communication with business and consumers

### Unfair contract terms

The ACCC has undertaken a proactive approach to achieving compliance with the unfair contract term provisions that were introduced under the ACL. During the quarter, the ACCC continued to seek compliance with the unfair contract provisions in the telecommunication and vehicle rental industries. Through proactive engagement with these industry sectors, the ACCC has encouraged businesses to amend potentially unfair terms.

The ACCC continued to lead the CDRAC Unfair Contract Terms Working Group with Consumer Affairs Victoria. The first phase analysis of standard form contracts used by online retailers is close to completion. The review covers a range of online sectors including online retail, travel, group buying, digital media and auction sites. Approximately 80 business standard form contracts have been reviewed. This project has already identified several types of possible unfair contract terms including broad limitations of liability, terms that deem the consumer to have 'understood' the contract, intellectual property and consumer guarantees issues and attempts to limit jurisdiction, as well as a range of other ACL issues. During the next phase of the project, the ACCC will engage with business on the identified terms to promote compliance.

During the quarter, the legal proceedings against Advanced Medical Institute Inc. and its related companies continued. Patients of NRM Corporation Pty Ltd and NRM Trading Pty Ltd (collectively NRM and a related company) are required to provide 30 days' written notice to NRM to terminate the contract and must also pay a number of fees including a fixed administrative fee of 15 per cent of the original contract price. The ACCC alleges that each of the fees had the effect of penalising a consumer who gave notice of termination and therefore causing a significant imbalance in the parties' rights under the contract. This is the first case brought by the ACCC under the unfair contract terms provisions.

### Consumer guarantees

The ACCC continued to develop its communications campaign to increase consumer awareness and understanding of consumer guarantees ready for the 5 February 2012 launch date.

The campaign aims to increase consumers' awareness of their rights when they buy goods and services that are faulty, unsafe or do not work as intended or fail to meet the specified requirements, and increase their confidence to go back to the business with a problem or contact their local consumer protection agency or the ACCC when businesses refuse to help. The campaign will focus on those consumers who have been identified to be more at risk of detriment, including consumers from culturally and linguistically diverse backgrounds, Indigenous communities, young consumers and consumers living in regional areas.

During the quarter, the ACCC presented information on consumer guarantees at industry events, published articles in several industry newsletters, and developed ACCC guidance materials on repair notices and warranties against defects. The ACCC distributed over 30 000 point of sale signs about consumers' refund rights to key retail industry associations and retailers.

### Scams

During the quarter, the ACCC continued work on initiatives to alert consumers to new and emerging scams. 'SCAMwatch radars' are alerts published on the SCAMwatch website at [www.scamwatch.gov.au](http://www.scamwatch.gov.au) and alert consumers to new and emerging scams with advice on how to protect themselves and report scams. Ten SCAMwatch radars were issued this quarter covering: scam websites offering birth, death and marriage certificates; scam online classifieds ads for smartphones and tablet devices; fake climate change websites; secure ways to erase personal details from computers before disposal; parcel delivery scam telephone calls; scam gift vouchers offered on social networking websites; London Olympics accommodation scams; lottery scams; and phishing scams.

The ACCC's most popular radar was 'The 12 scams of Christmas' highlighting common and emerging scams to watch out for over the festive season. Over 41 000 people viewed the radar on the SCAMwatch website during November and December.



## 2. Communication with business and consumers

'The 12 scams of Christmas' was particularly popular via social media with hundreds of consumers, small businesses and government organisations sharing the message with their followers and friends.

The SCAMwatch website received a high number of visitors with over 6.7 million hits recorded, and over 210 000 unique visitors during the quarter. The SCAMwatch Twitter account issued almost 400 tweets to over 844 followers.

### Industry code compliance audits

On 1 January 2011 the ACCC was given the power to conduct audits to monitor compliance with industry codes prescribed under the CCA. This power enables the ACCC to obtain from a corporation any documents it is required to keep, to generate or to publish under the three current mandatory codes of conduct.

This quarter the ACCC served six audit notices on traders operating under the Franchising Code of Conduct and the Horticulture Code of Conduct. The ACCC has now served audit notices on 18 traders (13 franchisors and five horticulture traders) since the power was introduced. The majority of traders audited to date have been found to be compliant with the relevant codes.

### Product safety

A significant product safety focus this quarter was the conclusion of the national pre-Christmas toy survey. This involved the ACCC and state and territory fair trading agencies undertaking targeted surveillance of toys to ensure they met all mandatory safety requirements. Conducted in the lead up to Christmas, the surveillance targeted a range of suppliers, from major retailers to discount variety stores. Online traders were also included.

### Emerging hazards and product safety recalls

During the quarter, the ACCC:

- reviewed 561 mandatory reports of which 271 were referred to other regulators (predominantly food reports referred to Food Standards Australia New Zealand) while the remaining 290 were assessed or are under assessment by the ACCC
- received notification and uploaded details of 104 consumer product safety recalls to the Recalls Australia website ([www.recalls.gov.au](http://www.recalls.gov.au))—57 of these recalls were for consumer goods, which are recalls actively managed by the ACCC. Significant recalls this quarter included PJ SAS Trading Ltd children's face paint, Adventure Foldable Single Hammock and Malmar Enterprises Pty Ltd Yo-Yo Octopus ball.

The ACCC is pleased to see industry continue its high use of the recalls progress reporting e-form, with take-up remaining close to 100 per cent for another quarter. The form is one of the tools used by the ACCC when reviewing recall effectiveness and deciding whether to close a recall.

### Minimising potential harm to consumers

On 21 November 2011 the Parliamentary Secretary to the Treasurer issued a warning notice advising parents not to purchase a particular type of child car restraint which had been identified for sale online. The product, which was marketed under different names including 'Baby Car Seat Pouch,' did not comply with the mandatory standard for child restraints for use in motor vehicles.

Other product safety activities undertaken this quarter to minimise potential harm to consumers included the proactive screening for lead and other toxic elements of a sample of products intended for children and likely to be ingested or mouthed, such as finger paint and Play Doh. Screening was initially conducted using an x-ray fluorescence gun and some products were then also subject to migration tests in accordance with the mandatory standard. Of the 95 products initially screened, only one was found to be non-compliant: Children's Horror Face Paint was found to contain excessive levels of lead and was recalled by the supplier.



## 2. Communication with business and consumers

This quarter, the ACCC also undertook testing of a range of other consumer goods for potentially hazardous chemicals, including assessing dummies and infant bottle teats for nitrosamines and di(2-ethylhexyl) phthalate (more commonly referred to as DEHP). Products tested as a part of this assessment met all mandatory requirements.

Together with the Queensland Office of Fair Trading and Consumer Affairs Victoria, the ACCC also tested a sample of foam play mats for formamide following media coverage related to a possible safety hazard. Testing found products supplied in Australia presented no risk to children.

In the period leading up to Christmas, the ACCC worked with state and territory fair trading agencies on a toy surveillance activity. In total, more than 100 000 product lines and 2931 retailers were surveyed. Corrective actions were commenced in relation to 493 product lines that did not comply with the relevant mandatory standard or ban. Where warranted, the ACCC and state and territory agencies also considered enforcement action in response to the non-compliance.

### Regulatory policy

This quarter, the ACCC undertook a number of public consultation exercises in relation to possible regulatory changes, including:

- release of several public consultation papers related to a possible Mandatory Standard for tobacco (Graphic Health Warnings). This culminated in a Mandatory Information Standard being published in late December for commencement from 1 January 2012
- release of a public consultation paper on a proposed services standard related to corded internal window coverings
- release of a discussion paper looking at the labelling of portable above-ground pools.



## 2. Communication with business and consumers

### **Case study: Fast action to remove a hazardous product from the marketplace**

In late September the ACCC received a complaint that a child had choked on a piece of silicone that had broken off the seal of a food blender. The consumer reported that the seal had become dislodged from the channel in the blender base and was chopped into pieces by the blades. In this case, the child's mother was fortunately able to remove the piece of silicone from the child's throat and no injury occurred, but the incident suggested a possible serious safety hazard in a product commonly available on the Australian market.

The Homemaker blender, supplied by Kmart, was recalled on 3 October 2011.

The ACCC identified a very similar item available in Woolworths stores, and took prompt action to assess whether Woolworths had sourced the same blender from the same factory as Kmart. Woolworths subsequently confirmed that their Abode blender (sold by BIG W) was in fact sourced from the same factory as the recalled Kmart blender and that it had the same faulty seal. Woolworths recalled the product on 10 October 2011.

After both recalls had been announced, the ACCC was contacted by the manufacturer enquiring whether they could resupply the blender if the fault was corrected. The manufacturer was advised that once design improvements and safety assessments had been carried out, the design changes and model number re-designation should be provided to the relevant testing laboratory and accrediting body so that—if the redesigned product was assessed as safe for use (including a foreseeable misuse)—the relevant approval certificates and safety reports could be updated and provided to suppliers such as Kmart and Woolworths to give them some assurance as to the safety of the product.

The ACCC doesn't 'certify' products as safe—it is a supplier's responsibility to ensure that the products they supply are safe for the products foreseeable use, and any foreseeable misuse, and meet all mandatory safety requirements. More information about supplier requirements is on the Product Safety Australia website [www.productsafety.gov.au](http://www.productsafety.gov.au).



### 3. Mergers

In assessing mergers, acquisitions and asset sales under section 50 of the *Competition and Consumer Act 2010* (CCA), the ACCC conducts thorough and rigorous processes to ensure transactions do not lead to a substantial lessening of competition in the marketplace.

#### **Merger reviews undertaken in the December 2011 quarter**

In the December 2011 quarter, 83 matters were pre-assessed by the ACCC and reviews were conducted on 26 matters, including confidential and public merger reviews. Of the 26 matters reviewed, 81 per cent of merger proposals were cleared unconditionally by the ACCC.

The ACCC expressed concerns following one confidential review proposal. One public merger review was resolved following the ACCC's acceptance of and undertaking pursuant to section 87B of the CCA.



### 3. Mergers

**Table 3.1: Matters assessed and reviews undertaken, December 2011 Quarter**

	Confidential	Public	Total
<b>Pre-assessed 1 October—31 December 2011</b>	<b>83</b>	<b>0</b>	<b>83</b>
<b>Total reviews undertaken</b>			
<b>1 October—31 December 2011</b>	<b>3</b>	<b>23</b>	<b>26</b>
<i>Total reviews can be broken down into the following categories:</i>			
Not opposed	0	21	21
Finished—no decision (including withdrawn) <sup>1</sup>	2	1	3
Opposed outright	0	0	0
Confidential review—ACCC concerns expressed	1	0	1
Resolved through undertakings <sup>2</sup>	0	1	1
Variation to undertaking accepted	0	0	0
Variation to undertaking rejected	0	0	0
Total matters assessed and reviews undertaken	86	23	109

**Table 3.2 Matters assessed and reviews undertaken, financial year comparisons**

	2009–10	2010–11	YTD 2011–12
<b>Total matters assessed and reviews undertaken</b>	<b>321</b>	<b>377</b>	<b>185</b>
<b>Matters assessed - no review required</b>	<b>153</b>	<b>236</b>	<b>135</b>
<b>Reviews undertaken</b>	<b>168</b>	<b>141</b>	<b>50</b>
<i>Total reviews can be broken down into the following categories:</i>			
Not opposed	131	110	37
Finished—no decision (incl. withdrawn)	16	14	9
Publicly Opposed outright	8	3	0
Confidential review—Opposed or ACCC concerns expressed	6	4	2
Resolved through undertakings	4	7	2
Variation to undertaking accepted	2	3	0
Variation to undertaking rejected	1	0	0

<sup>1</sup> These are matters that were withdrawn or where no decisions were made. They are not included in the timings in table 3.3 below.

<sup>2</sup> Only public matters can be resolved through undertakings.





## 3. Mergers

### Time taken to assess mergers

The following table breaks down the time taken by the ACCC to complete reviews of merger proposals in the December 2011 quarter. This does not include 83 pre-assessed matters (the majority of these are completed within two weeks), three matters that were either withdrawn or where no decision was formed on a confidential basis, or three reviews of a completed acquisition.<sup>3</sup>

**Table 3.3: Time taken to review merger proposals 1 October—31 December 2011**

Time taken to undertake merger reviews (cumulative)	Number of reviews	Percentage of mergers
Two weeks or less	0	0%
Four weeks or less	2	10%
Six weeks or less	8	40%
Eight weeks or less	13	65%
More than eight weeks	7	35%

### Statement of Issues

On 4 November 2011 the ACCC released a Statement of Issues in relation to PactGroup Pty Limited's proposed acquisition of Viscount Plastics Limited.

### Public competition assessments

To support the aim of fostering informed markets and provide an enhanced level of transparency in its decision making, the ACCC provides public competition assessments outlining how decisions are reached on matters of particular public interest or those that have important precedence value.

The ACCC did not issue any public competition assessments during this quarter.

### Major matters

Major matters decided during the December 2011 quarter included:

#### Commonwealth Bank of Australia proposed acquisition of Court Financial

On 9 September 2011 the ACCC commenced a review of the proposed acquisition of Court Financial (Court) by Commonwealth Bank of Australia (CBA). Court is a provider of financial services through their network of aligned accountants. CBA is a fully integrated financial service provider. Both parties operate on a national basis in Australia.

On 17 of November 2011 the ACCC decided that the proposed acquisition would be unlikely to have the effect of substantially lessening competition in any market in contravention of section 50 of the CCA.

The ACCC considered the impact of the proposed acquisition in the context of the supply of a number of relevant products, including financial planning and advisory services, mortgage and mortgage referral services, investment and investment platforms, and life insurance. However, the ACCC did not consider it necessary to precisely define the relevant markets in order to assess the effects of the proposed acquisition.

The ACCC noted that the acquisition would increase CBA's presence in the supply of financial planning and mortgage referral services. The ACCC considered that this increased presence could potentially reduce

<sup>3</sup> Reviews of completed mergers are not included in table 3.3. Completed mergers are not subject to the same time frames as reviews of proposed mergers for several reasons, including that it often takes longer to obtain parties' submissions because the time incentives of parties are altered. The tables do not include matters pre-assessed as not requiring substantive review, e.g. FIRB notifications. The majority of matters that are pre-assessed as not requiring a review are dealt with in less than two weeks, but are not recorded in these tables because the tables list only the timing relating to substantive merger investigations.





### 3. Mergers

competition in the supply of these services and increased the ability of CBA to direct business to its upstream investment and mortgage related products. However, the ACCC was satisfied that CBA would continue to be constrained by a number of other significant financial planning dealer groups, suppliers of mortgage referral services, and investment and platform providers.

With respect to life insurance and related products such as disability insurance, the ACCC noted that Count's presence as a provider of referral services to customers for insurance products provided by third parties was relatively small. The ACCC found that CBA would continue to be constrained by alternative providers of life insurance and any increased inflows to CBA's own insurance products was likely to be minimal and unlikely to raise significant competition concerns.

Outcome | On 17 November 2011 the ACCC decided not to oppose the proposed acquisition.

#### **Arrow Energy Holdings Pty Ltd—proposed acquisition of Bow Energy Limited**

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On 14 October 2011 the ACCC commenced its review of the proposed acquisition of Bow Energy Limited (Bow Energy) by Arrow Energy Holdings Pty Ltd (Arrow Energy). Bow Energy is an explorer and developer of coal seam gas (CSG) fields predominantly in the Bowen and Surat Basins of Queensland. Arrow Energy (a joint venture between Shell Energy Holdings Australia and PetroChina) is primarily involved in the exploration, development and production of CSG fields in Queensland, including supplying gas to the domestic market. Arrow Energy is also planning to develop a liquefied natural gas (LNG) processing and export facility at Gladstone, Queensland.

On 1 December 2011 the ACCC decided that the proposed acquisition of Bow Energy by Arrow Energy would be unlikely to have the effect of substantially lessening competition in any market in contravention of section 50 of the CCA.

In particular, the ACCC considered that the increase in both Arrow's proven and probable reserves and its proven, probable and possible reserves as a result of the acquisition would not be significant and Arrow would be unlikely to be in a position to increase prices for wholesale gas supply to domestic users.

The ACCC, in conducting its assessment, recognised the concerns of domestic gas users in southern Queensland regarding the availability of long term gas contracts in the short to medium term.

The ACCC considered that broader market developments associated with the development of the LNG industry in Queensland meant that prices to domestic users may rise as a result of export opportunities available to domestic gas developers and producers. The ACCC formed the view that this process is unlikely to be affected by the proposed acquisition.

The ACCC considered that, were it not acquired by Arrow Energy, Bow Energy would be likely to have explored a number of options for the development of its reserves, including production of the gas for LNG export, and would be expected to have entered into a supply contract with the purchaser willing to pay the highest price. The ACCC concluded that Bow was unlikely to have developed the reserves for domestic supply if the price received for domestic supply was lower than the effective equivalent price for LNG export.

Industry feedback suggested that with or without the proposed acquisition, Arrow Energy was unlikely to enter into new contracts to supply gas to domestic users in the short to medium term and would be focused on the development of its gas reserves to be supplied to its proposed LNG project at Gladstone. The ACCC noted this feedback in making its final assessment.

Outcome | On 1 December 2011 the ACCC announced its decision to not oppose the proposed acquisition.



### 3. Mergers

#### **Woolworths Limited completed acquisition of Greystanes Shopping Centre**

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On 5 September 2011 the ACCC commenced a review of the completed acquisition of the Greystanes Shopping Centre by Woolworths Limited. At the time of the acquisition the Greystanes Shopping Centre included supermarket tenants Woolworths and Franklins and 29 specialty stores.

The ACCC considered the likely impact of the completed acquisition on the local retail supermarket. The ACCC also considered the market for the local retail supply of takeaway packaged liquor because the completed acquisition may provide Woolworths with the ability to establish a bottle shop within the shopping centre.

The geographic dimension of these local markets was considered to be the suburb of Greystanes and surrounding areas, extending up to five kilometres from the Greystanes Shopping Centre. The ACCC had regard to natural geographic features and other relevant factors, but considered that a different geographic market would not necessarily alter the outcome of the competition assessment.

The ACCC further considered the impact of the completed acquisition on relevant wholesale procurement and supply markets, including packaged groceries and packaged liquor, in New South Wales.

The ACCC concluded that the completed acquisition was unlikely to substantially lessen competition in any market. In considering the extent of competition between local retail supermarkets, the ACCC was satisfied that a potential reduction in the number of competing supermarkets at the Greystanes Shopping Centre would not significantly alter the level of competition. This potential reduction existed due to Woolworths' power to determine the tenants within Greystanes Shopping Centre, of which Franklins was a tenant. The ACCC found that competing supermarkets, including supermarkets based in alternative shopping centres, would act to constrain Woolworths.

In terms of the retail supply of takeaway packaged liquor, the ACCC found that if Woolworths was to establish a liquor store within the Greystanes Shopping Centre, it would face competition from a number of competing liquor operators based on price, range and levels of service.

With respect to the relevant wholesale markets, the ACCC considered that the completed acquisition would be unlikely to significantly alter the volume of Woolworths' purchases in terms of supermarket products or packaged liquor.

Outcome | On 7 December 2011 the ACCC announced its decision to not oppose the completed acquisition.

#### **Transit Systems Pty Ltd—proposed acquisition of Stradbroke Ferries Limited**

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On 5 April 2011 the ACCC commenced its public review of the proposed acquisition. Transit Systems Pty Ltd (Transit) and Stradbroke Ferries Limited (Stradbroke Ferries) both operated scheduled vehicle ferry services between Toondah Harbour, Brisbane and Junner Street, North Stradbroke Island (the Brisbane–North Stradbroke Island route) and ferry services to other areas of Moreton Bay.

The ACCC considered that, in the absence of the undertakings, the proposed acquisition would result, or be likely to result, in a substantial lessening of competition in the market for the supply of vehicle ferry services on the Brisbane–North Stradbroke Island route.

The ACCC considered that the proposed acquisition would remove Stradbroke Ferries as a vigorous and effective competitor to Transit and leave Transit as the only supplier of vehicle ferry services on the Brisbane–North Stradbroke Island route.

The ACCC considered that there were very high barriers to entry for the supply of vehicle ferry services on the Brisbane–North Stradbroke Island route and that the threat of new entry would not be likely to constrain the merged firm. These barriers to entry largely consisted of sunk capital costs and environmental regulatory



### 3. Mergers

restrictions in developing new landing sites, as well as the presence of exclusive access rights over existing landing sites. The ACCC noted that the threat of switching by customers was unlikely to constrain the merged firm.

The objective of the undertaking was to address the ACCC's competition concerns that would otherwise arise as a consequence of the proposed acquisition, by ensuring that any potential new entrant on the Brisbane-North Stradbroke Island route has access to landing sites.

The ACCC considered markets relating to the south Moreton Bay islands but did not express concerns in relation to those or any other markets.

On 1 December 2011 the ACCC announced its decision not to oppose the proposed acquisition, subject to section 87B undertakings given by Transit Systems Pty Ltd.

Outcome | On 1 December 2011 the ACCC announced its decision not to oppose the proposed acquisition, subject to section 87B undertakings given by Transit Systems Pty Ltd (Transit).



## 4. Authorisations and notifications

### Authorisations

During the December quarter 2011, the ACCC issued three final determinations, three draft determinations and made one interim decision. The ACCC received 11 new authorisation applications covering seven projects, including three applications for revocation and substitution of an authorisation, in the quarter.

**Table 4.1: Authorisations received and decisions issued—October to December 2011**

<b>Total authorisations received 1 October—31 December 2011</b>	<b>11</b>
New	6
Revocation and substitution	5
Minor variations	0
<b>Decisions issued 1 October—31 December 2011</b>	<b>7</b>
Draft determinations	3
Final determinations	3
Interim decisions	1

### Major authorisations

Major authorisations of note decided during the December 2011 quarter included:

#### **Virgin Australia Group & Singapore Airlines—A91267 & A91268**

On 20 June 2011 Virgin Australia and Singapore Airlines sought authorisation to make and give effect to an aviation alliance in relation to international passenger transport services.

Result | On 1 December 2011 the ACCC issued a final determination granting authorisation in respect of an alliance between Virgin Australia and Singapore Airlines for five years.



## 4. Authorisations and notifications

### Draft determinations (not otherwise appearing above)

Draft determinations issued during the December 2011 quarter included:

#### Australian Processing Tomato Growers—A91270

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Summary | On 26 August 2011, the Australian Processing Tomato Growers, a branch of the Victorian Farmers Federation's Horticulture Group, sought authorisation on behalf of 22 named tomato growers and any future members, to collectively bargain on the terms and conditions of contracts with tomato processors.

The ACCC considered submissions from potentially interested parties and on 13 December 2011 issued a draft determination proposing to grant authorisation for the proposed conduct for five years. Growers who operate or have an interest in a tomato-processing business would not be authorised to participate in the collective bargaining. The ACCC is now considering submissions received in response to the draft determination and will publish a final determination in February 2012.

### Authorisations under consideration

Authorisations of interest under consideration during the quarter included:

#### NBN Co Limited—A91271–A91273

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Summary | On 29 August 2011 NBN Co Limited (NBN Co) lodged applications seeking authorisation of certain provisions of an agreement entered into with SingTel Optus and other Optus entities (Optus) to migrate Optus' hybrid fibre-coaxial (HFC) subscribers to the national broadband network.

Under the agreement, among other provisions, NBN Co will make progressive payments to Optus based on the actual number of customers that migrate from the Optus HFC network to the national broadband network, and Optus will progressively decommission parts of the HFC network that do not provide ongoing support for mobile infrastructure and business customers.

Note: In January 2012 NBN Co withdrew these applications and lodged new applications in slightly different terms. The ACCC has sought submissions from NBN Co and interested parties and the matter is under consideration.

### Collective bargaining authorisations

Collective bargaining authorisations of interest decided during the quarter included:

#### Newsagents Association of NSW and the ACT—A91269

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On 1 August 2011 the Newsagents Association of NSW and ACT Ltd (NANA) sought authorisation to collectively bargain on behalf of its members with NSW Lotteries in relation to the terms and conditions of agency agreements and distribution services including: commission fees; handling fees; agency application fees; support services levies; freight charges; product ordering fees; equipment hire costs; retail image design and agency subsidy and insurances; and any conduct protocols issued by NSW Lotteries.

Outcome | On 6 October 2011 the ACCC issued a final determination granting the NANA authorisation for five years.



## 4. Authorisation and notifications

### Notifications

#### Exclusive dealing notifications

Notifications of interest decided or under consideration during the quarter included:

##### **Football Queensland Limited—N93402**

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Summary | On 28 April 2008 Football Queensland Limited lodged exclusive dealing notification N93402 regarding the 'Teamwear Program', which requires clubs that 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.

Outcome | On 15 December 2011 the ACCC issued a notice to revoke the notification.

Note: Football Queensland Limited lodged an appeal against this decision with the Australian Competition Tribunal on 5 January 2012.

#### Collective bargaining notifications

Collective bargaining notifications of interest decided or under consideration during the quarter included:

##### **Australian Newsagents' Federation Ltd—CB00156**

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On 6 October 2011 ANF lodged collective bargaining notifications on behalf of its South Australian members to collectively bargain on behalf of the newsagents with SA Lotteries in relation to the terms and conditions of the lottery distribution agent agreements, including: commissions, fees, terms of supply, rights of termination, and matters contained within the Agent Guide.

Outcome | On 27 October 2011 the ACCC wrote to the Australian Newsagents' Federation Ltd (ANF) advising that the ACCC has decided not to take further action with respect to the notifications at this time.

##### **Mai Wiru Regional Stores Council Aboriginal Corporation CB00150–CB00155**

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On 7 September 2011 Mai Wiru Regional Stores Council lodged collective bargaining notifications on behalf of itself and six regional community stores to collectively bargain on behalf of the stores for the procurement of essential grocery and supermarket items to be sold to members of remote indigenous communities within the Anangu Pitjantjatjara Yankunytjatjara Lands.

Outcome | On 4 October 2011 the ACCC wrote to Mai Wiru Regional Stores Council advising that the ACCC has decided not to take further action with respect to the notifications at this time.



## 5. Regulatory affairs

The ACCC and AER have roles in promoting competition in network industries: communications, energy, post, water and transport. The ACCC is also involved in monitoring prices of selected goods and services. The ACCC and the AER ensure that participants in the regulated industries comply with access obligations and revenue or pricing arrangements that apply to facilities such as gas transmission pipelines, electricity transmission networks, telecommunications networks and airports.

### Communications

In the December 2011 quarter, the ACCC:

- commenced public consultation on NBN Co's special access undertaking (SAU)
- issued a discussion paper in relation to Telstra's revised structural separation undertaking (SSU)
- removed geographic exemptions for declared fixed line services
- commenced consultation on whether to declare the wholesale ADSL service
- issued draft guidelines on non-discrimination for NBN and super fast telecommunications networks
- issued a draft final access determination (FAD) for declared transmission services
- invited final comments on the local bitstream access service description
- published three reports: *Imputation and non-price terms and conditions report* for the June 2011 quarter and for the September 2011 quarter, and *Current cost accounting report* for the second half-year and the full year ended 30 June 2011.

### NBN Co's special access undertaking

On 20 December 2011 the ACCC commenced consultation on the SAU lodged by NBN Co on 5 December 2011.

The SAU provides a framework for access to services provided over NBN Co's fibre, wireless and satellite networks until June 2040. The ACCC's discussion paper sets out the process that it intends to follow in assessing the SAU. It also provides an overview of the legislative assessment framework for the SAU and the SAU itself.

The ACCC intends to release a supplementary consultation paper in February 2012 and it will consider submissions received by 30 March 2012 in assessing whether to accept or reject the SAU.





## 5. Regulatory affairs

### **Telstra's revised structural separation undertaking**

On 16 December 2011 the ACCC commenced consultation on Telstra's revised SSU, submitted on 9 December 2011.

The ACCC is seeking submissions on the appropriateness and effectiveness of the interim equivalence and transparency measures and the monitoring of compliance measures in Telstra's revised undertaking.

Submissions were due by 13 January 2012 and the ACCC intends to release its final decision in February 2012.

### **Geographic exemptions for declared fixed line services**

On 16 December 2011 the ACCC completed its public inquiry into the geographic exemption provisions of the wholesale line rental (WLR), local carriage service (LCS), and PSTN originating access (PSTN OA) services. The ACCC's decision varies the final access determinations (FADs) for these services to remove the exemption provisions.

The ACCC's analysis found three key reasons for removing the exemption provisions:

1. uncertainty surrounding the timing and location of the roll-out of the National Broadband Network (NBN), and subsequent de-commissioning of the copper network, increases the risks associated with investing in copper-based infrastructure that will be redundant on the NBN.
2. Telstra remains the main provider of wholesale voice-only services and there is little prospect of a wholesale market developing in voice-only resale services in the exempt areas.
3. Telstra's continuing dominance in retail markets as well as a number of supply-side constraints significantly limits the effectiveness of retail competition in restraining Telstra's exercise of its wholesale market power.

The ACCC's decision effectively re-regulates the supply of the WLR, LCS and PSTN OA services in the currently-exempt exchange service areas (ESAs). The ACCC believes that removing the exemptions will promote: competition; the efficient use of and investment in infrastructure; and the long-term interests of end-users.

### **Draft final access determination for regulated transmission services**

On 9 December 2011 the ACCC issued a draft FAD for the declared domestic transmission capacity service (DTCS).

The price terms of the draft FAD are based on a domestic benchmarking approach using a linear regression model. The model uses prices on competitive routes to predict the prices that would be expected for declared routes if these routes were priced competitively by the market.

The ACCC considers that this pricing approach reflects the complex relationships between the different factors affecting the price of transmission of services. The FAD also includes non-price terms.

### **Final access determination for mobile terminating services**

On 8 December 2011 the ACCC released a FAD for the domestic mobile terminating access service (MTAS) following consultation with stakeholders.

The ACCC's previous pricing principles reduced the rate for the MTAS from 21 cents per minute in 2004 to 9 cents per minute from 1 July 2007 to 31 December 2011. The FAD implements a reduction in the regulated MTAS rate, from 6 cents per minute on 1 January 2012 to 3.6 cents per minute on 1 January 2014.

While parties will still be able to negotiate their own commercial agreements, the FAD establishes benchmark prices and non-price terms and conditions for access seekers to fall back on in negotiations.





## 5. Regulatory affairs

### Inquiry into declaration of wholesale ADSL

On 16 December 2011 the ACCC commenced consultation on whether to declare a wholesale ADSL service.

This declaration inquiry has been initiated in light of on-going competition concerns that have arisen from complaints by access seekers that a lack of regulated access to wholesale DSL services has impeded their ability to compete with Telstra.

The ACCC must consider whether declaration is likely to promote competition, achieve any-to-any connectivity between end-users and encourage efficient investment. Once a service is declared an access provider supplying the declared service must supply the service in accordance with the standard access obligations.

### Local bitstream access service

On 24 November 2011 the ACCC invited final comments on the local bitstream access service description as it prepared to regulate the service.

The recent amendments to the *Competition and Consumer Act 2010* and *Telecommunications Act 1997* required that the ACCC declare the service. The local bitstream access service will be used to carry digital data on superfast telecommunications networks.

### Reports

During the December 2011 quarter the ACCC published three telecommunications related reports:

1. *Imputation and non-price terms and conditions report* for the June 2011 quarter
2. *Imputation and non-price terms and conditions report* for the September 2011 quarter, and
3. *Current cost accounting report* for the second half and the full year ended 30 June 2011.

These reports are required under the accounting separation regime that applies to Telstra.

### Access disputes

Following amendments to Part XIC of the *Competition and Consumer Act 2010*, transitional provisions provide that access disputes may be notified to the ACCC until a FAD in respect of a regulated service is made. Once a FAD is made, access disputes can no longer be notified to the ACCC in relation to that service. The ACCC has made FADs in relation to the six regulated fixed line services (ULLS, WLR, LSS, PSTN OA, PSTN TA and LCS).

Arbitration hearings for access disputes are private and the ACCC generally does not make any public comment on disputes.

In the December 2011 quarter, no new access disputes were notified to the ACCC. The following table summarises developments in relation to access disputes during the December 2011 quarter.

**Table 5.1: Developments in relation to access disputes—October to December 2011**

	Total
Active disputes at 1 October 2011	13
Decisions subject to appeal to the Federal Court	0
New arbitrations commenced	0
Final determinations issued	0
Disputes withdrawn	0
Published determinations	0
<b>Active disputes at 31 December 2011</b>	<b>13</b>



## 5. Regulatory affairs

### **Guidelines on non-discrimination for NBN and superfast telecommunications networks**

On 13 December 2011 the ACCC released draft guidelines on the non-discrimination provisions contained in Part XIC of the *Competition and Consumer Act 2010*. As part of the National Broadband Network reforms, NBN Co and other providers of superfast telecommunications services are prohibited from discriminating between their customers, except in limited circumstances.

### **Australian Energy Regulator**

All papers and submissions relating to the AER are freely accessible by the public on the AER's website at [www.aer.gov.au](http://www.aer.gov.au).

### **AER State of the Energy Market 2011 report**

On 14 December 2011 the AER published its *State of the energy market 2011* report.

The report provides an overview of Australia's electricity and gas markets over the past 12 months. It supplements the AER's extensive technical and compliance reporting on the energy sector and is intended to meet the needs of a wide audience, including government, industry and the broader community. The 2011 edition consists of a market overview, supported by four chapters on the electricity and gas sectors.

### **Appointments to the AER's Customer Consultative Group**

In December 2011 the AER offered positions on its Customer Consultative Group (CCG) to 10 organisations for a two-year period ending in late 2013.

The organisations are: the Australian Council of Social Services; the Australian Industry Group; Consumer Action Law Centre; Consumer Utilities Advocacy Centre; the Council on the Ageing (National); Public Interest Advocacy Centre; the Queensland Council of Social Services; the Saint Vincent de Paul Society; the Tasmanian Council of Social Services; and UnitingCare Wesley Adelaide.

CCG membership will provide organisations with the opportunity to inform the AER about issues that impact on the groups they represent. It will also provide a forum in which organisations can meet with other consumer representatives on key energy consumer issues.

It is anticipated that the group's next meeting will be held in February 2012 and that its main focus will be retail and non-price distribution regulatory issues. At the final meeting of the inaugural CCG membership on 28 October 2011, the group discussed the AER's proposed changes to network regulation rules; the AER's approach to retail market compliance and enforcement when the Retail Law and Retail Rules commence on 1 July 2012; consumer engagement strategies and the development of the AER's price comparator website.

### **Gas network regulation matters**

#### **Approved 2012 Victorian gas transmission tariffs**

On 14 December 2011 the AER approved APA GasNet's proposed 2012 transmission tariffs in accordance with the *APA GasNet Australia Access Arrangement*. The AER approved GasNet's annual tariff variation application on the basis that it complied with all the relevant requirements of its Access Arrangement, and was satisfied that the application complied with the relevant principles and formulae. The approved tariffs commence from 1 January 2012.



## 5. Regulatory affairs

### **2012 Reference Tariffs and Ancillary Reference Tariffs for Victorian gas distribution networks**

On 13 December 2011 the AER approved Reference Tariffs and Ancillary Reference Tariffs submitted by the Victorian gas distribution networks Multinet, SP AusNet, Envestra Victoria and Envestra Albury. Information regarding the Reference Tariffs and Ancillary Reference Tariffs are available on the AER's website.

### **Access arrangement proposal for Roma to Brisbane Pipeline**

On 16 November 2011 the AER released an access arrangement proposal for the Roma to Brisbane Pipeline (RBP) for consideration and comment by interested parties. The proposal was submitted by the service provider of the RBP, APT Petroleum Pipeline Limited, for the period 12 April 2012 to 30 June 2017.

The access arrangement proposal establishes the basis for the terms and conditions of access for users and prospective users for the pipeline.

The AER is required to make the decision to approve or not approve the access arrangement proposal, and sought submissions for consideration in making its draft decision on the proposal. Submissions closed on 19 December 2011. The AER also hosted a stakeholder forum on the proposal on 30 November 2011 in Brisbane.

## **Electricity network regulation matters**

### **Final decision: Victorian f-factor determinations and explanatory statement**

On 22 December 2011 the AER made its final determinations to set fire start targets for the Victorian electricity distribution businesses CitiPower, Jemena, Powercor, SP AusNet and United Energy under the Victorian Government's f-factor scheme for the 2012–15 period. The AER made these final determinations after considering the submissions received to the draft determinations, which were published for consultation on 5 October 2011.

The AER's final determinations are made under the *f-factor scheme order 2011*, published on 23 June 2011.

The f-factor scheme is intended to provide incentives for Victorian distributors to reduce the risk of fire starts and to reduce the risk of loss or damage caused by fire. For the first four years (2012–15), distributors will be either rewarded or penalised at the incentive rate of \$25 000 per fire for performing better or worse than their respective fire start targets.

### **Consultation: draft connection charge guideline for electricity under the forthcoming chapter 5A of the National Electricity Rules**

On 22 December 2011 the AER published a draft connection charge guideline and an explanatory statement for public consultation. This was following Ministerial Council on Energy (now Standing Council on Energy and Resources) endorsement of the introduction of a new chapter 5A: *Electricity connection for retail customers* to the National Electricity Rules (NER). Under chapter 5A, the AER is required to develop and publish connection charge guidelines to codify how electricity distribution network service providers should charge new electricity customers for connecting to their networks.

The AER released a *Consultation Paper: Issues and AER's preliminary positions, Connection charge guidelines: for accessing the electricity distribution network* (Issues paper) on 10 June 2011. The issues paper identified a number of issues and alternate options for calculating the connection charge, on which the AER sought stakeholders' opinions. The AER also hosted a public forum on 11 July 2011 to explain the issues identified in the issues paper to facilitate stakeholders in preparing their submissions.



## 5. Regulatory affairs

The draft connection charge guideline and explanatory statement are published in accordance with the distribution consultation procedures set out in clause 6.16(b) of the NER for the purpose of consulting with stakeholders before the AER finalises the connection charge guideline.

Interested parties have been invited to make written submissions regarding the draft connection charge guideline by 17 February 2012.

### **Electricity Network Service Provider Registration Exemption Guideline**

On 20 December 2011 the AER released an Electricity Network Service Provider Registration Exemption Guideline (network Guideline) and accompanying Final Decision.

Under the NER, any party that owns or operates a private electricity network must either be registered with the Australian Energy Market Operator (AEMO) as a network service provider, or be exempted by the AER from this requirement. The network Guideline outlines classes of electricity transmission or distribution activities which will be exempt from the obligation to be registered as a network service provider with AEMO, subject to the conditions set out in the Guideline being met.

The network Guideline replaces and updates the existing network exemption guidelines which were originally made by the National Electricity Code Administrator which, since 2005, have been administered by the AER.

The AER had released a draft network Guideline and accompanying Draft Decision in October 2011. This Final Decision reflects the AER's consideration of submissions received on the Draft Decision and, where relevant, consequential amendments to the network Guideline.

The network Guideline came into effect on 1 January 2012. Over the first six months, the AER's compliance approach will focus on monitoring, and educating participants on their obligations under the Guideline.

### **Powercor Australia Limited - Cost pass through application 13 December 2011 – Victorian Bushfire Royal Commission**

On 13 December 2011 the AER received an application from Powercor for the pass through of costs resulting from the change in the compliance framework stemming from the Victorian Bushfire Royal Commission recommendations.

Powercor has proposed that additional revenues of \$85.1 million be passed through to distribution network users during the 2011–15 regulatory control period.

Under clause 6.6.1 of the NER, the AER must determine whether a positive change event has occurred and if so, it must then determine the approved pass through amount. In making this decision, the AER must take account of the factors in clause 6.6.1(j) of the NER. Interested parties have been invited to make written submissions regarding this paper by 6 February 2012.

The AER expects to make its determination on Powercor's application in March 2012.

### **Approved 2012 Victorian electricity network pricing proposals**

On 9 December 2011 the AER determined that the Victorian distributor's network pricing proposals complied with Part I of Chapter 6 of the NER as well as the AER's 2011–15 distribution determination, and that all forecasts associated with the proposals were reasonable.

In accordance with clause 6.18.9 of the NER, the Victorian distributors must publish and maintain information relating to approved prices, including a statement of expected price trends, on their respective websites. Approved pricing proposals for network tariffs apply from 1 January 2012 to 31 December 2012.



## 5. Regulatory affairs

### **Market notice and consultation paper—Matters relevant to the framework and approach for Australian Capital Territory and New South Wales 2014–19 distribution determinations**

On 13 December 2011 the AER released a market notice and consultation paper on matters relevant to the framework and approach for the Australian Capital Territory (ACT) and New South Wales (NSW) electricity distribution network service providers' 2014–19 distribution determinations.

The market notice outlines that the AER is preparing to receive regulatory proposals from the ACT and NSW electricity distributors. The ACT distributor is ActewAGL, and the NSW distributors are Ausgrid, Endeavour Energy and Essential Energy. The market notice informs interested parties about the AER's consultation for the framework and approach process to be undertaken prior to receiving the distributors' regulatory proposals; the consultation paper outlines issues around the classification of electricity distribution services. The AER has invited interested parties to make written submissions to the consultation paper by 17 February 2012.

### **Discussion paper—Distribution Ring-Fencing Guidelines Review**

On 12 December 2011 the AER released a discussion paper that sets out the issues that the AER believes are relevant to developing a set of nationally consistent Distribution Ring-Fencing Guidelines.

The AER is undertaking a review of the Distribution Ring-Fencing Guidelines under clause 6.17.2 of the National Electricity Rules. Currently, there is not a single set of nationally consistent ring-fencing guidelines that apply to Distribution Network Service Providers in all participating jurisdictions.

The purpose of this Discussion Paper is to seek views on whether the AER should develop a nationally consistent set of Distribution Ring-Fencing Guidelines, and has invited submissions by 24 February 2012. The AER will take submissions into account in deciding whether to proceed to develop a draft set of nationally consistent Distribution Ring-Fencing Guidelines for public comment.

### **ETSA Utilities—Cost allocation method amendment**

On 9 December 2011 the AER approved an application by ETSA Utilities to amend its cost allocation method under section 6.15.4 of the NER.

The purpose of ETSA Utilities' amendments is to reflect recent internal corporate group restructuring and the inclusion of alternative control services consistent with the AER's 2010–15 distribution determination. The AER found that the amended cost allocation method complied with the National Electricity Rules and the AER's cost allocation guidelines.

### **2012–13 Distribution Loss Factor approval process**

On 7 December 2011 the AER released its proposed timeline and process for approval of the 2012–13 Distribution Loss Factors' (DLFs) for distribution businesses.

Distribution businesses have an obligation to provide DLFs approved by the AER to AEMO for publication by 1 April 2012. An assessment is required under clause 3.6.3(i) of the National Electricity Rules and the DLFs must be determined in accordance with a methodology published either by the AER or the distributor (where the AER has not published a methodology). The AER has previously decided not to publish a DLF calculation methodology.

The AER's proposed timeline and process for approval of future year DLFs will be a continuation of the approach used in recent years for approving DLFs. The package should be submitted by end of the second week in March each year to guarantee the AER can complete its assessment in time to meet the 1 April deadline for receipt of approved DLFs by AEMO. Interested parties have been invited to make submissions on the approval process by 9 March 2012.



## 5. Regulatory affairs

### **Draft distribution determination—Aurora Energy Pty Ltd 1 July 2012 to 30 June 2017**

On 29 November 2011 the AER released its draft distribution determination for Aurora Energy Pty Ltd for the regulatory control period 1 July 2012 to 30 June 2017.

In order to explain the draft distribution determination and receive oral submissions, the AER hosted a predetermination conference in Hobart on 13 December 2011. The AER has also invited written submissions in response to the draft distribution determination and the consultants' reports by 20 February 2012.

### **Powerlink electricity transmission determination 2012–13 to 2016–17**

On 29 November 2011 the AER released its draft decision on the Powerlink transmission determination for the period 1 July 2012 to 30 June 2017.

In order to explain the draft distribution determination and receive oral submissions, the AER hosted a predetermination conference in Brisbane on 14 December 2011. The AER has also invited written submissions in response to the draft distribution determination and the consultants' reports by 20 February 2012.

### **Performance report of ACT and NSW electricity distributors, 2009–10**

On 16 November 2011 the AER released its 2009–10 performance report of the ACT and NSW electricity distribution network service providers. The report reviews the financial and service performance of ActewAGL, Ausgrid, Endeavour Energy and Essential Energy.

This report is the AER's first annual performance report for these distributors under the National Electricity Law. The report focuses on their performance for 2009–10, but also provides trend data on service performance from 2005–06, based on jurisdictional information.

### **Final determination on Victorian advanced metering (smart meter) infrastructure roll-out 2012–2015**

On 11 October 2011 the AER released its Advanced Metering Infrastructure (AMI) final determination, in relation to CitiPower, Jemena, Powercor, SP AusNet and United Energy's AMI budgets and charges for 2012–15.

The final determination establishes the basis for the metering charges payable by Victorian consumers using less than 160MWh of electricity per annum over the period 2012 to 2015.

The AER's final determination approves a total forecast expenditure of \$1.1 billion. In response to the AER's draft determination, all distribution businesses, other than SP AusNet, submitted lower amended budget proposals.

### **Energex and Ergon Waiver of Ring-fencing Guidelines—Final decision**

On 24 October 2011 the AER released its final decision to approve Energex and Ergon Energy's applications for a waiver of specific clauses of the Queensland Ring-fencing Guidelines.

On 4 August and 17 August 2011, Energex and Ergon Energy respectively, applied to the AER for a waiver from clauses 1(c), 1(d) and 2 of the Guidelines in respect of regulatory accounts. The waiver seeks to avoid reporting duplication in preparing regulatory accounts.

On 12 September 2011 the AER published its draft decision to approve the waiver applications. No submissions to the draft decision were received by the AER.

The AER's final decision is to waive the clauses of the Guidelines which require the Queensland distributors to maintain and report regulatory accounts as developed by the Queensland Competition Authority. In the future, this information will be reported in accordance with the AER's annual reporting requirements.





## 5. Regulatory affairs

### **AER issues paper—Transmission service target performance incentive scheme**

On 11 October 2011 the AER released an issues paper as part of its review of the transmission network service provider service target performance incentive scheme. Under section 6A.7.4 of the NER, the AER is responsible for establishing the scheme, designed to provide incentives for each transmission network service provider to maintain or improve the reliability of transmission network services.

The AER's issues paper outlines the proposed scope of issues and the consultation process. Interested parties were invited to make written submissions by 11 November 2011.

## **Energy wholesale markets**

### **Short Term Trading Market information and data compliance bulletin**

On 9 December 2011 the AER released its seventh compliance bulletin. This compliance bulletin relates to information and data requirements in the Short Term Trading Market (STTM).

The STTM is a market for the supply of natural gas, operated and administered by the AEMO. There are presently three geographically separate markets centred around gas hubs in Adelaide, Brisbane and Sydney. STTM market outcomes are a product of the information and data provided by businesses and pipeline operators to AEMO, which then operates a scheduling and pricing algorithm, determining prices and payments.

The AER is concerned about the continuing high number of data failures by STTM facility operators. These failures can seriously impact on the efficiency of the STTM and in some cases have had adverse financial outcomes for trading participants.

The AER's strategy to date has been focussed on industry engagement to promote compliance. However, given continuing failures, STTM facility operators are now on notice that if in future the AER believes that a participant has failed to provide STTM facility data consistent with the Gas Rules, the AER will consider issuing infringement notices with associated penalties and/or seek court based orders and sanctions. The AER considers that this approach will act as a deterrent to future non-compliance.

### **Instrument transformer testing compliance bulletin**

On 6 December 2011 the AER released a compliance bulletin relating to instrument transformer testing.

The NER require instrument transformers to be tested every 10 years for accuracy, unless an alternate test plan has been approved by AEMO. In 2011 the AER was made aware of a failure by industry to test instrument transformers in accordance with the NER. The AER was also notified by AEMO that industry had formed a Current Transformer Testing Working Group (CTTWG) to identify an acceptable sample testing approach.

The AER is concerned by the potential harm that untested instruments transformers may have on the NEM. If an instrument transformer is inaccurate, this can affect the overall accuracy of the metering installation. However, given the work of the CTTWG and the current lack of industry guidance on testing methodologies, the AER has chosen to issue a compliance bulletin. The AER is seeking that industry demonstrate a willingness to comply by testing a sample of their instrument transformers over 12 months.

### **September 2011 Wholesale Markets Quarterly Compliance Report**

On 25 October 2011 the AER published its latest wholesale markets quarterly compliance report.

The report summarises the AER's compliance monitoring and enforcement activities in the electricity and gas markets during the July–September 2011 period.



## 5. Regulatory affairs

It provides an overview of investigation outcomes (including special reports into significant market or power system events), compliance audits and targeted compliance reviews undertaken during the quarter. It also covers electricity derogations and rebidding inquiries.

### Energy retail markets

During this quarter, the AER continued its preparations for the new roles and functions it assumes with the commencement of the National Energy Retail Law and Rules on 1 July 2012. This work included consultation with consumer and industry representatives to inform the AER's approach to the development of its price comparator website and the publication of final guidelines on exempt selling and Retailer of Last Resort.

#### Final Exempt Selling Guideline

On 7 December 2011 the AER released its final *Exempt Selling Guideline* and accompanying *Notice of Final Instrument*.

Under the National Energy Retail Law (NERL), which commences on 1 July 2012, a person wishing to sell energy must either hold a retailer authorisation, or a valid exemption from that requirement.

The *Exempt Selling Guideline* outlines classes of onselling activities (known as deemed and registrable exemptions) which will be exempt from the requirement to hold a retailer authorisation. Onselling activities that do not fall within those classes may be eligible for an individual exemption. The Guideline outlines situations where an onseller should seek an individual exemption from the AER, and explains how to apply to the AER for an individual exemption.

The AER has developed the *Exempt Selling Guideline* (and accompanying determinations of classes of deemed and registrable exemptions) in accordance with requirements in the NERL in anticipation of its new functions.

The AER has undertaken several rounds of stakeholder consultation in developing the *Exempt Selling Guideline*. Stakeholder consultation has been in the form of formal written submissions and also stakeholder forums held in various capital cities (with video links to other capital cities). The AER has taken comments made in the most recent round of full consultation, and comments in a further, targeted round of consultation, in developing the final Guideline and determinations.

#### Notice of final instrument: Retailer of Last Resort Guidelines, plan and statement of approach

On 8 November 2011 the AER released the Retail of Last Resort (RoLR) Guidelines, Plan and Statement of Approach (final RoLR package).

The NERL introduces a new national RoLR framework, making provision for a national RoLR scheme principally designed to ensure that in the event of retailer failure, arrangements are in place to ensure that customers continue to receive electricity and/or gas supply. To support these functions, the NERL provides wide ranging functions and powers to the AER to oversee the RoLR scheme.

The final RoLR package has been prepared by the AER to outline stakeholder obligations under the RoLR scheme and assist stakeholders understand the operation of the whole RoLR framework.

The AER commenced consultation on its power and functions under the RoLR scheme with the release of an issues paper in November 2010. This was followed by the release of a Notice of Draft Instruments, the draft RoLR Guidelines, the draft RoLR Plan and draft RoLR Statement of Approach in July 2011.





## 5. Regulatory affairs

### **Draft Statement of Approach for the price comparator website and draft amended AER Retail Pricing Information Guideline**

On 4 November 2011 the AER released the following three documents for consultation on its proposed approach to the development of its national price comparator website as required under the NERL:

- A draft Statement of Approach which details the AER's proposed approach to the price comparator website, including required inputs from the user, the display of available offers to the user, and ensuring the website is accessible to users. Views expressed in submissions to the general issues paper released on 27 July 2011 and the accompanying public stakeholder forums on 17 and 25 August 2011 were considered in the development of the draft Statement of Approach.
- A draft amended AER Retail Pricing Information Guideline which amends the AER Retail Pricing Information Guideline published on 12 September 2011. The draft amended Guideline includes an additional section providing direction to energy retailers about the provision of data and information to the AER for the purposes of the price comparator website. The draft amended Guideline has been published in accordance with the retail consultation procedure set out in r.173 of the National Energy Retail Rules and any additional content and changes have been underlined or struck through for ease of reference.
- An accompanying Notice of Draft Amended Instrument which outlines the draft amended Guideline consultation procedure and the reasons for and process involved in the development of the amendments to the Retail Pricing Information Guideline.

The AER hosted a stakeholder forum on the draft Statement of Approach on 17 November 2011 and invited interested stakeholders to make written submissions on the documents by 2 December 2011.

## **Transport and general prices oversight**

### **Ports**

The ACCC monitors the Australian container stevedoring industry under a direction from the Treasurer pursuant to Part VIIA of the CCA. The ACCC is required to monitor prices, costs and profits of container terminal operator companies at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney. Container stevedoring involves the lifting of shipping containers on and off ships.

The ACCC releases the monitoring reports annually. The ACCC issued its monitoring report for the 2010–11 year on 2 November 2011. The report shows that industry operating performance was affected by increased demand for stevedoring services. At the individual stevedore level, growth in demand during 2010–11 was entirely serviced by DP World and represented a transfer of market share from Patrick to DP World.

Across the industry, unit costs decreased as a result of higher container volumes. Unit revenues (which are indicative of average prices) were only slightly higher than 2009–10 levels, due to higher revenues from non-stevedoring services. Industry profitability increased in 2010–11 as a result of higher volumes, higher stevedoring margins and a reduction in the value of the industry's asset base.

Quay-side productivity decreased across the five mainland container ports. Further incentives for the existing stevedores to offer a more productive service are needed. Competition is the most effective means of driving productivity in the operation of existing capacity, and the most effective way of driving efficient investment in new capacity.

Capacity expansion plans that provide for new entry are well underway in Brisbane and Sydney, with Hutchison Port Holdings scheduled to commence operations in those ports around 2013. There is a risk that capacity problems could emerge in Melbourne as early as 2015 if demand is higher than anticipated. The Victorian Government is currently deciding how it will provide for future container capacity and increased competition at Melbourne.



## 5. Regulatory affairs

### Bulk wheat export—access to port terminal services

During 2011 the ACCC accepted undertakings under Part IIIA of the CCA regulating access to services for the export of bulk wheat at port terminals operated by GrainCorp at seven port terminals on the east coast, Australian Bulk Alliance at the Port of Melbourne, Viterra at six ports in South Australia and Cooperative Bulk Handling (CBH) at four ports in Western Australia.

The access arrangements provide for:

- obligations on port operators not to discriminate or hinder access in the provision of 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 for access to port terminal services
- the ability of wheat exporters to seek mediation or arbitration on terms of access in the event of a dispute.

The ACCC has a role in access arrangements for wheat exporters as part of the deregulation of the wheat industry. Access undertakings are intended to ensure that third party exporters are able to access the port terminals operated by vertically integrated port terminal operators, ensuring competition in this significant export market.

Since accepting the undertakings, the ACCC has been monitoring each of the port operators to ensure compliance with the respective undertakings. This includes:

- an examination of access agreements between port terminal operators and the associated accredited wheat exporter to ensure that access arrangements to port terminal services do not discriminate
- monitoring the reporting outputs of each of the port terminal operators
- engaging with industry stakeholders with respect to the development of Viterra's auction system as it is required to introduce before 14 May 2012 pursuant to its Part IIIA undertaking.

In addition to the ongoing monitoring role, the ACCC has been liaising with the Department of Agriculture, Fisheries and Forestry with respect to legislative amendments to further deregulate the wheat export market.

## Rail

### Hunter Valley rail access undertaking

The ACCC accepted an access undertaking under Part IIIA of the CCA from Australian Rail Track Corporation (ARTC) on 29 June 2011. The undertaking regulates access to ARTC's leased rail network in the Hunter Valley region of New South Wales. The network is predominantly used to transport export coal from the region's mines to the Port of Newcastle, but it is also used for non-coal and domestic coal freight.

The arrangements provide for:

- the negotiation of long term access contracts between users of the rail network and ARTC
- processes for new investment in the rail network, in consultation with stakeholders
- incentives to promote alignment of all coal chain contracts and efficient use of the Hunter Valley infrastructure.

The undertaking is a key step in the implementation of the long-term solution to capacity constraints in the Hunter Valley coal export supply chain, and should allow all parties to work together to remove export bottlenecks for the coal industry. The undertaking also includes mechanisms to facilitate access to the network by non-export coal parties, including a negotiate/arbitrate framework and a reference to indicative terms of access.



## 5. Regulatory affairs

During the December 2011 quarter the ACCC continued carrying out the functions conferred to it under the undertaking. The ACCC is currently assessing a variation to the undertaking to determine and implement the efficient train service for the Hunter Valley coal chain as proposed by ARTC. ARTC's proposal is the first step in a two-stage process for determining the final characteristics of the most efficient train. Determining the efficient train will be a further step toward maximising throughput on the coal supply chain, and forms part of the long-term solution to reducing capacity constraints in the Hunter Valley.

### Water

Under the *Water Act 2007*, the ACCC has policy development, enforcement and monitoring responsibilities relating to water markets, water trading and water delivery services in the Murray–Darling Basin. The ACCC also conducts compliance activities to assist stakeholders to understand the rules it is responsible for enforcing.

### Monitoring and Water Pricing

#### ***Water Monitoring Report 2010–11***

The *Water Act 2007* requires that the ACCC provide an annual monitoring report to the Commonwealth Minister responsible for water resources.

The ACCC received completed requests for information from 37 water infrastructure operators in October 2011. The data provided in these requests forms the basis for the ACCC's report to the Minister which includes information about regulated water charges levied by water infrastructure operators, transformation arrangements and compliance with the water market rules and water charge rules.

The ACCC's *Water Monitoring Report* for 2010–11 is scheduled for release in March 2012.

#### **Accreditation of Essential Services Commission of Victoria**

Part 9 of the *Water Charge (Infrastructure) Rules* (WCIR) allows for the accreditation of arrangements whereby a state agency is responsible for approving or determining the regulated charges of Part 6 and Part 7 operators under the WCIR instead of the ACCC.

On 23 November 2011, the ACCC received an application for accreditation from the Essential Services Commission of Victoria to approve or determine rural water infrastructure charges levied by Goulburn-Murray Water and Lower Murray Water. In December 2011 the Commission published its draft decision to approve the accreditation application and sought submissions. The ACCC will publish its final decision in February 2012.

### Compliance and enforcement

#### **Compliance activities**

Following a request from the Murrumbidgee Valley Food and Fibre Association, on 9 November 2011 staff met with approximately 60 irrigators in the Griffith region to provide information on the rules made under the *Water Act 2007* that are enforced by the ACCC. The presentation covered information about the requirements in the *Water Charge (Infrastructure) Rules* on tier two infrastructure operators to consult with their customers and to provide them with a Network Consultation Paper as part of developing a Network Service Plan.

On 2 December 2011 the ACCC released a revised guide to the *Water Charge (Termination Fees) Rules* which was updated following amendments to the *Water Charge (Termination Fees) Rules* and in response to feedback from industry. The revised guide includes additional information about the requirement for a written notice of termination and further details on how to calculate the total network access charge, which is a key concept in determining the maximum permissible termination fee.



## 5. Regulatory affairs

### Enforcement activities

During the December quarter the ACCC concluded its investigation into the actions of the Bungunyah-Koraleigh Irrigation Trust (BKIT) in relation to its processes and procedures for irrigators transforming and trading their water rights and terminating the associated delivery entitlements. The investigation resulted in an administrative resolution with BKIT improving its transformation procedures. An article referring to the investigation was published in the *Riverine Grazier* on 9 November 2011 which will increase awareness and understanding of the rules amongst key stakeholders in that area.

### Fuel price monitoring

The ACCC closely follows developments in the petroleum industry and monitors the retail prices of petrol, diesel and automotive liquefied petroleum gas (LPG) in all capital cities and around 150 regional centres and country towns.

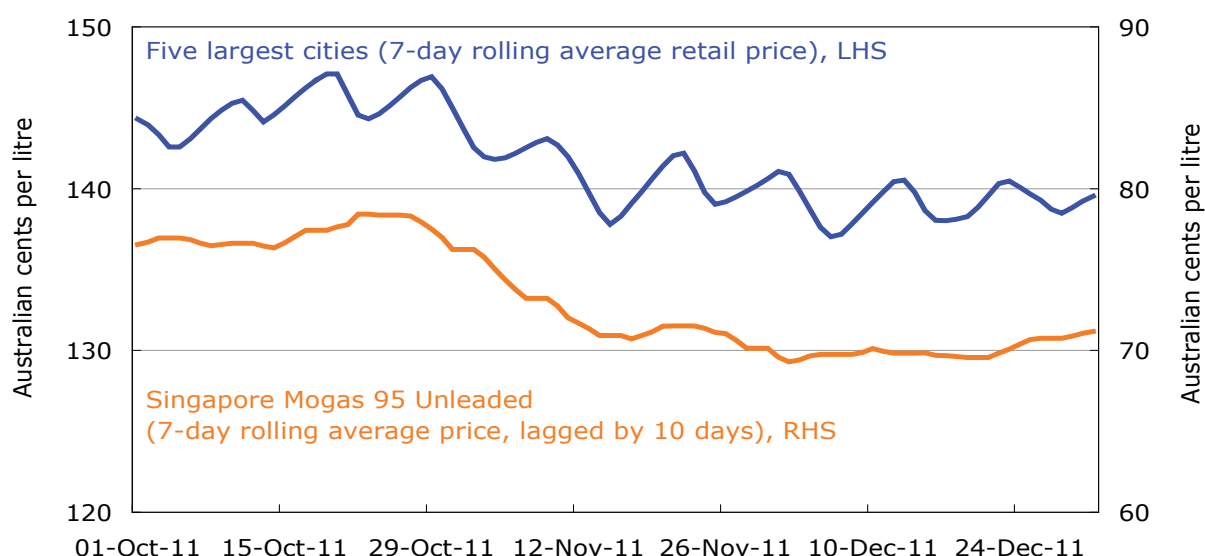
### Price movements in the December 2011 quarter

#### Petrol

The ACCC monitors movements in domestic retail petrol prices against movements in international benchmark prices. In the case of regular unleaded petrol (RULP), movements in seven-day rolling average retail RULP prices in the five largest cities (Sydney, Melbourne, Brisbane, Adelaide and Perth) are compared with movements in seven-day rolling average prices for Singapore Mogas 95 Unleaded (lagged by 10 days) in Australian cents per litre (cpl).

Chart 5.1 shows movements in these prices over the period 1 October to 31 December 2011. Retail RULP prices are shown on the left hand side of the chart and Singapore Mogas 95 Unleaded prices are shown on the right hand side. It is important to remember that a comparison of movements in these two prices is indicative rather than an exact science and factors other than international benchmark prices can influence retail petrol prices in the short run. This caveat also applies to the comparisons of movements between retail diesel and automotive LPG prices and their respective international benchmarks.

**Chart 5.1: Movements in retail RULP prices and international benchmark prices**  
—1 October to 31 December 2011



Note that the cyclical movements in the seven-day rolling average retail price series arise because petrol price cycles in 2011 have been longer than seven days. Traditionally the ACCC has used a seven-day rolling average to smooth out the effects of the petrol price cycle.



## 5. Regulatory affairs

The chart shows that both retail RULP prices and Singapore Mogas 95 Unleaded prices decreased in the December 2011 quarter. Seven-day rolling average retail RULP prices across the five largest cities increased from 144.3 cpl at the beginning of October 2011 to a high of 147.1 cpl in mid-October. Prices subsequently decreased to 139.5 cpl at the end of December 2011—an overall decrease of 4.8 cpl over the quarter.

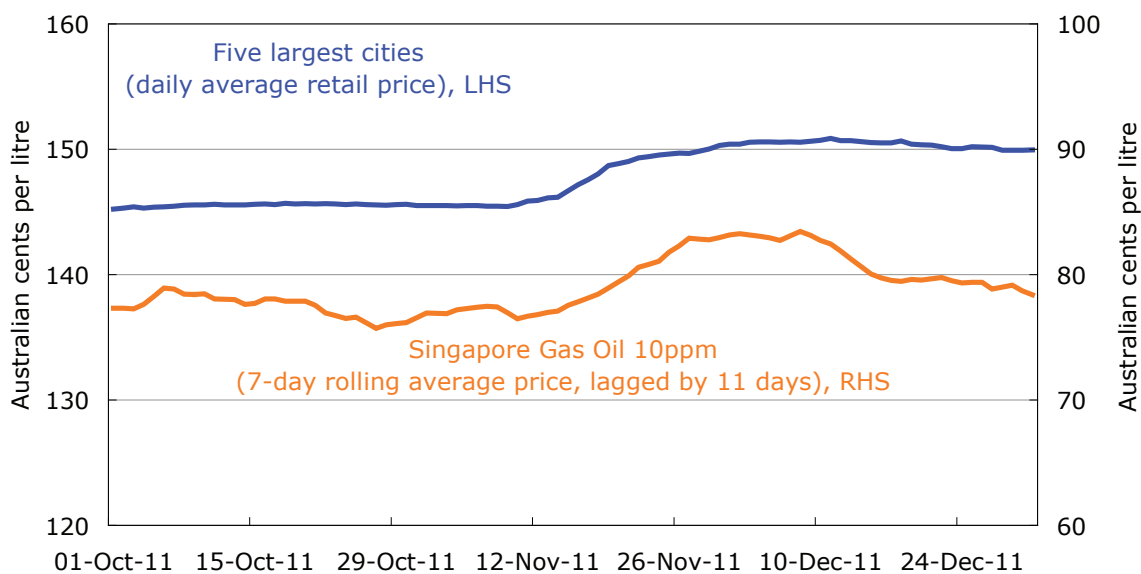
The decrease in Singapore Mogas 95 Unleaded prices in the December 2011 quarter was driven by ongoing concerns over the European debt crisis and an increase in the Australian/US dollar exchange rate.

### Diesel

The ACCC monitors the movement of retail diesel prices against the price of Singapore Gasoil with 10 parts per million (ppm) sulphur content. Chart 5.2 shows daily average retail diesel prices on the left hand side of the chart and seven-day rolling average Singapore Gasoil 10 ppm prices (lagged by 11 days) on the right hand side.

Daily average retail diesel prices for the five largest cities increased by 4.7 cpl over the December 2011 quarter—from 145.2 cpl to 149.9 cpl. Singapore Gasoil 10 ppm prices were supported by strong regional demand in Asia.

**Chart 5.2: Movements in retail diesel prices and international benchmark prices**  
—1 October to 31 December 2011



### Automotive LPG

The ACCC monitors the movement of retail automotive LPG prices against the average price of Saudi Aramco contract prices for propane and butane, which are issued on the first day of the month (see chart 5.3).

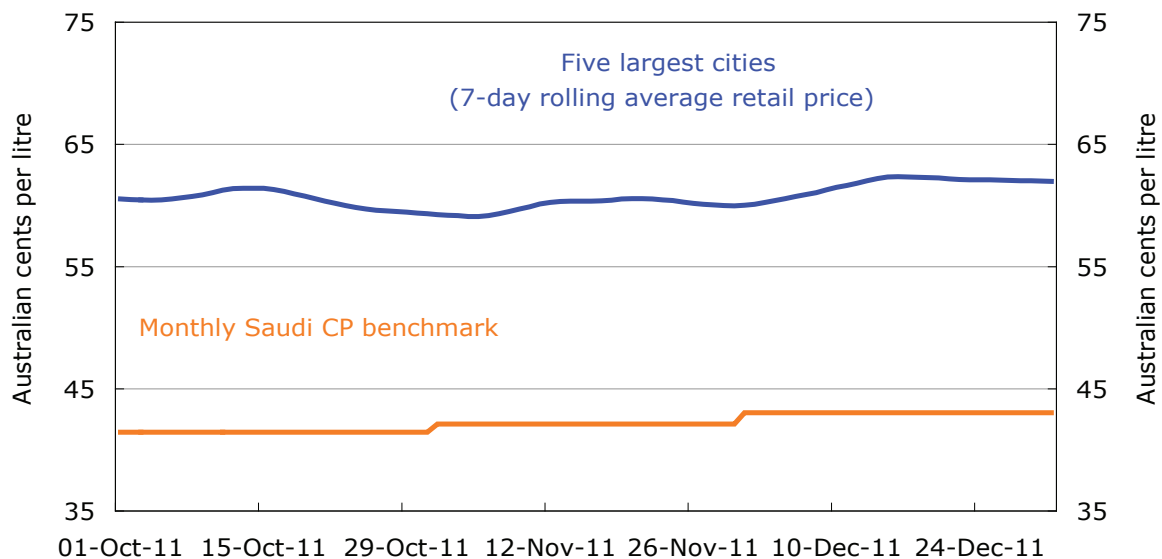
Average retail automotive LPG prices in the five largest cities (on a seven-day rolling average basis) increased by 1.5 cpl over the December 2011 quarter—from 60.5 cpl to 62.0 cpl.

From 1 December 2011 excise has been imposed on automotive LPG at a rate of 2.5 cpl. The level of excise will increase to 5.0 cpl on 1 July 2012 and then increase by 2.5 cpl annually until 1 July 2015, when the excise will be 12.5 cpl. This compares with a current excise rate of 38.14 cpl for petrol and diesel.



## 5. Regulatory affairs

**Chart 5.3: Movements in retail automotive LPG prices and international benchmark prices  
– 1 October to 31 December 2011**



### 2011 petrol monitoring report

The ACCC's latest petrol monitoring report was released on 8 December 2011. The key findings of the report included the following:

- Australian retail petrol prices closely followed the international benchmark prices of refined petrol (Singapore Mogas 95 Unleaded). In 2010–11 higher global oil prices drove higher international petrol prices which fed through into higher retail petrol prices in Australia.
- The regular retail petrol price cycles were again evident in the larger cities. These cycles are a concern for consumers. The ACCC is concerned about the level of coordination apparent in the price cycle and is analysing the likely effects of this behaviour on outcomes for consumers.
- The structural changes in the Australian petrol industry continued. Mobil finalised its exit from the Australian retail market after selling its retail assets to 7-Eleven and On the Run. Shell announced the closure of its Clyde refinery and independents continued to increase their share of refined petroleum product imports.
- Demand for ethanol continued to grow, spurred by the NSW mandate. While supplies of ethanol by the three domestic producers are improving, industry participants have expressed concern that growing demand is placing pressure on supplies leading to higher prices for ethanol-blended petrol.
- Overall the ACCC did not find evidence of excessive profits in the Australian downstream petrol industry. It estimates that net profit to the petrol companies on each litre of petrol sold was around 2.2 cents. Other profit measures such as return on assets are comparable to other Australian manufacturing industries and petrol industries in other countries.
- Pre-tax prices are consistent with prices in other developed countries. Prices inclusive of tax are the fourth lowest in the Organisation for Economic Co-operation and Development, due to comparatively lower taxes in Australia.
- Regional prices tend to be higher than in large capital cities. This generally reflects higher costs and lower levels of competition in the smaller regional markets.



## 6. International activities

The ACCC's international activities support its work by promoting international enforcement assistance and best practice regulation, and by developing and maintaining effective networks and links with international counterpart agencies.

### International fora

The ACCC participates in a variety of international fora throughout the year. For example, the ACCC is an active member of the International Competition Network (ICN) and is represented on its steering group and a number of working groups, including those relating to mergers and cartels. The ACCC is also an active member of the International Consumer Protection Enforcement Network. The two networks hold calls, meetings, workshops and conferences through the year which ACCC staff attend as required.

The ACCC is also the Chair of an Organisation for Economic Co-operation and Development (OECD) Product Safety Working Party, which is focusing on improving information sharing across national borders, and participates in an International Consumer Product Safety Caucus working group examining product tracking and traceability.

Significantly, the ACCC progressed work through the OECD on the development of a global recalls database. A pilot is expected by mid 2012.

The ACCC is also working with the United States, Canada and Europe to align international safety requirements for targeted products. In the first instance, the project is focussed on infant slings, chair-top booster seats and corded internal window coverings.





## 6. International activities

**Table 6.1 ACCC international conference attendance – December quarter 2011**

Event	Date	Location
Participated in the East Asia Pacific Infrastructure Regulatory Forum.	4–8 October	Bangkok, Thailand
Presented at the OECD-Korea Policy Centre training program on 'Legitimate business practices or cartels in disguise'.	5–7 October	Hanoi, Vietnam
Attended the IBC Legal Conference on 'Multi-jurisdictional Cartel Enforcement'.	10 October	Brussels, Belgium
Presented at the International Regulatory Forum.	10–12 October	Kuala Lumpur, Malaysia
Moderated at the APEC Training Course on Competition Policy, on the theme of 'Effective mechanism against Cartel Offences'.	10–12 October	Penang, Malaysia
Presented at the International Competition Network Cartel Workshop 'Enhancing the Effectiveness of the Fight Against Cartels'.	11–13 October	Bruges, Belgium
Contributed to roundtable discussion materials and attended the OECD competition committee meetings.	17–20 October	Paris, France
Attended the OECD committee on consumer policy meeting.	24–26 October	Paris, France
Participated in OECD workshop on consumer protection in telecommunications markets.	25 October	Paris, France
Participated in the OECD Product Safety Working Party and International Consumer Product Safety and Health Organisation meeting.	30 October – 5 November	Seoul, Korea
Presented at the Ministry of Domestic Trade, Co-operatives and Consumerism Seminar on 'Competition Law and Consumer Welfare'.	2–5 November	Kuala Lumpur, Malaysia
Participated in the 8th 'SME's in the Global Economy' Conference.	8–11 November	Nong Khai, Thailand
Participated in regular calls held by the ICN's Steering Group, Working Group Chairs, Cartel Working Group and Merger Working Group, the ICPEN's Advisory Group and the International Mass Marketing Fraud Working Group.	Weekly	Teleconference

## Information requests

The ACCC continues to actively share information regularly with its international counterparts. During the December 2011 quarter, the ACCC received and/or sought information from counterpart agencies in Brazil, Canada, Costa Rica, Egypt, the European Union, Germany, Japan, Mexico, New Zealand, Singapore, Ukraine, the United States and the United Kingdom.

Information shared between the ACCC and its counterpart agencies relates to all aspects of the ACCC's work including market inquiries, best-practice processes for investigations, product safety standards, fuel trends, regulatory issues (in particular telecommunications), outreach, awareness and compliance, cross-border cartels, mergers and scams/fraud, and general information about the ACCC's role and functions and Australia's competition, regulatory and consumer protection laws and policies. The ACCC has also exchanged information to assist with enforcement investigations and provided technical assistance to a number of developing agencies and economies.





## 6. International Activities

### Bilateral/multilateral meetings and visits

In addition to information requests, the ACCC hosts visits by counterpart agencies which provide an opportunity to share information, experiences and expertise. In addition to hosting meetings in Australia, the ACCC also holds meetings with counterpart agencies at international events.

During the December 2011 quarter, the ACCC met with representatives from a number of agencies and organisations, including:

- Chinese General Administration of Quality Supervision, Inspection and Quarantine to discuss product safety related issues
- Singapore Energy Market Authority to discuss a number of issues surrounding cyber security
- Singapore Media Development Authority to discuss communications and convergence issues and the latest regulatory developments that Australia has been exploring in relation to convergence, content, consumers and competition.
- Hong Kong Customs to discuss internet-related consumer protection work
- South African National Treasury and Central Bank to discuss concentration in the banking industry
- Korean Communication Users Protection Agency and Communications Commission to discuss consumer protection policy in the ICT sector.

### Free trade agreements

The ACCC continues to actively participate in free trade agreement (FTA) negotiation rounds contributing to work on competition and consumer protection issues. The ACCC's participation in these negotiations reflects its goals of promoting competition and consumer protection in the region and ensuring that Australia's FTAs:

- are compatible with Australia's competition and consumer protection law and regulations
- are practical in implementation
- contain mechanisms to build cooperative arrangements between the relevant enforcement authorities.

This quarter the ACCC participated in negotiations, or assisted in the preparation of material for negotiations, for the following FTAs:

- Australia-Malaysia
- the Trans-Pacific Partnership Agreement.

# Appendix

## Speeches

During the December quarter the ACCC delivered 35 addresses including:

*The franchising sector and the ACCC*

Rod Sims, Chairman

Franchising Council of Australia National Convention, Melbourne, 10 October 2011

*Some perspectives on competition and regulation*

Rod Sims, Chairman

Melbourne Press Club, Melbourne, 10 October 2011

*Some compliance and enforcement issues*

Rod Sims, Chairman

Law Institute of Victoria, Melbourne, 25 October 2011

*The regulatory environment*

Michael Schaper, Deputy Chairman

BEC Small Business Development Conference, Sydney, 31 October 2011

*Carbon pricing and enforcement issues*

Rod Sims, Chairman

West Australian Chamber of Commerce and Industry, Perth, 15 November 2011

*Bogus health claims*

Marcus Bezzi, Executive General Manager Enforcement and Compliance Division

Australian Skeptics Conference, Sydney, 19 November 2011

## News releases

During the December quarter 2011 the ACCC issued 71 news releases and the AER issued six news releases.

## Publications

### Completed, new, changed or reprinted in October—December 2011

No.	Publication name
1	<i>ACCC Annual Report 2010–11</i>
2	<i>Working safely under a vehicle</i>
3	<i>Safety alert—Prams and strollers</i>
4	<i>Keeping Baby Safe—advertisement</i>
5	<i>Carbon price representations—Guide for business</i>
6	<i>Telstra's compliance with the retail price control arrangements—1 July 2010 to 30 June 2011</i>
7	Working Paper no.5, November 2011 <i>Evaluation of Australian Infrastructure Reforms: An Assessment of Research Possibilities</i>