

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**Review of the Australian  
Competition and Consumer  
Commission Annual Report 2015  
(Second Report)**

Standing Committee on Economics

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# Chair's foreword

At the public hearing with the ACCC on 14 October 2016, the organisation outlined its principal responsibilities under the *Competition and Consumer Act 2010* (the Act) as a competition and consumer regulator. The committee scrutinised the performance of the ACCC and examined its role, recent activities, and priorities for the coming year.

The committee was particularly interested in hearing about the ACCC's existing powers, the impacts of proposed changes to competition law, and competition in the banking sector. The committee heard that financial services are the one area where the ACCC is not the principal consumer regulator. The ACCC stated that its focus in the financial sector is on mergers and cartels as well as any activity that causes a significant lessening of competition.

The ACCC advised the committee that it had, relatively recently, initiated a programme of conducting market studies into particular sectors of the economy, and that this is consistent with the practices of other competition regulators internationally. The committee noted the ACCC's work in this area, however it was concerned that the ACCC had not initiated a market study into the banking sector, given that the ACCC has expressed concern that competition in banking is less than robust.

The ACCC also pointed to a number of sectors which were of concern, including telecommunications, the operators of various Australian ports and market concentration in the supermarket sector. In this context, the ACCC emphasised that the banking sector was also of concern as it was a highly concentrated market.

The committee noted the ACCC's view on the potential impacts of introducing an effects test into section 46 of the Act, as suggested by the Harper Review. The ACCC reiterated its position that the existing provisions are poorly crafted and that an effects test will support more competition and innovation in various markets, including the financial sector.

On behalf of the committee I would like to thank the Chairman of the ACCC, Mr Rod Sims, and his colleagues for appearing at the public hearing on 14 October 2016. The ACCC plays a vital role in seeking to ensure Australia's markets function fairly for both businesses and consumers. The committee will continue to provide oversight of this into the future.

**David Coleman MP**

**Chair**

# Contents

Chair's foreword .....	iii
Membership of the Committee .....	vii
Terms of Reference .....	ix
Abbreviations .....	xi

## The Report

<b>1</b>	<b>Introduction.....</b>	<b>1</b>
	Background .....	1
	Scope and conduct of the review .....	2
<b>2</b>	<b>Current issues in competition and consumer law .....</b>	<b>3</b>
	Overview.....	3
	Powers and activities of the ACCC.....	4
	Market studies .....	4
	Legal activities and access.....	6
	Resourcing of the ACCC.....	7
	Sectors of concern for the ACCC.....	9
	Priority areas .....	10
	Competition in the banking industry .....	11
	Mergers .....	12

Market power.....	13
Section 46 and the effects test .....	15
Other matters.....	16
Petrol pricing.....	16
Food and Grocery code of conduct.....	17
Motor vehicle aftermarket.....	17
National broadband network .....	19
Credit card surcharges.....	19
Conclusion .....	20

## **End Matter**

A. Public hearing details and documents .....	21
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# Membership of the Committee

## *Chair*

Mr David Coleman MP

## *Deputy Chair*

Hon Matt Thistlethwaite MP

## *Members*

Mr Adam Bandt MP

Ms Julia Banks MP

Mr Scott Buchholz MP

Mr Pat Conroy MP (to 7 November 2016)

Mr Trevor Evans MP

Mr Kevin Hogan MP

Mr Craig Kelly MP

Mr Matt Keogh MP

Ms Madeleine King MP (from 7 November 2016)

## **Committee Secretariat**

Stephen Boyd, Committee Secretary

Kilian Perrem, Inquiry Secretary

Jazmine Rakic, Office Manager



# Terms of Reference

The House of Representatives Standing Committee on Economics is empowered to inquire into, and report on, the annual reports of government departments and authorities tabled in the House that stand referred to the committee for any inquiry the committee may wish to make. The reports stand referred in accordance with the schedule tabled by the Speaker to record the areas of responsibility of the committee.



# Abbreviations

ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
FSI	Financial System Inquiry
NBN	National broadband network



# 1. Introduction

## Background

- 1.1 The House of Representatives Standing Committee on Economics (the committee) is empowered to inquire into, and report on, the annual reports of government departments and authorities tabled in the House, that stand referred to the committee in accordance with the Speaker's schedule.
- 1.2 The 2015 annual report (annual report) of the Australian Competition and Consumer Commission (ACCC) stands referred to the committee in accordance with this schedule. The committee resolved at its meeting on 15 September 2016 that it would continue its inquiry into the annual report.
- 1.3 The ACCC is an independent Commonwealth statutory authority whose role is to enforce the *Competition and Consumer Act 2010* (the Act) and a range of additional legislation.
- 1.4 The ACCC was established in 1995 to administer the *Trade Practices Act 1974* (renamed the *Competition and Consumer Act 2010* on 1 January 2011) and other acts. The ACCC has a Chair, Deputy Chairs, Commissioners and Associate Members. Appointments to the ACCC involve participation by Commonwealth, state and territory governments.
- 1.5 The ACCC's stated aims include promoting competition, fair trading and regulating national infrastructure for the benefit of all Australians.

## **Scope and conduct of the review**

- 1.6 The ACCC appeared before the committee at a public hearing to review its 2015 annual report in Canberra on 14 October 2016.
- 1.7 The proceedings of the hearing were webcast over the internet, through the Parliament's website, allowing interested parties to view or listen to the proceedings as they occurred. The transcript of the hearing is available on the committee's website.
- 1.8 This report focuses in particular on matters raised at the public hearing.
- 1.9 At the public hearing, the committee examined the powers and recent activities of the ACCC, resourcing of the organisation, sectors of concern and priority areas for the ACCC, competition in the banking sector, and other matters including petrol pricing, the food and grocery code of conduct, and the motor vehicle aftermarket.

## 2. Current issues in competition and consumer law

### Overview

- 2.1 The Australian Competition and Consumer Commission (ACCC) appeared before the committee on Friday 14 October 2016 in Canberra for a public hearing as part of the review of its 2015 annual report.
- 2.2 Issues raised at the hearing included sectors of concern for the ACCC, the current powers of the ACCC and the impacts of proposed changes to competition law, and resourcing of the organisation. Competition in the banking sector was also a significant area of interest for the committee at the hearing.
- 2.3 In his opening remarks to the committee, the Chairman of the ACCC, Mr Rod Sims, stated that the role of the ACCC in the financial sector is no different to any other sector of the economy but is restricted to competition matters. The Chairman emphasised that financial services is the one area where the ACCC is not the consumer regulator:

ASIC is the consumer regulator for financial services under Australian Consumer Law, so our focus on the financial sector is mergers, cartels and anything that involves a substantial lessening of competition. We also have a

role in authorising what would otherwise be seen as anticompetitive behaviour.<sup>1</sup>

- 2.4 The Chairman further remarked that financial sector issues dealt with by the ACCC tend to be specific in nature, such as mergers and cartel activity.<sup>2</sup> He stated however that the ACCC does have some general concerns in relation to banking:

There seems a lack of very robust competition in banking. The Australian banks are very profitable and there is nothing wrong with that. We like our Australian companies to be as profitable as possible, but their profits have, I guess, steadily increased over the last 30 years, particularly as a share of GDP. Their market shares have grown and we are not seeing as much new entry into the sector as we would normally like. We are not seeing as much robust competition as we would like.<sup>3</sup>

- 2.5 The Chairman went on to say that the Productivity Commission is best placed to conduct a review of competition in the banking sector, as recommended by the Financial System Inquiry (FSI), and that the ACCC is strongly supportive of this.<sup>4</sup>

## Powers and activities of the ACCC

### Market studies

- 2.6 The Chairman remarked that other than taking action where a breach of the Act had occurred, that is, enforcement, the other relatively new tool available to the ACCC is to engage in advocacy or market studies, which all other competition regulators around the world do. He stated:

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<sup>1</sup> Mr Rod Sims, Chairman, Australian Competition and Consumer Commission (ACCC), *Transcript*, 14 October 2016, p. 1.

<sup>2</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 1.

<sup>3</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 2.

<sup>4</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 2.



That has been controversial recently because Professor Harper [Chair of the recent Competition Policy Review Panel] felt that probably was not an appropriate role for us, but it is something that all other competition regulators around the world do, and the government has endorsed us doing advocacy and market studies. So, if we have general concerns, that is what we use. We do undertake probably a couple of market studies a year.<sup>5</sup>

- 2.7 The Chairman further informed the committee that the ACCC has limited resources to conduct these studies and therefore has to make judgments about which sectors to focus on. He stated:

Right now we have one into the communications sector underway, we have one into the beef cattle sector, we are about to embark on one in the dairy sector and we have one into motor vehicles ranging from consumer guarantees to access to data. So that really is the limit of what we are able to do.<sup>6</sup>

- 2.8 The committee was interested in whether such a study had been conducted into the banking sector and was surprised to learn that the ACCC had not done so. The Chairman reemphasised the limitations in terms of resources but also remarked that:

... market studies, firstly, are quite new for the ACCC. Secondly, in judging which sectors to do a market study on, there is no other sector [banking] that we deal with that has three specialist regulators looking at it, and so that is a very relevant factor to which sectors we would decide to do a market study in... the Productivity Commission is doing it anyway, but it would be a huge exercise for us to get involved and one that would come with a large cost to alternative things that we would be doing.<sup>7</sup>

- 2.9 The committee further queried the ACCC on why it would not conduct a market study on competition in the banking system given that this is not the focus of the other regulators.

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<sup>5</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 3.

<sup>6</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 3.

<sup>7</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 4.

- 2.10 The Chairman reiterated that conducting these reviews was a new power for the ACCC but that it could consider a future market study into banking:

I am not saying that we would not do a market study into banking, I am saying that it is a new power. While there has been a lot of focus on the banks, and that is something we could consider, there is the Murray review, and the government has endorsed the Productivity Commission having a look at the banking sector. If the Productivity Commission were to find things that we felt we could take forward we would most certainly do it.<sup>8</sup>

### **Legal activities and access**

- 2.11 The committee sought advice from the ACCC on whether the high cost risk of bringing a court case on competition or consumer issues acted as a barrier against private sector entities taking such actions. The committee was interested to know whether changes could be made to make it easier for private cases to be taken, which might also lessen the burden on the ACCC.
- 2.12 The Chairman responded that the ACCC has done a fair amount of work in this area but that it is essentially a policy issue.<sup>9</sup>
- 2.13 The ACCC further commented that the issue of ‘access to justice’ is complicated and gets tangled up with questions of legal aid and also issues about how it might be made easier to take class actions.<sup>10</sup> The ACCC further remarked:

There are a number of factors there that you could expect policymakers to think about, but it is not an easy solution. What I would say is that our actions can facilitate further flow-on actions. It is not always easy that they can do that. We have to bear in mind that the cases we take are chalk and cheese from a case a private party might take. We need to explore very broad issues

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<sup>8</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 4.

<sup>9</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 13.

<sup>10</sup> Mr Marcus Bezzi, Executive General Manager Competition Enforcement, ACCC, *Transcript*, 14 October 2016, p. 13.

because we want to make a broad impact. Individual parties may be able to be more targeted...<sup>11</sup>

2.14 The committee further queried whether there is in fact a competition or consumer protection effect of private entities not being able to bring cases of the type that the ACCC would bring.

2.15 The ACCC responded that the government had accepted recommendations of the Harper committee in relation to improving legislation to enable follow-on actions to be taken from successful ACCC cases and also enable people to seek compensation. The ACCC stated:

They have recommended changes to the law, which I understand the government, and broadly — there has been acceptance of those changes. They are changes to section 83. They will make it easier for findings of fact made in proceedings we bring to then be relied upon in subsequent proceedings...<sup>12</sup>

2.16 The ACCC noted however that the gap in this regard is more on the consumer side than the small business side although it is filled to some extent by other mechanisms:

Fair trading agencies and conciliation services can take actions at a lower end to the ACCC. Access to some of the low-cost dispute resolution services that tribunal's offer is, I think, a real key to this issue of access to justice on the consumer protection side. Ensuring that they are consistent and continue to be accessible are key issues.<sup>13</sup>

## Resourcing of the ACCC

2.17 The committee queried the ACCC on its litigation budget and other resourcing of its activities. The committee was also interested in how the ACCC's litigation contingency fund operates.

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<sup>11</sup> Mr Scott Gregson, Executive General Manager Consumer Enforcement, ACCC, *Transcript*, 14 October 2016, p. 13.

<sup>12</sup> Mr Bezzi, ACCC, *Transcript*, 14 October 2016, p. 13.

<sup>13</sup> Mr Gregson, ACCC, *Transcript*, 14 October 2016, p. 14.

- 2.18 The Chairman indicated that the litigation budget was about \$25 million during the last year and a similar amount had been available over the previous three years.<sup>14</sup> The Chairman explained that a litigation contingency fund of \$10 million was used to cover costs in the event that the ACCC lost a court action.<sup>15</sup>
- 2.19 The committee further asked whether the ACCC had an equivalent resource to ASIC's special enforcement account that is used to fund large pieces of litigation.
- 2.20 The Chairman stated that the ACCC did not have such a fund but that this would probably be a good idea and discussions are taking place with the government on this matter. He remarked:

Just to be clear for all members of the committee, we have just been talking about when we lose a case in a one-off; now and again the government eventually covers those. What is being referred to here is sometimes you cannot always run a legal budget for a given amount every year. If we underspend then you lose the money; if we overspend then you have got a problem. So the ability to carry forward money in a special account, we think, would be helpful because it is hard to know how much legal spending we will do in any one year but that is something we are discussing with government.<sup>16</sup>

- 2.21 The Chairman further commented however that the ACCC's base level of funding is the main constraint on its ability to run cases against anti-competitive behaviour. He stated:

We have roughly 60 or 70 competition investigators all around the country – that is, Australia wide. We have about the same in consumer law. So when a, dare I say, Murray Goulburn dairy matter comes along or we have just been asked to have a look at the sugar issue, we really have to pull resources and slow down other matters. The biggest constraint is just the level of staff that

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<sup>14</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, pp. 10-11.

<sup>15</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 11.

<sup>16</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 11.

we have got as distinct from the legal budget. The legal budget is a constraint but the much bigger one is the number of people we are able to hire.<sup>17</sup>

- 2.22 The Chairman remarked in response to questions about measuring the ACCC's enforcement activities that the ACCC is constantly seeing breaches of the Act that it does not have the resources to pursue. He stated:

There are innumerable consumer and competition matters out there that we would be pursuing if we were able to... it is not a bad thing that a regulator has to choose the most egregious cases to act upon rather than chasing everything that looks like a breach. Nonetheless, we want to be as efficient as we can be and, given the huge array of things that we could be taking and that the Australian community—I would argue, although you are best placed to judge—would like us to take action on, then that leads us to focus on how efficient or how many actions we are taking with the money available, given that there is an endless supply of matters that we could take on.<sup>18</sup>

- 2.23 The ACCC further commented that when it wins a case, all penalties and costs awarded by the courts are returned to the government, that is, consolidated revenue.<sup>19</sup>

## Sectors of concern for the ACCC

- 2.24 The committee was interested in the sectors of the economy that were of most concern to the ACCC.
- 2.25 The Chairman responded that telecommunications had been a sector of concern given Telstra's control of the copper wire network, although this was a problem that was receding. Monopolies in various Australian ports and also the fact that the supermarket sector had two dominant players were also areas of ACCC interest. Mr Sims further emphasised that the banking sector was of concern as it was highly concentrated. He commented:

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<sup>17</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, pp. 11-12.

<sup>18</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 18.

<sup>19</sup> Mr Gregson, ACCC, *Transcript*, 14 October 2016, p. 12.

We have concerns whenever industries are highly concentrated and remain that way. There is nothing wrong with high concentration if you can be challenged, but if industries are highly concentrated and remain that way then we often wonder why, and we do have concerns. But it is very sector-specific and very much depends on how you define the market.<sup>20</sup>

## Priority areas

2.26 The ACCC informed the committee that it identifies priority areas through a strategic review each December, although this process involves both subjective and objective elements. Mr Marcus Bezzi, Executive General Manager Competition Enforcement, ACCC, stated:

We usually ask ourselves the question, after we have intervened in a particular area in relation to a priority area, 'Have we been effective and to what extent have we been effective?' That happens in December each year, when we do what we describe as our strategic review of our priorities. We get all of our senior staff together and we do an assessment. As I said, it is often subjective, but we try to bring as much material as we can into the assessment so that it can be a bit more objective. That assessment then feeds into whether we need to keep the priority on our books for the next year...<sup>21</sup>

2.27 The ACCC also commented that it very much focuses on areas where it believes there is harm and the need for action, and does so in a visible way:

Firstly, we transmit those priorities each February and tell the industries that we are keen to pursue of the conduct. Secondly, in the funnel of filtering the large number of matters we could pursue through contacts and other intelligence we very much seek to focus on those that have factors of high harm, in their individual rights—so the actions we take are the ones we think have an individual merit—but we will also send broader deterrents to key issues.<sup>22</sup>

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<sup>20</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 2.

<sup>21</sup> Mr Bezzi, ACCC, *Transcript*, 14 October 2016, p. 19.

<sup>22</sup> Mr Gregson, ACCC, *Transcript*, 14 October 2016, p. 19.

2.28 The ACCC informed the committee also that it has a role in assisting small businesses with possible impacts of competition or consumer law issues. The ACCC stated:

Its [the ACCC small business team] role is largely in relation to maintaining a good working relationship with industry associations, ensuring the ACCC is alert to and aware of emerging issues of interest to small businesses that we have jurisdiction over. It also has a role in providing some guidance and advice—education, if you will—in relation to some of the new and emerging areas of the law that impact on small business.<sup>23</sup>

2.29 The priorities outlined in the 2016-17 ACCC corporate plan include:

- enduring compliance and enforcement priorities such as cartel conduct, anti-competitive agreements and practices, and the misuse of market power;
- the assessment of product safety issues which have the potential to cause serious harm to consumers;
- assess and review mergers to prevent structural changes that substantially lessen competition with a particular focus on concentrated markets; and
- competition and fair trading issues in agriculture markets.<sup>24</sup>

## Competition in the banking industry

2.30 Competition in the financial services sector, and particularly in retail banking, was an area of considerable interest and concern for the committee at the public hearing.

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<sup>23</sup> Mr Nigel Ridgeway, Executive General Manager, ACCC, *Transcript*, 14 October 2016, p. 20.

<sup>24</sup> ACCC and AER Corporate Plan 2016-17, pp. 4-5, see

<<http://www.accc.gov.au/publications/corporate-plan-priorities/corporate-plan-2016-17>> viewed 27 October 2016.

## Mergers

- 2.31 The committee was interested in the ACCC's previous decision not to challenge the Commonwealth Bank's acquisition of BankWest or Westpac's acquisition of St. George given the dominance of the four major retail banks in this sector.
- 2.32 The ACCC noted in the first instance that it has no actual administrative power to stop a merger. The ACCC remarked that 'we can advise parties, and we do have a regime where we advise parties on whether we will clear a merger or whether we will oppose a merger, which effectively means going to court or having the tribunal adjudicate on it.'<sup>25</sup>
- 2.33 The ACCC further remarked in relation to the two bank mergers in question that BankWest had considerable financial problems at that time. The ACCC further noted in relation to the acquisition of St. George by Westpac that it considered the level of competition from other institutions to be sufficient to constrain this merged entity from raising fees or lessening its service.<sup>26</sup>
- 2.34 The Chairman commented also that the BankWest and St. George acquisitions would certainly receive close scrutiny under section 50 of the Act if they were to be assessed today:

Those two transactions, without commenting on the review they had earlier, would certainly get an extremely close focus by the ACCC at this stage. The BankWest one may have been an unusual one, but St George-Westpac would get extremely close scrutiny, particularly now that we have seen the sector getting more concentrated. There may well have been a view at that time that there were other competitors there who could provide competition. With the benefit of hindsight, it probably has not happened as much as we would have liked. So it would get very close scrutiny.<sup>27</sup>

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<sup>25</sup> Mr Rami Greiss, Executive General Manager Mergers and Adjudication Review, ACCC, *Transcript*, 14 October 2016, p. 6.

<sup>26</sup> Mr Greiss, ACCC, *Transcript*, 14 October 2016, p. 6.

<sup>27</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 14.



2.35 The Chairman also remarked in relation to assessing whether to contest a merger:

... the judgement we have to form by the act is not 'Has there been a lessening of competition?' It is 'Has there been a substantial lessening of competition?' We can only work, as Mr Greiss said, through the courts... We have to go to court and win the court case, and so we have to be alive to the court precedents in this area.<sup>28</sup>

2.36 The ACCC further commented that the law is very strict in relation to how it looks at mergers and their possible impact on market share over time:

We can only look at the particular transaction before us and we can only look so far into the future that it is predictable. So there are great limitations to what we can do and, obviously, we do not have a mandate to shape the market. We have to take the market as we see it.<sup>29</sup>

## Market power

2.37 The committee queried the ACCC on whether it believes that any of the Australian banks have a *substantial* degree of market power in specific markets.

2.38 The Chairman commented that the ACCC does not usually make independent judgements of this nature. He stated:

We normally wait for a matter to arise and then form the view whether the behaviour we are concerned about involves a firm with substantial market power... it depends which particular sector in the financial services market the behaviour is and how big one or two players may be in that market who are engaging in the exclusionary conduct.<sup>30</sup>

2.39 The ACCC further commented that this assessment would very much depend on the conduct under investigation, for example:

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<sup>28</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 6.

<sup>29</sup> Mr Greiss, ACCC, *Transcript*, 14 October 2016, p. 22.

<sup>30</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 8.

... if a bank is exercising power in some small geographic market—let us say it owns most of the land in a particular town, on which it put a retail premises for a bank, and it seeks to prevent new entry into that town—then, in that example, you would very much focus on the circumstances of that town.<sup>31</sup>

2.40 The committee further sought the ACCC's view on the difficulty in establishing before the courts whether a particular bank, or any firm, had a substantial degree of market power. The committee queried also whether the advent of online banking would contribute to this level of difficulty in the case of the four major banks.

2.41 The ACCC indicated in the case of the banks that it would depend on whether online banking is 'fully substitutable' (and that it probably is) but that this issue highlights the need to know all of the circumstances in any particular market.<sup>32</sup>

2.42 The Chairman reiterated that it would be very much conduct related but stated that:

If we felt that there was a substantial lessening of competition coming from one of those banks, and that what they were doing was having that substantial effect, I think we would certainly have a go at trying to prove to a court that they also had substantial market power.<sup>33</sup>

2.43 The Chairman agreed however that proving this before the courts was a 'hurdle of some substance'. He commented:

One of the points in the debate over section 46 is that you have to have substantial market power and you have to substantially lessen competition. There is a link between those two things. If you are able to substantially lessen competition it may follow you have so much power that you have a substantial market power. We agree with you that it is not an easy hurdle to jump. The whole competition provisions of the Australian Competition and

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<sup>31</sup> Mr Bezzi, ACCC, *Transcript*, 14 October 2016, p. 8.

<sup>32</sup> Mr Bezzi, ACCC, *Transcript*, 14 October 2016, p. 9.

<sup>33</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 9.

Consumer Act is a very broad mesh to catch extreme behaviour; it is not there to tell the market what to do.<sup>34</sup>

2.44 Further to the issue of establishing before the courts that firms had substantial market power and were using it to substantially lessen competition, the ACCC remarked:

... if they are all engaging in parallel conduct—even if we cannot establish that they are colluding—essentially, giving the same message to firms that might be trying to break into a market, if they are seeking in some way or other to exclude those firms from participation in a market, then what is clear in section 46 is that there can be more than one party in a market that has substantial market power. You do not just look at market share; you look at a range of factors. You look at what they are actually able to do what effect they can actually have within the market.<sup>35</sup>

## Section 46 and the effects test

2.45 The committee was interested in the ACCC's view on the general impact of introducing an effects test into section 46 of the Act, as proposed by the Harper Review.<sup>36</sup> The committee was particularly interested in any likely impacts of this change in the financial services sector.

2.46 The Chairman reiterated the ACCC's previous view that the current law is badly crafted and that an effects test will be pro-competition and pro-innovation. In relation to the financial sector, the Chairman remarked that an effects test will be an important provision if the banks were to engage in any exclusionary behaviour in the future. He stated:

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<sup>34</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 9.

<sup>35</sup> Mr Bezzi, ACCC, *Transcript*, 14 October 2016, p. 9.

<sup>36</sup> Introducing an effects test would amend section 46 the Act so that a firm with *substantial* market power would be prohibited from actions that have the *effect of* substantially lessening competition. Currently, section 46 'prohibits corporations that have a substantial degree of market power from *taking advantage* of that power for the purpose of eliminating or substantially damaging a competitor.' The Harper review final report notes that a principal argument for introducing the effects test is that competition law should be directed to the *effect of* commercial conduct on competition rather than the *purpose* of such conduct as it is the anti-competitive *effect* that is detrimental to competition and consumer welfare.

... with new technology hopefully going to disrupt the financial sector, with peer-to-peer lending, whatever other way you want to look at it, the key provision we would want to use if the major banks were to seek to remove important new competitors is section 46. We are not alleging anything in relation to banks on excluding competitors, so I do not want that to be misinterpreted. But, with all that is going on that we hope will occur in banking with new technology, the change to section 46 cannot come too soon, because at the moment we could not deal with that form of exclusionary behaviour. But, with the new Harper 46, we can.<sup>37</sup>

2.47 The committee further queried whether any of the big banks would be in breach of an effects test if it became law.

2.48 The Chairman stated that he is not aware of any issues that the ACCC would take on in the financial sector 'at the moment' in the event that the effects test was introduced into law.<sup>38</sup> He remarked however:

I emphasise 'at the moment'. I think that, with all the start-up, new-technology FinTech, it could be an issue in the future as I said earlier, but right now there is no issue. Our main focus on banks at the moment is particularly cartel activity.<sup>39</sup>

## Other matters

### Petrol pricing

2.49 The committee queried why there can sometimes be significant variation in petrol prices at the pump between towns and regional centres that are geographically quite close.

2.50 The Chairman responded that the ACCC's regional studies on petrol prices in Darwin and Launceston had revealed higher than normal profits at the retail level but that this transparency and exposure had had a big effect on

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<sup>37</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 5.

<sup>38</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, pp. 6-7.

<sup>39</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 7.

bringing prices down. He noted that two further studies on petrol prices are underway at the ACCC. He stated:

We are hoping that once we finish the four studies we will be able to come up with some form of ready reckoner that might give more general application and that bit more transparency and exposure on these issues—and that might help right across the country. I guess there are two things, to directly answer your question. One is a market where you just do not have enough competition, and particularly what happens is a market where you do not have anybody who sees it as in their interest to discount.<sup>40</sup>

## **Food and Grocery code of conduct**

- 2.51 The committee asked the ACCC whether it maintained oversight of the Food and Grocery Code of Conduct and whether this code has had any effect on the average time taken for supermarkets to pay their suppliers.
- 2.52 The ACCC responded that it does have a role in auditing the various requirements under the code with retailers who have signed up to it. The ACCC emphasised that although it does not have sufficient data to perform quantitative assessments of average payment terms for suppliers it is looking at this issue:

... we are concerned about some of the reports we hear about delays in payment terms and indeed the way in which some grocery supply agreements might define those. So that is an active area for us to consider. We do not have data available to us to quantify that. We are continuing to look at it and we have benefited from individual experience.<sup>41</sup>

## **Motor vehicle aftermarket**

- 2.53 The committee asked whether the ACCC had concerns about alleged withholding of computer codes that would affect the ability of independent repairers to service a car.

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<sup>40</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 21.

<sup>41</sup> Mr Gregson, ACCC, *Transcript*, 14 October 2016, p. 7.

2.54 The Chairman responded that this was of great concern to the ACCC and that they have now announced a market study into the motor vehicle market and that the independent review of this industry previously announced by the government would form part of that study.<sup>42</sup>

2.55 In reply to questions about whether a mandatory code should be introduced for the motor industry, the Chairman indicated that this was one of the issues that would be considered. He stated:

Where we are with the motor vehicle industry is really at the starting gate. Although we have done a lot of work on consumer guarantee issues—and, again, I emphasise how important they are—if you cannot get your consumer guarantee rights and you have a car that you regard as not fit for purpose, we have got investigations underway there... we will consider all options and a code may well be one option. I am not saying we are heading that way; I am just saying that that will be something we will keep on the table.<sup>43</sup>

2.56 The ACCC released its issues paper for the new car retailing industry market study on 17 October 2016 announcing that the following key areas would be covered:

- compliance with consumer guarantees obligations and the ability of consumers to enforce their rights;
- interaction between consumer guarantees, manufacturer's warranties and dealer's extended warranties;
- the effect on competition and on consumers of post-sale service arrangements (such as servicing and repair);
- availability and access to repair and service information and data for new cars; and

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<sup>42</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 8.

<sup>43</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 8.

- false, misleading and deceptive practices in fuel consumption, carbon dioxide emissions, noxious emissions and car performance.<sup>44</sup>

## National broadband network

2.57 The committee sought advice from the ACCC on issues around national broadband network (NBN) access and speed, and the potential packaging of offers.

2.58 The Chairman responded that the ACCC is looking at a number of matters in relation to the NBN but that speed and access are two different issues. He stated:

We are looking at speed claims made by ISPs and we are looking at how they can be made more effective. We are looking at whether there are any constraints on people believing what they can say under Australian consumer law. But, more importantly, we are going to work with industry and come up with much more informed statements so consumers know what speeds they are getting.<sup>45</sup>

## Credit card surcharges

2.59 The committee asked the ACCC for an update on its enforcement of the new credit card surcharging rules.

2.60 The ACCC informed the committee that this responsibility sits within its consumer enforcement area in Brisbane and involved considerable engagement with both business and consumer stakeholders, and contributions to the government's development of this policy.<sup>46</sup> The ACCC further remarked:

I am happy to indicate that we are currently triaging the matters that are coming to us. A large number of those probably are not matters for us to

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<sup>44</sup> ACCC, *Issues Paper for the New Car Retailing Industry Market Study*, see <<http://www.accc.gov.au/media-release/accc-releases-issues-paper-for-new-car-retailing-industry-market-study>> viewed 27 October 2016.

<sup>45</sup> Mr Sims, Chairman, ACCC, *Transcript*, 14 October 2016, p. 17.

<sup>46</sup> Mr Gregson, ACCC, *Transcript*, 14 October 2016, p. 20.

pursue, because they either involve small business not currently subject to the law or, alternatively, based on misunderstandings about the surcharging rules, in terms of banning it outright as opposed to excessive. But there are a small number of matters—not that small; a material but small number of matters—that could raise concerns and we are engaging with business, and where that does not resolve we will look at action.<sup>47</sup>

## Conclusion

- 2.61 The ACCC must continue to remain vigilant against anti-competitive behaviour and breaches of the consumer law in Australia’s markets as this is vital for the health of the Australian economy. The committee will continue to scrutinise and provide oversight of the effectiveness of the ACCC’s actions in this regard.
- 2.62 The ability of the ACCC to now conduct its own market studies and gain an additional tool to taking enforcement action is welcomed. The ACCC has already expressed concern that the level of competition in banking is less than robust. The committee shares this concern, and will continue to assess the performance of the ACCC in this area.

**Mr David Coleman MP**

**Chair**

**9 November 2016**

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<sup>47</sup> Mr Gregson, ACCC, *Transcript*, 14 October 2016, p. 21.



# A. Public hearing details and documents

## Public hearing

*Friday 14 October 2016, Canberra*

*Australian Competition and Consumer Commission*

Mr Rod Sims, Chairman (by teleconference)

Mrs Rayne De Gruchy, Chief Operating Officer

Mr Marcus Bezzi, Executive General Manager Competition Enforcement

Mr Scott Gregson, Executive General Manager Consumer Enforcement

Mr Rami Greiss, Executive General Manager Mergers and Adjudication Review

Mr Nigel Ridgeway, Executive General Manager Consumer Small Business and Product Safety

## Documents

Document 1                      Australian Competition and Consumer Commission  
(Responses to Questions on Notice)