

## **Current issues in competition and consumer law**

### **Overview**

- 2.1 The Australian Competition and Consumer Commission (ACCC) appeared before the committee on Friday, 29 June 2018 in Canberra for a public hearing, as part of the review of its 2017 annual report.
- 2.2 Issues raised at the hearing included criminal cartel cases arising from ACCC investigations, competition and Australian Consumer Law (ACL) penalties, and electricity and gas pricing.
- 2.3 The committee scrutinised the ACCC on its regulation of competition in the financial sector, including its work examining residential mortgage pricing.
- 2.4 The committee also questioned the ACCC on a range of other matters, including petrol prices, a mandatory code for the new car retailing industry, monitoring and enforcing free range egg standards, introducing a dairy industry code, and regulating cryptocurrency.

### **Criminal cartel cases**

- 2.5 The Competition and Consumer Act<sup>1</sup> prohibits cartels under civil law and makes it a criminal offence for businesses and individuals to participate in

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<sup>1</sup> *Competition and Consumer Act 2010*, Part IV – Restrictive trade practices, Division 1 – Cartel conduct. Cartel conduct provisions prohibit parties, who would otherwise be in competition

a cartel. The ACCC investigates cartel conduct, manages the immunity process, takes proceedings in the Federal Court in respect of civil cartel contraventions, and refers serious cartel conduct to the Commonwealth Director of Public Prosecutions (CDPP) for consideration for prosecution.

- 2.6 The ACCC has launched recent criminal cartel proceedings against the Australia and New Zealand Banking Group (ANZ), Deutsche Bank and Citigroup Global Markets Australia (Citigroup). Criminal charges have also been laid against several senior executives. The charges involve alleged cartel arrangements relating to trading in ANZ shares held by Deutsche Bank and Citigroup.<sup>2</sup> The committee noted that these matters are subject to active court proceedings.

## Secondary boycotting

- 2.7 The committee questioned the ACCC on its case against the Construction, Forestry, Mining and Energy Union (CFMEU) for secondary boycott<sup>3</sup> conduct in breach of section 45D of the Competition and Consumer Act. In February 2018 the Court ordered the CFMEU to pay a penalty of \$1 million and made declarations.<sup>4</sup>
- 2.8 The ACCC highlighted the challenges of this type of case, remarking that it is a 'hard law to interpret', and that, broadly speaking, it is difficult to get witnesses due to the intimidation involved. In relation to this specific case, the ACCC stated that:

We certainly felt what was going on [at Boral] appeared to be secondary boycott activity. We put a team of people on it. We put matters before the court. That did get affected by the criminal proceedings taken by the Victorian police. That did have an unfortunate effect on our case, but in the end we did succeed in two matters.<sup>5</sup>

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with each other, from making or giving effect to a contract, arrangement or understanding that contains a cartel provision: price fixing; restricting outputs in the production and supply chain; allocating customers, suppliers or territories; or bid-rigging.

- 2 CDPP v ANZ, Deutsche Bank, Citigroup and others. See also: Australian Competition and Consumer Commission (ACCC), *Criminal cartel charges laid against ANZ, Citigroup and Deutsche Bank*, Media release, 5 June 2018, <<https://www.accc.gov.au/media-release/criminal-cartel-charges-laid-against-anz-citigroup-and-deutsche-bank>>, viewed 10 July 2018.
- 3 A secondary boycott is an attempt to influence the actions of one business by exerting pressure on another business.
- 4 ACCC, *Court lifts suppression orders in ACCC's CFMEU case*, Media release, 1 June 2018, <<https://www.accc.gov.au/media-release/court-lifts-suppression-orders-in-acccs-cfmeu-case>>, viewed 10 July 2018.
- 5 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 3.

2.9 The ACCC told the committee that while the outcome could have been better, it was very pleased with the outcome in the Boral case, noting that the \$1 million fine was 'eight to 10 times more' than had previously been achieved with its secondary boycott cases. The regulator saw the case as setting a precedent and sending a warning.<sup>6</sup>

2.10 The committee also asked the ACCC about the effects of secondary boycotts on the economy. The ACCC responded that:

I think there's no question that the harm to the economy from that action was considerable. I mean, you are stopping economic activity. I know there's controversy about whether the secondary boycott laws should be in our act or in an industrial relations act. I understand that. The reality from our point of view is that they are within our act, we will enforce the law and there certainly is harm done by this sort of activity. It really is a slightly strange way to run an economy when you have some people trying to tell other people who can service whom. We think secondary boycotts have the potential to be harmful, and we certainly think that, in the Boral case, they were.<sup>7</sup>

2.11 The committee noted that the changes originally proposed in the Competition and Consumer Amendment (Competition Policy Review) Bill 2017, to impose larger penalties for breaches of secondary boycott provisions, were removed before the Bill passed. The committee sought the ACCC's view on whether this was a matter of concern for the regulator. The ACCC expressed its support for the penalties for secondary boycotts to be 'the same as for other breaches of the competition act', stressing that it is about sending a considerable deterrence message and stopping illegal behaviour.<sup>8</sup>

## Penalties

2.12 The committee examined the ACCC on matters concerning penalties and the scope of penalties available to the regulator. The ACCC Chairman acknowledged that this is a 'hugely important issue' and stated:

As long as I've been in this job, I've increasingly come to the view that you do need high penalties so that company boards take

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6 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 3.

7 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 3.

8 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 4.

notice when they're found to have breached the law. We've had cases in competition matters – the penalty, for example, against Flight Centre was \$11 million, and it was immediately dismissed by the financial analysts as not being consequential. That doesn't help in sending a deterrence message. We've had penalties on the consumer side which, again, have been below the profit earned from the activity and, again, pass without comment. What we desperately need is penalties that send a message to the boards and top management that what they've done is serious... I think we need penalties of tens of millions of dollars. Sometimes we need penalties of well over \$100 million to get people to sit up and take notice and say: 'This is important. These are things you shouldn't be doing.'<sup>9</sup>

- 2.13 Further, the ACCC expressed the view that boards and senior managers of companies were not putting enough effort into making sure breaches do not happen.
- 2.14 In responding to the committee's question on the adequacy of penalties available to the ACCC, the regulator stated that things differed between the competition and consumer sides. This is discussed in the following sections.

## Competition law penalties

- 2.15 In relation to competition penalties, the ACCC observed that it has had an 'excellent penalty regime since 2007', which is a 'maximum of \$10 million per breach or three times the profit from the offending activity, or, if you can't determine that – and generally you can't – it's 10 per cent of turnover'.<sup>10</sup> However, the ACCC highlighted that the problems relate to the size of penalties for larger companies, and stressed that this is why the 10 per cent of turnover is important. For example, with a \$100 million company the potential penalty is \$10 million, but with a billion-dollar company, this is a \$100 million penalty.
- 2.16 The ACCC told the committee that it had been working, particularly in the last few years:

...to get the legal system generally, particularly the legal community – and I'm talking before things get to the courts – to realise that the law as changed in 2007 and precedence for what's an

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9 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 4.

10 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 4.

appropriate penalty set pre-2007 are no longer appropriate, because parliament changed the law in 2007 from a \$10 million penalty to something that could be up to 10 per cent of turnover. That's a big change. I think we're starting to see that change reflected.<sup>11</sup>

- 2.17 The ACCC highlighted the Full Federal Court's finding in the Yazaki case as having provided 'a bit of lift-off in this area'.<sup>12</sup> The ACCC saw the Full Federal Court's determination in the Yazaki case<sup>13</sup> of \$45 million in penalties – a considerable increase from the first-instance \$10 million penalty – as a sign that things are on the right track with competition penalties. This is the highest penalty handed down under the Competition and Consumer Act.<sup>14</sup> The ACCC Chairman explained that as Yazaki was not that big a company, the penalty size was important as it signals clearly that when dealing with larger companies, 'the penalties will be well over \$100 million.'<sup>15</sup>
- 2.18 The committee asked the ACCC whether the changes proposed in the Treasury Laws Amendment (2018 Measures No. 3) Bill 2018<sup>16</sup> would address the issues that came out in the report by the Organisation for Economic Co-operation and Development (OECD) *Pecuniary Penalties for Competition Law Infringements in Australia* (OECD report),<sup>17</sup> regarding Australia's comparatively low penalties.
- 2.19 The OECD report found that 'maximum and average pecuniary penalties imposed for competition law infringements in Australia are significantly lower than the penalties imposed in the other OECD jurisdictions considered in the report.'<sup>18</sup>

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11 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 4.

12 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 12.

13 ACCC, *Record \$46 million in penalties for Yazaki cartel*, Media release, 16 May 2018, <<https://www.accc.gov.au/media-release/record-46-million-in-penalties-for-yazaki-cartel>>, viewed 10 July 2018. The Federal Court found that Yazaki Corporation engaged in collusive conduct with its competitor when supplying wire harnesses to Toyota in Australia. On 16 May 2018 the Full Federal Court ordered the Yazaki to pay increased penalties of \$46 million for cartel conduct, following an appeal by the ACCC.

14 ACCC, *Record \$46 million in penalties for Yazaki cartel*, Media release, 16 May 2018, <<https://www.accc.gov.au/media-release/record-46-million-in-penalties-for-yazaki-cartel>>, viewed 10 July 2018.

15 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 4.

16 Parliament of Australia website: <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2F6053%22>>.

17 OECD, *Pecuniary Penalties for Competition Law Infringements in Australia*, March 2018.

18 ACCC, *Release of the OECD's Pecuniary Penalties for Competition Law Infringements in Australia report*, Speech, 26 March 2018, <<https://www.accc.gov.au/speech/release-of-the-oecd%E2%80%99s-pecuniary-penalties-for-competition-law-infringements-in-australia-report>>, viewed 19 July 2018.

2.20 The ACCC told the committee that the planned changes would address this issue on the consumer side, but that on the competition side, no legislative changes are being made. The ACCC explained that:

Really, it's a different exercise in terms of what needs to be done there to change. I think, as Mr Sims said earlier, we had the change in the law in 2007, but what we haven't really had is a change in our system to produce higher penalties that fit with that law.<sup>19</sup>

2.21 When scrutinised on why application of the new penalties had not been evident in post-2007 competition cases, like that of Colgate,<sup>20</sup> the ACCC told the committee that the old penalties and the old penalty regime had been applied as it related to pre-2007 conduct.<sup>21</sup>

2.22 The ACCC contended that due to lengthy litigation processes, it is only more recently that they are seeing higher penalties in judgements. The regulator provided its cases against Pfizer and Cascade Coal as examples of where there have been lengthy wait times between hearings and judgements.<sup>22</sup>

2.23 In response to questioning on whether previous case law or penalties may have been a factor restraining lifting penalties in cases since the 2007 changes, the ACCC conceded that this was a factor.<sup>23</sup>

2.24 The ACCC recognised that when advocating for penalties in court cases, much greater weight needed to be given to the size of the business than it had been in the past. It reflected that:

...the really telling part of the OECD report was that they said that in our jurisdiction we don't tend to discriminate very much between large businesses and small businesses. In the systems

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19 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy, ACCC, *Transcript*, 29 June 2018, p. 11.

20 ACCC v Colgate-Palmolive Pty Ltd (and Cussons and Woolworths). See ACCC, *Colgate ordered to pay \$18 million penalty in laundry detergent cartel proceedings*, Media release, 28 April 2016, <<https://www.accc.gov.au/media-release/colgate-ordered-to-pay-18-million-penalty-in-laundry-detergent-cartel-proceedings>>, viewed 10 July 2018.

21 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy, ACCC, *Transcript*, 29 June 2018, p. 11.

22 ACCC v Pfizer Australia Pty Ltd [2015] FCA 113 (first instance) [2018] FCAFC 78 (appeal) and ACCC v Cascade Coal Pty Ltd & Ors NSD584/2015. See ACCC, *Responses to questions on notice*, QON 5, 19 July 2018, pp. 1-2.

23 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy, ACCC, *Transcript*, 29 June 2018, p. 12.

they referred to, they do. They say it's a fundamentally important thing to penalise businesses according to their size.<sup>24</sup>

- 2.25 In its response to the release of the OECD report, the ACCC commented that the report reinforces its concern that penalties imposed in both competition and consumer cases historically have not been sufficiently high to deter contraventions, particularly in cases involving large businesses. The ACCC noted that the OECD report revealed that:

...in a sample of major Australian cartel cases up to November 2017, the average pecuniary penalty in Australia was \$25.4 million, while the average base penalty in the comparator jurisdictions for this conduct would have been \$320.4 million.

...this figure means that the average Australian penalty would have to increase 12.6 times to reach the level of the average penalty that would have applied in the comparator jurisdictions.<sup>25</sup>

## Australian Consumer Law penalties

- 2.26 In stark contrast to the strong competition law penalties, the ACCC observed that the current ACL penalty is a 'maximum of \$1.1 million per breach'.<sup>26</sup> However, it noted that the Treasury Laws Amendment (2018 Measures No. 3) Bill 2018,<sup>27</sup> contains provisions to amend the Competition and Consumer Act to align the maximum penalties under the ACL with the maximum penalties under the competition provisions.
- 2.27 The aim of the change is to strengthen the penalties regime, deter non-compliant conduct and reduce the financial benefits and incentives for businesses to engage in conduct in breach of the ACL. Since the hearing, the Bill was passed on 23 August 2018.
- 2.28 The ACCC told the committee that aligning the ACL penalties with the competition law penalties was 'absolutely crucial', stating:

The very idea that competition law penalties should be higher than consumer law penalties is ridiculous. The harm done by

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24 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy, ACCC, *Transcript*, 29 June 2018, p. 12.

25 ACCC, *Release of the OECD's Pecuniary Penalties for Competition Law Infringements in Australia report*, Speech, 26 March 2018, <<https://www.accc.gov.au/speech/release-of-the-oecd%E2%80%99s-pecuniary-penalties-for-competition-law-infringements-in-australia-report>>, viewed 19 July 2018.

26 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 4.

27 Parliament of Australia website: <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2F6053%22>>.

breaching consumer law can be equally as bad as by breaching competition law. I often use the case of Nurofen as an example. They were misrepresenting that particular pain relief tablets could target just one element of pain when, in fact, they were general pain relief tablets. People were paying double for that; so they were paying twice the price they should have. We rarely find a cartel case where they're doubling the price. So consumer law breaches can be at least as egregious as competition law breaches, and, often, they are felt much more directly by consumers.<sup>28</sup>

- 2.29 When questioned on its advocacy on ACL penalty issues, the ACCC confirmed that it has advocated for increased civil pecuniary penalties for breaches of ACL for several years. A significant step forward on this issue was the release of the *Australian Consumer Law Review: Final Report* in March 2017, which recommended increasing the maximum penalties available under the ACL to align them with the penalty regime under the competition provisions of the Competition and Consumer Act.<sup>29</sup>

## Competition in the financial sector

- 2.30 The Productivity Commission's draft report on competition in the Australian Financial System, January 2018, contended that the financial system needs a competition champion. However, it found that competition in Australia's financial system is 'without a champion among the existing regulators'. It stated that:

...no government agency is tasked with overseeing and promoting competition in financial markets, including forcing consideration of whether actions by regulators materially harm competition. Under the current regulatory architecture, promoting competition requires a serious rethink about how the RBA, APRA and ASIC consider competition...<sup>30</sup>

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28 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 4.

29 ACCC, *Responses to questions on notice*, QON 4, 19 July 2018, p. 1.

30 Productivity Commission, *Competition in the Australian Financial System: Draft Report*, January 2018, p. 17.



- 2.31 The Productivity Commission identified ACCC and ASIC as two possible candidates for competition champion. It did not include APRA and the RBA as options since these regulators' primary focus is on, and should remain on, financial stability.<sup>31</sup>
- 2.32 The committee questioned the ACCC on the Productivity Commission's finding that the ACCC 'may be well placed to take on the role of competition champion in the financial system.'<sup>32</sup> The ACCC responded:
- As you know...directly and completely as a result of this committee's work, we were given funds to establish a financial services unit and that allows us not just to reactively look at the financial sector but to proactively look at it. We did reactive looking when we were before this committee and we were being urged to be more proactive... We now have the funds to be proactive and we think that can allow us to play a competition champion role. So we are now with that proactive role, much more engaged with APRA, in particular, also the Reserve Bank, even more so with ASIC; although ASIC, as a fellow enforcement regulator, we have always worked fairly closely with. We are getting asked for advice on competition issues. I think we are well placed to play that role and, in fact, it is largely happening.<sup>33</sup>
- 2.33 When further questioned on whether the ACCC needed funds or greater powers to fulfil a competition champion role, it confirmed that it had the competition powers it needed. It told the committee that the Harper changes had provided the laws it needed. The ACCC expressed the view that it is 'now well placed to have a big influence in the sector.'<sup>34</sup>
- 2.34 The ACCC highlighted the lack of transparency in the financial sector as an issue that needs to be addressed. It outlined that companies in the banking sector do try to obscure the prices of their products. It acknowledged that in the case of mortgages, getting good price discovery involved applying at more than one bank. This ACCC saw this as a significant issue for consumers and the economy, when there are a 'lot of people running around wasting their time to get price discovery in a market that should be much more readily available.'<sup>35</sup>

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31 Productivity Commission, *Competition in the Australian Financial System: Draft Report*, January 2018, p. 23.

32 Productivity Commission, *Competition in the Australian Financial System: Draft Report*, January 2018, p. 23.

33 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 5.

34 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 5.

35 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 5.

- 2.35 In response to questioning on whether the lack of transparency comes from a lack of competition in the sector, the ACCC agreed that in electricity, and particularly in banking, the lack of transparency reflects a lack of competition. It commented that:

Whenever you get this lack of transparency, this obscurity, it's allowed to happen, because the small number of other players see that the others are doing it. Nobody wants to break ranks. If you had a more competitive market, someone would find it in their interests to differentiate themselves with a clear product that could attract consumers.<sup>36</sup>

- 2.36 The committee also examined the ACCC on the inherent tensions in the banking sector between stability and competition. The ACCC observed that banking is an unusual market, stating:

You've got regulation in place to make sure you've got a stable system. Sometimes that regulation can be so focused on stability that it can reduce competition and limit the ability of new players to get there. We're all aware of the prudential requirements that favour the larger banks, giving them a 30-basis-point pricing advantage. In concept, there shouldn't be a trade-off in the sense that, if you want strong banks, you want banks that can face strong competition. That's the best way to get strength – make sure you can survive in a competitive market. But there is a sense in which the way we're trying to bring about stability might limit that competition. That's certainly an issue that we're going to be focusing on, and we'll certainly engage APRA in that discussion.<sup>37</sup>

## **Mortgage pricing**

- 2.37 In the 2017–18 Budget, the Australian Government announced additional funding for the ACCC to establish the Financial Services Unit (FSU) to undertake regular inquiries into specific financial system competition issues. The FSU's first task is inquiring into residential mortgage prices. This involves inquiring into prices charged or proposed to be charged by Authorised Deposit-taking Institutions affected by the Major Bank Levy in relation to residential mortgage products in the banking industry in Australia from 9 May 2017 until 30 June 2018.

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36 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 6.

37 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 6.

- 2.38 In March 2018 the ACCC released the *Residential mortgage price inquiry: Interim report* (Interim report), which revealed a lack of transparency in the residential mortgage prices offered by the five banks<sup>38</sup> affected by the levy. This lack of transparency makes it difficult for customers to make informed decisions. Another preliminary finding was that pricing between the banks is not strongly competitive.<sup>39</sup>
- 2.39 The committee noted the ACCC's public comments about the lack of transparency in banks' mortgage pricing, and asked the regulator if this is an issue that the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission) should be examining.
- 2.40 The ACCC indicated that while it had not given much thought to what role the Royal Commission should play, it welcomed the involvement of other groups in dealing with the matter. It also noted that the Productivity Commission had focused on this issue in the interim report on competition in the Australian Financial System, and said it looked forward to seeing how the issue is addressed in the final report.
- 2.41 The ACCC emphasised that it is focused on this issue, noting that lack of transparency is a broader issue that is evident in other areas, such as the electricity sector. The ACCC Chairman also commented that the new open banking arrangements allowing access to data, recently announced by the Government, would help customers get a better deal and allow for smoother transition when switching providers.<sup>40</sup>

## Bank considered passing on bank levy costs

- 2.42 The committee also scrutinised the ACCC on whether it will be releasing information related to comments in its media release on the mortgage pricing interim report, that 'one bank considered whether the costs [of the major bank levy] could be passed on to customers and suppliers at a range of different time periods, including after the end of the ACCC inquiry.'<sup>41</sup>

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38 Australia and New Zealand Banking Group Limited, Commonwealth Bank of Australia, Macquarie Bank Limited, National Australia Bank Limited, and Westpac Banking Corporation.

39 ACCC, *Mortgage pricing not strongly competitive*, Media release, 15 March 2018, <<https://www.accc.gov.au/media-release/mortgage-pricing-not-strongly-competitive>>, viewed 12 July 2018.

40 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, pp. 5-6.

41 ACCC, *Mortgage pricing not strongly competitive*, Media release, 15 March 2018, <<https://www.accc.gov.au/media-release/mortgage-pricing-not-strongly-competitive>>, viewed 10 July 2018.

- 2.43 The ACCC informed the committee that after careful consideration it had made a deliberate decision not to name the bank. It took the view that it could 'provide the transparency and information to the public through emails...without necessarily identifying the bank'.<sup>42</sup>
- 2.44 When pressed on whether it would reveal the bank in the final report, the ACCC advised that it was yet to make that judgement, but noted that a particular confidentiality regime applies to the release of information, which involves a statutory decision-making process when there is a claim of confidentiality over material.
- 2.45 Further, the ACCC observed that the tactic mentioned by the bank in question – to wait until the end of the inquiry to pass on the major bank levy costs – would not work. It remarked that while this was the first inquiry, the ACCC has a permanent role in monitoring the banks, and so would be in a position to assess in a year or two what actually happened.<sup>43</sup>

## Energy markets

### Electricity

- 2.46 The ACCC outlined the following main issues in the electricity market:
- reliability – making sure that the power is there when you need it
  - sustainability and the Paris targets
  - affordability.
- 2.47 At the hearing, the ACCC expressed the view that the Renewable Energy Target was not a satisfactory policy, as it involves 'subsidising power to be supplied without any regard to the needs of the market.'<sup>44</sup> It noted that the subsidy would apply whether the market needed the power or not. For instance, there is no distinction made as to whether the power was produced at three o'clock in the morning or at a higher demand time of seven o'clock at night.

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42 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 6.

43 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 7.

44 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, pp. 2-3.

- 2.48 At the hearing, the ACCC identified the lack of transparency in the electricity sector as a big issue. The ACCC noted that companies try and obscure the prices of their products, and that on some occasions this obscurity can 'lead to breaches'.<sup>45</sup>
- 2.49 The committee also examined the ACCC on the regulator's concerns about the Queensland Government owning two-thirds of the generation capacity in the state. At the hearing, the ACCC stated that:

The evidence is there that, because they have got over 60 per cent of the capacity, there are times when they absolutely are certain they are going to get dispatched and so they can push the price up, and they did. The minister has pulled them back so that they hopefully won't do it as much in future. It is an issue which we are going to be providing recommendations on in our report.<sup>46</sup>

- 2.50 When further examined on whether this behaviour may have been a breach of competition law, the ACCC advised that 'it is not a breach, unfortunately', but it is a problem with lack of competition.<sup>47</sup>

- 2.51 To address this concern, in its final report for the retail electricity pricing inquiry, released in July 2018, the ACCC recommended that:

The Queensland Government should divide its generation assets into three generation portfolios to reduce market concentration in Queensland. The three portfolios should be of a similar size with a mix of generation assets to maximise competition in the wholesale market.

Once created, the Queensland Government should ensure that the three portfolios are separately owned and operated to maximise competition in the wholesale electricity market.<sup>48</sup>

## Electricity pricing inquiry findings

- 2.52 When discussing the ACCC's recent examination of the electricity sector, the regulator told the committee that:

We've given deep thought to recommendations as to how to improve affordability in the electricity sector. We desperately need to get prices down...We do have a range of proposals to put as to

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45 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 5.

46 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 17.

47 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 18.

48 ACCC, *Restoring electricity affordability and Australia's competitive advantage: Retail Electricity Pricing Inquiry – Final Report*, June 2018, p. 93, Recommendation 2.

how to get electricity prices down. We've looked right across the supply chain because there are various aspects. I know public debate focuses on particular parts of the electricity sector, but really you have to look at networks, generation, retail and the green costs. We've done all of that, so we do have some quite comprehensive recommendations coming...<sup>49</sup>

- 2.53 The ACCC released the final report for its retail electricity pricing inquiry in July 2018. When releasing the report, the ACCC Chairman described the National Electricity Market (NEM) as 'largely broken' and needing to be reset. He stated:

There are many reasons Australia has the electricity affordability issues we are now facing. Wholesale and retail markets are too concentrated. Regulation and poorly designed policy have added significant costs to electricity bills. Retailers' marketing of discounts is inconsistent and confusing to consumers and have left many consumers on excessively high 'standing' offers.<sup>50</sup>

- 2.54 In its report the ACCC noted that there is 'already some positive progress in the market that is helping with affordability issues'. The improvements to date include:

- there have been some small retail price decreases announced by retailers in June 2018
- network tariffs are generally flat or trending downward (albeit, in an historically low cost-of-capital environment)
- wholesale spot and futures prices are around 30 per cent lower than their 2017 peak
- significant work on demand management initiatives at the network, wholesale and retail levels is likely to put downward pressure on prices once implemented
- a variety of rule changes and guideline enhancements aim to improve the information provided to consumers and enhance competition.<sup>51</sup>

- 2.55 However, the ACCC found that there is more that needs to be done to help resolve Australia's electricity affordability problem. The regulator described the current situation with Australia's electricity markets as

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49 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 2.

50 ACCC, *ACCC releases blueprint to reduce electricity prices*, Media release, 11 July 2018, <<https://www.accc.gov.au/media-release/accc-releases-blueprint-to-reduce-electricity-prices>>, viewed 17 July 2018.

51 ACCC, *Restoring electricity affordability and Australia's competitive advantage: Retail Electricity Pricing Inquiry – Final Report*, June 2018, p. xiv.

'unacceptable and unsustainable'.<sup>52</sup> In its final report, it made 56 recommendations to 'bring down prices and restore consumer confidence and Australia's competitive advantage'. The full 56 recommendations are available on the ACCC's website.<sup>53</sup> The recommendations span the supply chain, focusing on the following four main areas:

- boosting competition in generation and retail
- lowering costs in networks, environmental schemes and retail
- enhancing consumer experiences and outcomes
- improving business outcomes.<sup>54</sup>

2.56 The ACCC estimated that, if adopted, its recommendations:

- will save the average household between 20 and 25 per cent on their electricity bill, or around \$290 to \$415 per annum
- could save Australia's 2.2 million small to medium businesses an average of 24 per cent on their electricity bill
- could see the electricity costs of commercial and industrial customers – the heaviest users – decrease on average by 26 per cent.<sup>55</sup>

2.57 The committee notes that the Government has since announced that it will implement a number of key recommendations from the ACCC retail electricity pricing inquiry. These include:

- Directing the ACCC and the Australian Energy Regulator (AER) to set a default price for electricity – a default market offer will provide consistency across retailers and deliver savings for consumers. It is expected to apply from July 2019, at the latest (recommendation 30).
- Implementing a technology neutral program to underwrite new, stable, low-cost generation for commercial and industrial customers (recommendation 4).

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52 ACCC, *Restoring electricity affordability and Australia's competitive advantage: Retail Electricity Pricing Inquiry – Final Report*, June 2018, p. iv.

53 ACCC, *Restoring electricity affordability and Australia's competitive advantage: Retail Electricity Pricing Inquiry – Final Report*, June 2018. The full report is available at: <https://www.accc.gov.au/publications/restoring-electricity-affordability-australias-competitive-advantage>. The 56 recommendations are listed on pages xvii to xxv.

54 ACCC, *Restoring electricity affordability and Australia's competitive advantage: Retail Electricity Pricing Inquiry – Final Report*, June 2018, p. iv.

55 ACCC, *ACCC releases blueprint to reduce electricity prices*, Media release, 11 July 2018, <<https://www.accc.gov.au/media-release/accc-releases-blueprint-to-reduce-electricity-prices>>, viewed 17 July 2018.

- Limiting market power by placing a cap on the share of generation any single market participant can own or control, excluding investments in new capacity, and noting the ACCC's recommended 20 per cent cap (recommendation 1).
  - Establishing a mandatory code of conduct for energy comparator websites to ensure that the recommended offers are based on benefits to consumers, not on the commissions the provider receives from energy companies (recommendation 34).
  - Establishing greater transparency in the wholesale electricity market and provide additional powers for the AER to address market manipulation in the wholesale market (recommendation 3).<sup>56</sup>
- 2.58 In addition, the Government will direct the ACCC to hold an inquiry into prices, profits and margins in the National Energy Market. The inquiry will run until 2025, with the ACCC to report on at least a six-monthly basis and identify cases where outcomes are unacceptable.<sup>57</sup>

## Liddell power plant

- 2.59 The committee questioned the ACCC on the Liddell power station in New South Wales. The committee noted that in 2014 the ACCC had objected to AGL's acquisition of the Liddell and Bayswater power stations. However, the Competition Tribunal decision had allowed the sale to proceed. The ACCC observed that part of the Competition Tribunal's reasoning in allowing the sale of Liddell and Bayswater power stations was that, at the time, there was excess electricity supply.<sup>58</sup>
- 2.60 AGL now plans to close rather than sell the Liddell power station. In a statement on the closure, AGL indicated that it was committed to the Liddell power station closure in 2022, and that it had provided 'advance notice in April 2015 to avoid the volatility created by the sudden exit from

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56 The Hon Scott Morrison MP, The Treasurer and the Minister for the Environment and Energy, The Hon Josh Frydenberg MP, 'Driving power prices down', *Joint media release*, 20 August 2018, < <http://sjm.ministers.treasury.gov.au/media-release/089-2018/>>, viewed 20 August 2018.

57 The Hon Scott Morrison MP, The Treasurer and the Minister for the Environment and Energy, The Hon Josh Frydenberg MP, 'Driving power prices down', *Joint media release*, 20 August 2018, < <http://sjm.ministers.treasury.gov.au/media-release/089-2018/>>, viewed 20 August 2018.

58 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 14.



the National Electricity Market of other coal-fired power stations.<sup>59</sup> When asked if the ACCC was disappointed by AGL's approach, the ACCC Chairman responded:

We've had a number of issues with AGL in both the gas and electricity markets. There is no doubt that they pursue profits in a very hard way. They're right up there with companies that do play hard. They're extremely interested in their own bottom line. They're allowed to do that, but I do observe that they do play things pretty hard.<sup>60</sup>

- 2.61 In response to further questioning on whether the ACCC was suggesting that AGL may not be acting within the spirit of the law by declining to sell Liddell, the ACCC clarified that:

It's one thing to say that we think it would have been a much more competitive outcome if Liddell were owned by another player. Of course it would help competition if they sold it to another player but there is no breach of the law in them not doing that, so they're perfectly entitled to pursue their own commercial self-interest.<sup>61</sup>

- 2.62 In addressing the committee's observation on the potential costs of maintenance, technical and capital upgrades associated with an older power plant like Liddell, the ACCC commented that:

There is stay-in-business capital as well as the maintenance costs. There's no question that, as these plants get older, the costs go up and there's no question that, when those operating and stay-in-business capital costs get up to a point, you close them. There's no doubt about that. I was just saying that there are no absolutes as to when you get there. It's an engineering question. We at the ACCC have not looked at, nor are we qualified to look at, when is the right time to close Liddell. We don't have that expertise.<sup>62</sup>

- 2.63 The committee questioned the ACCC on the new effects test in Section 46 of the Competition and Consumer Act. In particular, whether the test for anti-competitive conduct would cover a company with a substantial degree of market power limiting production to the prejudice of consumers. The ACCC Chairman indicated that it was a question of

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59 AGL, *AGL Energy statement on Liddell Power Station*, Media release, 6 September 2017, <<https://www.agl.com.au/about-agl/media-centre/asx-and-media-releases/2017/september/agl-energy-statement-on-liddell-power-station>>, viewed 17 July 2018.

60 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 2.

61 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 2.

62 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 20.

whether competition itself was inhibited rather than limiting production. He stated that:

The essential issue is: is competition limited in any way? As you know, with Liddell, one of the prospective buyers was Alinta. As there are other ways for Alinta to enter the market – they can build capacity – in some senses they're not restricted in competing in the market, so that's an issue in determining whether there's been a substantial lessening of competition. But, going more directly to your question, it's also a question of what they're actually doing to restrict capacity. Of course you've got to establish that they are, because they're partly saying they'll close plant and build other plants. But I think the bigger issue is, for it to be a substantial lessening of competition, there's got to be some inhibition on competition. If competition's not inhibited then it can occur in other ways.<sup>63</sup>

- 2.64 The ACCC distinguished between the closure of the Hazelwood power station in Victoria and Liddell. In the case of Hazelwood, the shortage of notice was a problem, as there was 'not much notice to the market to adapt, and it immediately wiped the excess capacity from the market and led to a very constrained supply-demand balance.'<sup>64</sup> However, with the Liddell power plant:

There is plenty of notice out there that Liddell is closing; there are plenty of people who've done extensive modelling that says: when Liddell closes, prices will go up. There's nothing to stop other people coming in to take advantage of that.<sup>65</sup>

- 2.65 When questioned on the controversy around AGL's decision to close the Liddell power plant rather than selling it, the ACCC responded that is a policy issue and not a breach of the act.<sup>66</sup>

- 2.66 In response to questioning on the example of a European Union case concerning German energy company E.ON and preliminary views that it may have infringed EC Treaty rules on market power, the ACCC indicated that it differed from the Liddell closure. The ACCC stated:

You've got a market and people are expecting you to bid in real time and, all of a sudden, you withdraw the capacity and the price spikes up. There are ways you could do that which would offend

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63 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 14.

64 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 14.

65 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 15.

66 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 21.

the electricity laws and, potentially, there are ways you could do that that could offend the laws we deal with. With Liddell, you've got something different. Liddell is closing in three or four years' time. This isn't withdrawing capacity in the next five-minute bid cycle. Signalling that you're going to close something in four years' time is a thoroughly different matter to what E.ON was dealing with, which withdrew capacity, as I remember it – a long time ago – in a short-term way. You just don't know what's going to be built in the next four years.<sup>67</sup>

## Gas

- 2.67 The ACCC is conducting a wide-ranging inquiry into the supply of, and demand for, wholesale gas in Australia. It includes publishing regular information on the supply and pricing of gas for the inquiry span from 2017 to 2020.<sup>68</sup> In its first interim report in September 2017, the ACCC projected a 'supply shortfall in the east coast gas market of up to 55 petajoules (PJ) in 2018, which could be as high as 108 PJ if domestic demand is higher than expected.'<sup>69</sup>
- 2.68 However, in the June 2018 *Gas Statement of Opportunities*, for eastern and south-eastern Australia, the Australian Energy Market Operator (AEMO)<sup>70</sup> highlighted that 'no supply gaps are forecast before 2030 under expected market conditions', as the 'risk of shortfalls previously projected for 2019 has been reduced due to changes in the energy markets'.<sup>71</sup>
- 2.69 The committee noted that broadly in 2018 wholesale gas prices had been coming down, and that electricity prices appear to have started to come down. When asked its view of this, the ACCC responded that they are separate markets, but acknowledged the link. While pleased with the decreasing prices – halved from their absolute peak – the ACCC noted

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67 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 16.

68 ACCC, *Gas Inquiry 2017-2020* <<https://www.accc.gov.au/regulated-infrastructure/energy/gas-inquiry-2017-2020>>, viewed 11 July 2018.

69 ACCC, Interim gas report finds substantial shortfall for east coast likely in 2018, Media release, 25 September 2017, <<https://www.accc.gov.au/media-release/interim-gas-report-finds-substantial-shortfall-for-east-coast-likely-in-2018>>, viewed 11 July 2017.

70 Australian Energy Market Operator (AEMO) is responsible for operating Australia's largest gas and electricity markets and power systems, including the National Electricity Market (the interconnected power system in Australia's eastern and south-eastern seaboard), the Wholesale Electricity Market (Western Australia) and various state gas services.

71 AEMO, *2018 Gas Statement of Opportunities: For eastern and south-eastern Australia*, June 2018, p. 3.

that prices are still high and that there is still more work to be done on electricity.

2.70 The ACCC also acknowledged AEMO's work that 'prompted the government to get the gas producers in, and that pressure has meant they have provided more gas and that has brought prices down.'<sup>72</sup>

2.71 When examined on whether it shared the AEMO's confidence that no domestic gas shortages were expected before 2030, the ACCC responded:

There are certainly things that have got to happen on the supply side to justify that statement, which we need to have a closer look at, and there are, of course, issues on the demand side. How much demand will there be for gas-fired power generation? So, I think there are things that we have got to assess on both demand and supply sides before we come to that view.<sup>73</sup>

2.72 The ACCC noted that when it last reported on short-term and medium-supply outlook, in December 2017, it found that:

- no gas supply shortfall in the east coast for 2019 was expected at the time
- the longer-term outlook for 2020-30 was uncertain, depending on realised level of production (particularly coal seam gas in Queensland), the level of domestic demand (particularly from gas powered generation) and the level of liquefied natural gas exports (particularly spot sales).<sup>74</sup>

2.73 Further, the ACCC commented that there were a number of factors that can affect certainty around supply outlooks, including that:

- the demand for gas powered generation can be volatile and difficult to forecast
- the production for 2019 can be forecast to be produced from undeveloped (and less certain) areas
- the nature of coal seam gas development and the need to continue drilling wells has inherent uncertainty around the quantity of gas that will be extracted.<sup>75</sup>

2.74 The committee notes that the ACCC has since reported, in its July 2018 interim report, that the recent gas supply outlook indicates there will

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72 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 16.

73 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 17.

74 ACCC, *Responses to questions on notice*, QON 6, 19 July 2018, p. 1.

75 ACCC, *Responses to questions on notice*, QON 6, 19 July 2018, p. 1.

likely be sufficient gas for 2019, and there have been a number of improvements to the operation of the East Coast Gas Market. This includes convergence of prices with export party prices, in the high \$8 to \$11/GJ range, in contrast to the first half 2017 prices peaking at offers as high as \$22/GJ in March 2017.

- 2.75 In its April 2018 Interim report for the Gas inquiry 2017–2020, the ACCC stated that it would publish a liquefied natural gas (LNG) netback price<sup>76</sup> series on its website on a trial basis for the duration of this inquiry, and then assess the merits of the publication at the conclusion of the inquiry. The ACCC observed that the availability of an indicative price and information about factors driving domestic gas prices would assist commercial and industry users in gas supply negotiations.<sup>77</sup>
- 2.76 In the interim report, the ACCC described the planned LNG netback publication as an important step towards improving transparency of pricing as ‘LNG netback prices currently play an important role in influencing domestic gas prices in the East Coast Gas Market.’<sup>78</sup>
- 2.77 At the hearing, the committee sought an update on when the publication would commence. The ACCC advised that it expected the LNG series to be released in the next couple of months, probably September. The ACCC commented that it has undertaken a lot of consultation, and has been negotiating with people who have the relevant information.<sup>79</sup>
- 2.78 The committee also questioned the ACCC on the regulator’s authorisation for Chevron, INPEX, Shell and Woodside to coordinate maintenance activities at their LNG facilities in Western Australia and Northern Territory. The ACCC confirmed that it had granted conditional authorisation on 2 March 2018, and imposed a condition on these LNG producers to publicly disclose the scheduled maintenance information they were sharing. It noted that a similar condition applies to the authorisation granted to LNG producers in Queensland in 2016.<sup>80</sup>

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76 An LNG netback price is a pricing concept based on an effective price to the producer or seller at a specific location or defined point, calculated by taking the delivered price paid for gas and subtracting or ‘netting back’ costs incurred between the specific location and the delivery point of the gas.

77 ACCC, *Gas inquiry 2017-2020 Interim report*, April 2018, p. 31.

78 ACCC, *Gas inquiry 2017-2020 Interim report*, April 2018, p. 31.

79 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 17.

80 Correspondence from Mr Rod Sims, Chair, ACCC, dated 3 July 2018, <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Economics/ACCC/AnnualReport2017/Public\\_Hearings](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/ACCC/AnnualReport2017/Public_Hearings)>.

## Other matters

### Petrol prices

2.79 The committee scrutinised the ACCC on its work on monitoring petrol prices. The ACCC advised that:

We took most of the petrol companies to court when they had a system set up, when they were exchanging near-real-time petrol prices amongst themselves. We eventually settled what would have been a complex case, even though we were confident of our position, on the basis that they provided that information to the public. Now that that information is out there, there are various apps and web pages where you can get access to that information. While the petrol market is terribly annoying, because the prices in the cities go up and down a lot and the prices in the country are often high, you do have the capacity to look for better prices.<sup>81</sup>

2.80 When pressed on the difference in competition in petrol prices in regional towns, the ACCC conceded that this was a problem, but that it had undertaken work in a number of places. The ACCC Chairman emphasised the value in having a compulsory system for showing prices, stating:

I think the more transparency, the better. We have a price monitoring role, as you know. Our job in monitoring is to help consumers navigate the very complex market. We'd like for there to be more tools out there, to make sure that people can see what the prices are. Even in regional areas – not all of them but many of them – there are different prices. Having those different prices known to consumers would be a great thing. There is definitely money to be saved, even in regional areas.<sup>82</sup>

2.81 In response to questioning on what tools it would like to see that would give consumers greater transparency and access to competitive prices, the ACCC expressed support for the increasing number of websites and apps that are making fuel price data available. The ACCC took the view that this can 'empower price-sensitive customers, and help drive more competitive markets in petrol retailing.'<sup>83</sup>

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81 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 21.

82 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 22.

83 ACCC, *Responses to questions on notice*, QON 9, 19 July 2018, p. 1.

2.82 However, the ACCC clarified that it 'has not endorsed one type of system of fuel price transparency, or made a judgement on whether it should be privately or government run.' It also emphasised the importance of ensuring the timeliness and completeness of the price data being made available.<sup>84</sup>

## New car retailing industry

2.83 In December 2017 the ACCC released its final report for its market study into Australia's new car retailing industry. It recommended several reforms to improve the new car retailing industry, and made three key observations:

- car manufacturers need to update their complaint handling systems and improve their approach to the handling of consumer guarantee claims
- a mandatory scheme should be introduced for car manufacturers to share technical information with independent repairers
- new car buyers need more accurate information about their cars' fuel consumption and emissions.<sup>85</sup>

2.84 The committee sought an update on progress made towards the mandatory code recommended in the market study report. The ACCC clarified that the ACCC had recommended that action be taken to mandate that manufacturers make technical information available. The three options were through: a mandatory code; amendments to the Motor Vehicle Standards Act; or by specific legislation.<sup>86</sup>

2.85 The ACCC advised that there had been some consultation with Treasury on this matter, but there was a bit of complexity involved in the way in which sharing the information would be mandated. It noted that:

In terms of the speed with which this could be mandated and implemented, I really think it's a matter for those who are designing it, who are not us but the Treasury. One of the complications is that any scheme needs to have regard to the fact that security and safety information are not compromised in an access regime as well. There are some complexities about how you

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84 ACCC, *Responses to questions on notice*, QON 9, 19 July 2018, p. 1.

85 ACCC, *ACCC calls for reform to help new car buyers*, Media release, 14 December 2017, <<https://www.accc.gov.au/media-release/accc-calls-for-reform-to-help-new-car-buyers>>, viewed 16 July 2018.

86 Mr Tim Grimwade, Executive General Manager, Consumer, Small Business and Product Safety Division, ACCC, *Transcript*, 29 June 2018, p. 8.

design that to ensure that the security information around locking a car and the alarms and so forth are not necessarily available to all.<sup>87</sup>

- 2.86 An example was discussed at the hearing of a car manufacturer refusing to provide an independent mechanic with technical information on a vehicle that was in for repair. The ACCC emphasised that on the evidence provided, such activities by the car manufacturer were not in 'breach of either the *Competition and Consumer Act 2010*, or the Australian Consumer Law.'<sup>88</sup> The ACCC stated:

...I think it lends tremendous strength to our recommendation for there to be a mandatory code so that manufacturers have to provide technical information so that independent repairers can repair their vehicles...In our view, this is a very important issue, and we're keen for some form of regulation to come in to mandate that. Your example is excellent evidence supporting some regulatory action in that area.<sup>89</sup>

- 2.87 When questioned on whether the car manufacturer's response to the independent mechanics was a breach of consumer law, the ACCC remarked that:

It's certainly misleading to require a party to go to a particular repairer, absent which any rights are waived in terms of the repairs made. Consumer guarantees outlive any contractual requirements. First of all retailers and then manufacturers owe responsibilities under the consumer guarantee laws. Sometimes, depending on the nature of the representation or the nature of the restrictions, yes, there might be an inconsistency there. But I think the real issue we're looking at there is the competition one...We can look at the consumer law issues there as well, but they would only arise in certain circumstances.<sup>90</sup>

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87 Mr Tim Grimwade, Executive General Manager, Consumer, Small Business and Product Safety Division, ACCC, *Transcript*, 29 June 2018, p. 20.

88 Letter from the ACCC to the Deputy Chair, the Hon Matt Thistlethwaite MP, dated 4 July 2018.

89 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, pp. 7-8.

90 Mr Scott Gregson, Executive General Manager, Enforcement Division, ACCC, *Transcript*, 29 June 2018, p. 8.



## Free range eggs standard

- 2.88 The committee examined the ACCC on its work in relation to monitoring the marketing of free range eggs. The ACCC advised that a new National Information Standard, made under the Australian Consumer Law (ACL), about free range eggs, came into effect on 26 April 2018. The ACCC will play a role in enforcing the new standard, but only a court can provide a definitive ruling on whether an egg producer is complying with a standard.
- 2.89 The ACCC has released a guide to help egg producers understand their fair trading rights and obligations when promoting or selling eggs as ‘free range’, and how the ACCC will be enforcing the standard. It will also help consumers understand the law.<sup>91</sup>
- 2.90 The committee questioned the ACCC on whether the marketing of eggs is something that it looks into regularly, or if it is prompted by complaints from consumers or competitors. The ACCC advised that it had proactively undertaken work on free range eggs three or four years ago, which included sending out substantiation notices – for producers to substantiate in what sense their eggs were free ranges – and had taken four matters to court, resulting in penalties against the companies.<sup>92</sup>
- 2.91 The ACCC informed the committee that these cases had helped to ‘clarify the law as to basically what access there needs to be inside the barn to have the eggs classified as free range.’<sup>93</sup> However, in terms of current monitoring activities, the regulator advised that while it was not actively monitoring:

...we do get complaints and we are looking at a few matters that are coming to our attention. We are considering presently what form of activity we might take to keep an eye on the industry in relation to the new standard. Just passing through the House recently was the final piece of the legislation that will give us the trigger to have the new full regime.<sup>94</sup>

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91 ACCC, *ACCC Enforcement Guidance: Free range chicken egg claims*, February 2018.

92 Links to the four judgements are available via the ACCC’s website: *ACCC releases guidance on free range egg standard*, Media release, 6 February 2018, <<https://www.accc.gov.au/media-release/accc-releases-guidance-on-free-range-egg-standard>>, viewed 16 July 2018.

93 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 13.

94 Mr Scott Gregson, Executive General Manager, Enforcement Division, ACCC, *Transcript*, 29 June 2018, p. 13.

## Dairy industry code

2.92 The ACCC advised the committee that it had recommended a mandatory code in the dairy industry, and has been successful in getting penalties associated with the franchising code.<sup>95</sup>

2.93 When asked if the spot-pricing<sup>96</sup> approach used with electricity could be applied to the dairy industry, the ACCC responded that:

I think the serious point with dairy is the mandatory code we've recommended, because I think you do have disproportionate bargaining power and I think that that often leads to outcomes that are not as good as they should be for dairy farmers.<sup>97</sup>

2.94 The ACCC explained that the recommended code would solve some problems, but not all problems in the dairy industry, stating:

Sometimes you can get extra payments from the processor, but only if you commit for the following year. There are various ways that make it hard for dairy farmers to work out where they can get their best price, so we think that a code could help that. We think a code could help with disputes. It's in those sorts of ways. Other than that, we'd like to help and see whether a bit more collective bargaining could help redress bargaining power as well.<sup>98</sup>

2.95 Further, the ACCC said there was scope for improvements in the unfair contract terms laws, which, if made more effective, could stop unilateral price variations and other terms which these farmers have to accept.

2.96 When asked for details on the changes that the ACCC would like to see to the business-to-business Unfair Contract Term (UCT) regime, the ACCC noted that the UCT regime is to be reviewed after November 2018, which will be two years since it came into effect. The ACCC identified the following aspects of the UCT regime as in need of review:

- Penalties and prohibition – Currently it is not illegal to include a UCT in a standard form contract, however, the ACCC or a party to the contract can seek to have a UCT declared void in a

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95 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 8.

96 Prices in the National Energy Market are determined every five minutes, and averaged over each half hour period to get a 'spot price'. Generators bid how much electricity they are willing to provide, and at what price, for each five minute interval. The Australian Electricity Market Operator then accepts the bids – starting from the lowest priced bid – up to the point where supply equals demand in that interval. The price paid for all electricity in those five minutes is that of the highest bid accepted.

97 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 10.

98 Mr Rod Sims, Chairman, ACCC, *Transcript*, 29 June 2018, p. 10.

Court. The ACCC therefore cannot seek civil pecuniary penalties, nor issue infringement notices in relation to contract terms that are likely to be unfair. The ACCC considers that the current UCT regime could better incentivise compliance if it expressly prohibited UCTs in standard form contracts and made civil pecuniary penalties and infringement notices available for breaches of that prohibition.

- Thresholds for small business – In 2016 the consumer UCT regime was extended to apply to business-to-business transactions where one of the parties to the contract is a small business. The ACCC considers that the thresholds to be considered a small business under the UCT regime should be reviewed, including the upfront value of the contract and the number of employees a business has.<sup>99</sup>

## Cryptocurrency

- 2.97 The committee also scrutinised the regulator on progress on the ACCC and ASIC's arrangements for consumer protection in relation to initial coin offers and cryptocurrencies. The ACCC acknowledged that moving financial services responsibilities from the ACL to the ASIC Act has left a 'number of crossover matters that don't fit definitions perfectly'.<sup>100</sup>
- 2.98 The ACCC confirmed that it has recently provided a delegation to ASIC in relation to cryptocurrencies,<sup>101</sup> which gives ASIC the capacity to take the lead on these matters. The delegation allows ASIC to take action if there are allegations of conduct that contravenes the ACL, regardless of whether a financial product or service is involved. However, the ACCC indicated that it was 'willing and able to assist' ASIC if there are any further issues.<sup>102</sup>

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99 ACCC, *Responses to questions on notice*, QON 3, 19 July 2018, p. 1.

100 Mr Scott Gregson, Executive General Manager, Enforcement Division, ACCC, *Transcript*, 29 June 2018, p. 13.

101 Companies do not need to seek ASIC's approval to launch an initial coin offering.

102 Mr Scott Gregson, Executive General Manager, Enforcement Division, ACCC, *Transcript*, 29 June 2018, p. 13. ASIC *Information Sheet 225: Initial coin offerings* gives guidance about the potential application of the *Corporations Act 2001* to entities that are considering raising funds through an initial coin offering and to other crypto-currency or digital token. See: ASIC, *Initial coin offerings and crypto-currency*, < <https://www.asic.gov.au/regulatory-resources/digital-transformation/initial-coin-offerings-and-crypto-currency/>>, viewed 16 July 2018.

## Conclusion

- 2.99 The ACCC has an important role to play in monitoring and holding individuals and groups to account for anti-competitive behaviour and breaches of Australia's consumer law (ACL). The committee will continue its scrutiny of the regulator's performance.
- 2.100 The committee notes the ACCC's assurance that it is taking a more proactive approach to issues in the financial sector. Through its Financial Services Unit, the ACCC now has a permanent role in monitoring the banks on competition matters, enabling the regulator to play a competition champion role.
- 2.101 The ACCC appears well placed for its new enhanced competition role. The committee notes the high penalty against Yazaki in the criminal cartel case. However, there is still much work to be done by the ACCC to clearly demonstrate to companies that for serious competition breaches there will be serious consequences.
- 2.102 On the consumer law side, the current ACL penalties have been too low to be an effective deterrent to breaches of consumer law. The committee notes the recent passage of the Treasury Laws Amendment (2018 Measures No. 3) Bill 2018. The maximum penalties under the ACL will now be aligned with the maximum penalties under the competition provisions.
- 2.103 The committee also notes that the ACCC is doing important work in energy markets on electricity and gas supply and affordability. In particular, the committee notes that the ACCC will now be monitoring and reporting to the Government on electricity prices, at least every six months, until 2025. The ACCC will be empowered to require energy providers to supply relevant information, and the regulator may make recommendations to Government on how to improve electricity outcomes for electricity customers.
- 2.104 The Government has also directed the ACCC and the Australian Energy Regulator to set a default price for electricity, which is expected to apply, at the latest, from July 2019. The committee will continue to monitor the ACCC's work on energy.