

Current issues in competition and consumer law

Overview

- 2.1 The Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator (AER) appeared before the House of Representatives Standing Committee on Economics (the committee) on 18 September 2019 in Canberra for a public hearing, as part of the committee's review of the ACCC's Annual Report 2018.
- 2.2 Issues raised at the hearing included market concentration, regulation of monopolies, misconduct deterrence and enforcement. The committee scrutinised the ACCC on its regulation of competition in the banking sector, energy markets and digital platforms.
- 2.3 Other matters discussed included petrol pricing, airport monopolies, consumer comparison websites, and the new car retailing and audit industries.

Market concentration and competition

- 2.4 The committee noted current trends in the Australian economy, including a lack of dynamism and job switching, a decline in firm entry rate, and an increase in market concentration. The committee asked the ACCC whether it was concerned about market concentration, in particular about excessive oligopoly power in the Australian economy.

- 2.5 The ACCC agreed that economic rents from concentrated behaviour are problematic, and a 'drag on the economy'.¹ It stated that the key issue is whether the merger regime is working appropriately to prevent mergers that lead to excessive market concentration.
- 2.6 The ACCC observed that it has 'trouble convincing the courts of the problems associated with increasingly concentrated industries.'² The ACCC Chair expressed the need for courts, and the broader community, to start with a presumption that excessive concentration is problematic, unless there is evidence to the contrary.
- 2.7 When discussing obstacles for new market entrants, the ACCC commented that, apart from where there are natural monopolies, the height of entry barriers poses the greatest difficulty for new entrants. It stated that successful participants:
- ... have either got strong investment or they've got strong brands that they can leverage. Obviously, our job is to make sure they're not engaging in anticompetitive activity to keep competitors out, but most businesses are trying to do what they can to protect their barriers to entry.³
- 2.8 In response to questioning on whether high levels of regulation can also be a barrier for new market entrants, the ACCC agreed that this is a challenge, noting that large companies can absorb new or high levels of regulation, whereas new companies trying to grow may find regulation a comparatively greater burden.⁴
- 2.9 Further, the ACCC acknowledged that it would be concerning if established players were using regulation to stymie the growth of new entrants, for example, by attempting to instigate regulators' investigations.⁵

1 Mr Rod Sims, Chair, Australian Competition and Consumer Commission (ACCC), *Transcript*, 18 September 2019, p. 4.

2 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 4.

3 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 12.

4 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 13.

5 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 14.

Effects test

- 2.10 An amendment to the *Competition and Consumer Act 2010* came into effect on 6 November 2017, designed to strengthen the prohibition on unilateral anticompetitive behaviour.⁶ Section 46 of the Competition and Consumer Act now prohibits a firm with a substantial degree of market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market. This is known as the 'effects test'.
- 2.11 The committee questioned the ACCC about the number of cases currently underway under the new laws. The ACCC outlined that since November 2017, it has looked at 133 matters through their 'under assessment' process, and have undertaken 31 in-depth investigations under section 46. Of these, 12 are ongoing, and the ACCC stated that it is optimistic about prosecuting one case in particular.⁷
- 2.12 The committee asked the ACCC whether the new law was enabling cases to be pursued that would not have been possible under the previous law. The ACCC confirmed that the new law was enabling prosecutions, and also added that it was causing positive behavioural change.

Competition in the financial sector

Factors affecting competition

- 2.13 The committee scrutinised the ACCC on competition in the banking sector. The ACCC commented that it did not think that 'there is strong competition in retail banking', and stated that:
- ... we're also observing that, even though you've got some quite big players outside the big four, it's not clear that any of them are really displacing any of the big four or making serious inroads.⁸
- 2.14 In particular, the ACCC flagged two key points of concern: a lack of price competition; and the fact that the four main players seem to be maintaining their market share and earning very high profits.⁹

6 *Competition and Consumer Amendment (Misuse of Market Power) Act 2017*, Schedule 1, <<https://www.legislation.gov.au/Details/C2017A00087>>, viewed 30 September 2019.

7 Mr Rod Sims, Chair, ACCC, and Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, ACCC, *Transcript*, 18 September 2019, p. 15.

8 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 2.

- 2.15 The committee asked the ACCC about levels of disruption in the Australian financial sector, and whether they were lower than in other parts of the world. The ACCC noted that while many of the ‘chief disruptors’ are large American tech companies, those players are having an equally disruptive effect in Australia as in America. However, the ACCC remarked there is a concern that this disruption is not causing changes in market shares, and is not encouraging new competitors to the market.¹⁰
- 2.16 The committee asked the ACCC about its views on the role of small banks in competition and about the effect of regulation design on small banks. The ACCC stated it has had meetings with the Customer Owned Banking Association (COBA). COBA’s view is that ‘whereas some of the requirements are a burden on the big banks, they’re a huge burden on the little banks,’ and this warrants differentiated rules.¹¹ The ACCC explained that it is gathering intelligence and talking to the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC), and that this is a topic requiring further examination.
- 2.17 In relation to competition issues in residential mortgage products, the ACCC commented that its previous research had found that in the mortgage market, as with other markets such as electricity, customers pay a ‘loyalty tax’ if they do not actively compare prices and switch providers.¹²
- 2.18 The ACCC stated that the implementation of open banking and the consumer data right in relation to the banking sector ‘can play an important role in terms of consumer inertia and in trying to lower some of the transactions costs from switching.’¹³ However, the ACCC also noted that transparency alone may not be an adequate tool to overcome the problem of consumer inertia.¹⁴

9 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 2.

10 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 14.

11 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 3.

12 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 7.

13 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 3.

14 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, ACCC, *Transcript*, 18 September 2019, p. 7.

Open banking

2.19 In response to questions about the United Kingdom experience of open banking, the ACCC explained that it worked closely with the UK authorities to learn from their experience. One of these lessons is the importance of a good testing and assurance regime, which the ACCC is building into the system. Another lesson has been that open banking must be backed by a strong enforcement regime. The ACCC stated that:

... as well as our very constructive engagement with participants, we also have the capacity to say that it isn't voluntary or un-mandated. In the ACCC there is a strong regulator that will make sure that participants are rolling out when they have to.¹⁵

2.20 The ACCC stated it was not concerned by the UK experience of low switching rates following the introduction of open banking, as it does not view 'complete take-up on day one as being the measure of success'.¹⁶ Rather, success would be characterised by a system that manages the tension between security and privacy. If this can be achieved, the ACCC believes the benefits of open banking will grow exponentially.¹⁷

2.21 The committee asked the ACCC about its preparedness for cyber-attacks. The ACCC responded that it has engaged external providers to assist with IT infrastructure, and has invested in the system's testing and assurance regime. The ACCC also confirmed it had contingency plans for significant breaches through built-in security mechanisms.¹⁸

2.22 However, the ACCC noted that, in contrast to some government systems, the open banking will not be susceptible to the flaws associated with centralisation, such as those experienced with the last census. In the case of open banking, the emphasis will be on banks 'making available to their customers the capacity to request that their data be released.'¹⁹

15 Mr Scott Gregson, Executive General Manager, Merger and Authorisation Review Division, ACCC, *Transcript*, 18 September 2019, p. 21.

16 Mr Scott Gregson, Executive General Manager, Merger and Authorisation Review Division, ACCC, *Transcript*, 18 September 2019, p. 21.

17 Mr Scott Gregson, Executive General Manager, Merger and Authorisation Review Division, ACCC, *Transcript*, 18 September 2019, p. 21.

18 Mr Scott Gregson, Executive General Manager, Merger and Authorisation Review Division, ACCC, *Transcript*, 18 September 2019, p. 22.

19 Mr Scott Gregson, Executive General Manager, Merger and Authorisation Review Division, ACCC, *Transcript*, 18 September 2019, p. 22.

- 2.23 The ACCC noted that open banking already has strong interest from data receivers, and its work with the banks is ‘putting us on track for the February release date’.²⁰

ACCC inquiry powers

- 2.24 The committee asked the ACCC about its inquiries into competition issues in the financial sector, and specifically whether the ACCC was intending to propose to the Treasurer an inquiry into bank competition.
- 2.25 The ACCC noted that, in the 2017-18 Budget, the then Treasurer, the Hon Scott Morrison MP, announced that the ACCC would have a permanent role looking at competition issues in banking. The ACCC advised the committee that it is performing this role through a series of inquiries; the first into whether the major bank levy was being passed onto customers, and the second into foreign exchange services.²¹ The ACCC indicated that it is now in discussions with Treasury about the next inquiry.
- 2.26 The ACCC stressed the need for an inquiry to allow them to perform more than a ‘desktop study’ into price competition and the predominance of the four major banks. It emphasised that ‘the only way we can do those deep dives with our information-gathering powers is if the Treasurer gives us a direction.’²²
- 2.27 The committee asked whether the ACCC would like a market studies power in line with the UK’s Competition and Markets Authority, to enable it to undertake inquiries of their own volition, using information-gathering powers. The ACCC confirmed it would like the power to self-initiate inquiries and exercise information-gathering powers without Government direction. However, the ACCC Chair conceded that he could ‘see that the Government could reasonably decide that, given the burden that these notices impose, that has to be enabled by them.’²³ The ACCC also noted that the Government has given it ‘a lot of inquiry directions’.²⁴
- 2.28 The committee also asked the ACCC to comment on the volume of recent inquiries focused on the financial sector. In particular, the committee

20 Mr Scott Gregson, Executive General Manager, Merger and Authorisation Review Division, ACCC, *Transcript*, 18 September 2019, p. 21.

21 ACCC, *Residential mortgage price inquiry*, Final report, 11 December 2018; and the *Foreign currency conversion services inquiry*, Final report, 2 September 2019.

22 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 2.

23 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, pp. 3-4.

24 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 3.

queried whether it would be advisable to observe the impact of these inquiries and open banking, before considering a further inquiry into competition. The ACCC stated:

You could do that. More work might help shape [the consumer data right], but I understand the issue. We're really in the hands of the Treasurer, and we will have discussions with the Treasurer about how best to do it.²⁵

Banking code of conduct

- 2.29 The committee asked the ACCC whether it had concerns about the Australian Banking Association's revisions to the Banking Code of Practice (the Code) following the Royal Commission. The ACCC commented that there are potential consumer and competition issues, including around the ability for banks to guarantee that consumers cannot be involuntarily put into overdraft, and the availability of basic bank accounts. It noted that the Code was being assessed by the ACCC's adjudication branch for authorisation.²⁶
- 2.30 Since the public hearing, the ACCC published its draft determination on 27 September 2019, proposing several conditions on the Code to improve access to some of the features that benefit low-income consumers and drought-affected farmers. Consultation closes on 14 October 2019, and the ACCC's final determination is due in November 2019.²⁷

Energy markets

- 2.31 The committee scrutinised the AER and the ACCC on various factors affecting energy prices, including regulation of monopolies, market manipulation, policy uncertainty and overinvestment.

25 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 3.

26 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 25.

27 The Australian Banking Association's authorisation application and the ACCC's draft determination are available at: ACCC, *The Australian Banking Association*, authorisation application lodged 22 May 2019, <<https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/the-australian-banking-association>>, viewed 1 October 2019.

Electricity prices

- 2.32 In response to questions about rising electricity prices in Australia, the ACCC stated that over the last ten years, average residential electricity bills have gone up by about 35 per cent after inflation. Over this ten-year period, the ACCC found that wholesale prices have been the smallest contributor to price increases, with network prices, the funding of the green scheme, and retailers' costs and margins contributing more to price increases than generation costs.²⁸
- 2.33 However, the ACCC did note that over the last two years, generation costs have been the dominant cause of rising prices.²⁹
- 2.34 The committee asked the ACCC for statistics on the national number of electricity disconnections. The ACCC stated that regional quarterly statistics were due to be published shortly, but noted that over the past year, affordability indicators have improved very slightly.³⁰

Regulation of energy monopolies

- 2.35 The committee asked the ACCC and the AER about distribution in the Queensland energy market, and specifically the regulated monopoly Ergon. The AER noted that in certain circumstances a monopoly can be the most efficient way of delivering a service, such as where there is a large or remote geographical area to be covered. However, the AER stressed the need to regulate monopolies, and explained that Ergon's annual revenues are subject to a cap, which feeds through to their tariffs and therefore to customer prices.³¹
- 2.36 The committee sought AER comment on anecdotes suggesting that the Queensland State Government instructed some of its utilities in the energy sector to take out debt, and then issue an equivalent special dividend to the State in the same financial year. The AER responded that the maximum revenue cap is designed to set efficient revenues, treating the business as an efficient commercial entity. It outlined that within this framework:

... while individual owners may come up with their own financing structures for whatever reasons they do, we use a benchmark so

28 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 19.

29 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 19.

30 Ms Michelle Groves, Chief Executive Officer (CEO), Australian Energy Regulator (AER), *Transcript*, 18 September 2019, p. 17.

31 Ms Michelle Groves, CEO, AER, *Transcript*, 18 September 2019, pp. 15-16.

that the actual practices of, for example, a particular network or a particular network owner are not determinative of [their rate of return]. We use this benchmark to ensure there aren't the incentives for individual owners to manipulate the system through their ways of structuring their debt and how they might require dividends to be paid.³²

Market manipulation

- 2.37 The committee asked the ACCC various questions about the operation of competition laws in relation to market manipulation in the energy sector.
- 2.38 The ACCC acknowledged that it may be a profitable strategy for a large electricity generator to withdraw supply from the market in order to benefit from a higher wholesale and spot price elsewhere. It indicated that this concern motivated it to oppose AGL's acquisition of Macquarie Generation, as it would result in such a strong market share that they could withhold capacity to push up prices.³³
- 2.39 However, the ACCC clarified that, absent other actions to prevent competitors entering the market, withdrawing capacity to try to spike the spot price of energy would not constitute a breach of competition laws.³⁴
- 2.40 The committee questioned the ACCC on whether it would be a breach if a company closed down a generation asset rather than selling it, in order to prevent a competitor using that asset to enter the market. In response, the ACCC referenced the Macquarie Generation acquisition, and its concern that AGL would have an incentive to close the Liddell power plant rather than sell it. The ACCC noted that its opposition to the merger was overturned by the Competition Tribunal.³⁵
- 2.41 However, the ACCC also commented that where there is sufficient warning given to the market, there is 'ample opportunity for others to come in and set up a new plant', or of pursuing alternative means of getting new capacity in the system.³⁶ In such cases, it would not be a breach of the law to close down an asset instead of selling it, unless, potentially, the company was also actively erecting further barriers to stop competitors from entering the market.

32 Ms Michelle Groves, CEO, AER, *Transcript*, 18 September 2019, p. 15.

33 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 16.

34 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 16.

35 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 16.

36 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 16.

- 2.42 In response to questions from the committee about negative pricing in Queensland, the ACCC stated that it monitors instances of price variation, but was not aware of any specific instances of low prices causing sufficient concern to warrant a detailed investigation.³⁷
- 2.43 On the subject of the frequency of court action for price manipulation, the AER advised that other than action over Stanwell's rebidding practices,³⁸ neither the ACCC nor the AER has taken action against providers for price manipulation.³⁹
- 2.44 In relation to the AER's report into the 2016 South Australian blackout,⁴⁰ the committee asked why no action was taken against power companies for the issues with their protection settings that contributed to the prolonged blackout period. The AER responded that the failure in the restart processes at the quarantine power station did not contribute to the system blackout event.⁴¹

Energy policy

- 2.45 The committee questioned the ACCC on policy uncertainty in the electricity sector, referencing the Retail Electricity Pricing Inquiry report's support for the National Energy Guarantee (NEG) as a means of addressing policy and resultant investment uncertainty.⁴²
- 2.46 The ACCC Chair contended that claims by some of the larger energy companies that policy uncertainty was deterring investment 'are exaggerated'.⁴³ Further, he stated that, leaving aside emission reduction and reliable supply questions, addressing investment uncertainty would

37 Ms Michelle Groves, CEO, AER, *Transcript*, 18 September 2019, p. 8.

38 *Australian Energy Regulator v Stanwell Corporation Ltd* [2011] FCA 991. The *National Energy Rules* allow a generator who has made an offer to the Australian Energy Market Operator to 'rebid' in good faith if circumstances have changed. The Rules were adjusted after the AER lost its case against Stanwell. See further <<https://www.aemc.gov.au/rule-changes/bidding-in-good-faith>>, viewed 30 September 2019.

39 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, pp. 8-9.

40 Australian Energy Regulator, *The Black System Event Compliance Report: Investigation into the pre-event, system restoration, and market suspension aspects surrounding the 28 September 2016 event*, 14 December 2018, <<https://www.aer.gov.au/wholesale-markets/compliance-reporting/investigation-report-into-south-australias-2016-state-wide-blackout>>, viewed 30 September 2019.

41 Mr Mark Feather, General Manager, Policy and Performance, AER, *Transcript*, 18 September 2019, p. 9.

42 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, Retail Electricity Pricing Inquiry, Final report, 11 July 2018, p. 100.

43 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 19.

not be a priority from an affordability perspective. However, the Chair qualified his remarks by noting that it is a contested area, and that this is his personal view.⁴⁴

- 2.47 On 16 September 2019, the ACCC published its second report as part of its inquiry into the prices, profits and margins in the supply of electricity in the National Electricity Market.⁴⁵ The committee asked the ACCC about this report's stance on the NEG. The ACCC replied that the report did not mention the NEG except insofar as it listed the recommendations of the Retail Electricity Pricing Inquiry, and noted that the NEG's reliability mechanism had been implemented, while the emissions reduction mechanism had not.⁴⁶
- 2.48 In the Retail Electricity Pricing Inquiry report, the ACCC stated that, as a mechanism to improve competition, 'requiring the divestiture of privately owned assets is an extreme measure to take', and decided there were better means to achieve the same outcome.⁴⁷ The committee asked the ACCC whether it maintained the view that divestiture is unnecessary to improve competition and consumer outcomes. The ACCC confirmed that the report represented its most recent position on the issue, and it had not re-examined the issue since the report was published.

Overinvestment in energy networks

- 2.49 In the report *Restoring electricity affordability and Australia's competitive advantage*,⁴⁸ the ACCC found that there has been significant overinvestment in state-owned networks in New South Wales, Queensland and Tasmania, driven by excessive reliability standards and a regulatory regime tilted in favour of network owners at the expense of electricity users. The ACCC concluded that this overinvestment has led to increased prices for consumers, and recommended using write-downs and rebates to reduce costs going forward.⁴⁹

44 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, pp. 19-20.

45 ACCC, *Inquiry into the National Electricity Market*, August 2019 Report, 16 September 2019, <<https://www.accc.gov.au/system/files/Inquiry%20into%20the%20National%20Electricity%20Market%20report%20-%20August%202019.pdf>>, viewed 30 September 2019.

46 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 20.

47 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, Retail Electricity Pricing Inquiry, Final report, 11 July 2018, p. 89.

48 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, Retail Electricity Pricing Inquiry, Final report, 11 July 2018.

49 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, Retail Electricity Pricing Inquiry, Final report, 11 July 2018, Chapter 7.2: network costs.

- 2.50 The committee queried why the ACCC endorsed the Grattan Institute's methodology for calculating overinvestment in electricity networks.⁵⁰ The ACCC explained that all methods are imprecise due to the difficulty in ascribing instances of investment to specific incentives. The ACCC indicated that it had examined the Grattan Institute's methodology and considered it to be reasonable and likely to reach approximately the right number.⁵¹
- 2.51 The committee then asked about the causes of overinvestment, and the AER's role in approving network investments. The ACCC outlined the following causes of overinvestment:
- In response to blackout incidents in New South Wales and Queensland, reliability standards were raised which increased compliance costs.
 - The AER had limited powers to intervene, including a lack of discretion to reject investment proposals if the organisation could show that the investment was reasonably necessary to comply with standards.
 - In instances where the AER used its powers to set a rate of return for businesses engaging in network investment, these companies and Energy Networks Australia successfully challenged the AER in tribunal hearings and in the Federal Court under the limited merits review system.⁵²
- 2.52 The ACCC contended that the recent abolition of the limited merits system⁵³ and reforms to the AER's limited discretion have fixed these causes of overinvestment.

Gas

- 2.53 The committee asked the ACCC about the causes of, and potential solutions to, limited gas supply in Australia. The ACCC noted that current supply levels were partially caused by the industry overestimating the amount it could supply, coinciding with bans on exploration and development in Victoria and New South Wales. The ACCC also acknowledged that there are other supply constraints. The ACCC

50 Grattan Institute (Tony Wood, David Blowers and Kate Griffiths), *Down to the Wire: a sustainable electricity network for Australia*, Report, 25 March 2018, <<https://grattan.edu.au/report/down-to-the-wire/>>, viewed 30 September 2019.

51 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 9.

52 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, pp. 9-10.

53 The *Competition and Consumer Amendment (Abolition of Limited Merits Review) Act 2017* abolished the limited merits review system.

suggested that while import terminals in Victoria could help supply, they would not lower prices. The ACCC Chair explained that:

By definition [import terminals will provide] the overseas price of gas, plus shipping to get it here, plus re-gasification. Doing those three steps is about \$2 or \$3 a gigajoule, which is about the same cost as it is to get the gas from Queensland down to Victoria anyway.⁵⁴

- 2.54 The committee sought the ACCC's views on possible changes to the Australian domestic gas security mechanism,⁵⁵ to improve supply in a way that balances consumer benefit and sovereign risk issues. The ACCC responded that there may be room to improve the mechanism, but cautioned that it is a complicated issue. The ACCC pointed out that Australia's three LNG suppliers currently sell more than fifteen per cent of their product to the domestic market, so a reservation policy of less than this would not be effective.⁵⁶

Prevention, deterrence and penalties in competition law

Penalties and deterrence mechanisms

- 2.55 At the public hearing, the committee raised the 2018 Organisation for Economic Co-operation and Development report into competition law penalties, which found that Australia's maximum penalties for breaches of competition law are lower than in comparable jurisdictions.⁵⁷
- 2.56 The ACCC noted that penalties in Australia's competition law were increased in September 2018 to align with penalties in consumer law, and that when an appropriate case occurs, 'hopefully we can get extremely high penalties to send that deterrence message'.⁵⁸

54 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 24.

55 The mechanism allows the Government to require LNG projects to limit their exports or find new gas sources if there is a supply shortfall in a domestic market. See Department of Industry, Innovation and Science, *Australian Domestic Gas Security Mechanism*, 7 August 2019, <<https://www.industry.gov.au/regulations-and-standards/australian-domestic-gas-security-mechanism>>, viewed 1 October 2019.

56 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 24.

57 OECD, *Pecuniary penalties for competition law infringements in Australia*, 26 March 2018, <<https://www.oecd.org/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm>>, viewed 30 September 2019.

58 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 11.

- 2.57 The committee asked the ACCC about other forms of deterrence in its remit that could complement, or provide an alternative to, higher penalties. The ACCC responded that its current focus is on penalties, and discussed the range of penalties at its disposal, such as pecuniary penalties, imprisonment and banning orders. It stated that banning orders:
- ... can be a very effective penalty, particularly for a person who has a long career in business. If they realise that they face disqualification from managing a corporation, that can be a significant deterrent. ... It is about finding the penalty that is going to be appropriate in the circumstances of the particular case.⁵⁹
- 2.58 However, the ACCC emphasised that for serious conduct, such as cartel and collusive behaviour, price fixing and market sharing, it is important that perpetrators face the possibility of imprisonment, supported by a regulator with a reputation for enforcement.⁶⁰
- 2.59 The ACCC confirmed that there was empirical data, not merely anecdotal evidence, of the deterrent effect of penalties. For effective regulation and deterrence, the ACCC also identified the need for a 'strong enforcement profile', adequate capacity for detection, and a proactive approach to enforcement.⁶¹
- 2.60 The committee scrutinised the ACCC about its proactivity around its responsibilities to maintain and promote competition, remedy market failure by preventing anticompetitive mergers, stop cartels and intervene when misuse of market power is identified.
- 2.61 The ACCC described its outreach work with businesses and industry associations to inform them about their obligations under the law.⁶² It added that it produces an annual strategic priority-setting public document to identify industries that are expected to need special attention. This signals its regulatory focus, and helps the ACCC target its regulatory actions.⁶³
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59 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, ACCC, *Transcript*, 18 September 2019, p. 11.

60 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, ACCC, *Transcript*, 18 September 2019, p. 11.

61 Mr Scott Gregson, Executive General Manager, Merger and Authorisation Review Division, ACCC, *Transcript*, 18 September 2019, p. 11.

62 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, ACCC, *Transcript*, 18 September 2019, p. 12.

63 Mr Rami Greiss, Executive General Manager, Enforcement Division, ACCC, *Transcript*, 18 September 2019, p. 12.

2.62 The ACCC identified a lack of resources and the need for IT upgrades as constraints on its ability to be proactive.⁶⁴ In response to the committee's question about how the ACCC allocates its limited resources across cases and activities, the ACCC stated that the main criterion is the level of detriment to consumers, and the ultimate effect of the behaviour in question.⁶⁵

Cartel cases

2.63 On 2 August 2019, the Federal Court ordered the Japanese shipping company Kawasaki Kisen Kaisha (K-Line) to pay \$34.5 million for cartel conduct,⁶⁶ the largest ever criminal fine imposed under the Competition and Consumer Act.

2.64 The committee queried why imprisonment was not pursued against the individual K-Line directors. The ACCC explained that prosecution of the individuals would have been difficult given the available evidence, and added that some of the individuals had already faced imprisonment terms in the United States. Therefore, the ACCC only referred the company for prosecution, noting that final prosecutorial decisions lie with the Commonwealth Director of Public Prosecutions.⁶⁷

2.65 In response to committee questioning about proactive cartel detection work, the ACCC explained that while it is undertaking some proactive work, most of its resources are occupied in managing cases resulting from the cartel immunity program.⁶⁸

2.66 Proactive steps the ACCC has taken to detect cartel conduct include undertaking branch training from the Federal Bureau of Investigation on cartel investigations, proactive intelligence and monitoring, outreach programs in various sectors to improve awareness of cartel activity, and guidance for governments in how to approach procurement and recognise cartels.⁶⁹

64 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, pp. 11-12.

65 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 12.

66 *Commonwealth Director of Public Prosecutions v Kawasaki Kisen Kaisha Ltd* [2019] FCA 1170.

67 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, ACCC, *Transcript*, 18 September 2019, p. 17.

68 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, and Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 26.

69 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, ACCC, *Transcript*, 18 September 2019, pp. 26-27.

- 2.67 However, the ACCC advised that resourcing was limiting its ability to proactively detect cartels. The ACCC explained that the Government had provided \$10 million in extra funding in 2018, and that it is currently working with the central government agencies to pursue further funding.⁷⁰
- 2.68 In addition to further funding for IT, the ACCC stated that access to government procurement and tender contract information would be a significant data set that could assist in identifying cartel behaviour, if accompanied by sufficient resourcing to facilitate analysis of this data.⁷¹

Digital platforms inquiry

- 2.69 On 26 July 2019, the ACCC published the final report from its Digital Platforms Inquiry.⁷² The inquiry examined the effect of search engines, social media and other digital platforms on competition in media and advertising markets. The report made 23 recommendations, including:
- changes to mergers and acquisitions laws;
 - a new platform-neutral regulatory framework for content producers;
 - industry development of codes of conduct;
 - copyright enforcement mechanisms;
 - funding for public broadcasters and grants for local journalism;
 - improving digital media literacy;
 - privacy law reform; and
 - areas for future investigation and review.⁷³

70 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, pp. 26-27.

71 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, ACCC, *Transcript*, 18 September 2019, p. 27.

72 ACCC, *Digital Platforms Inquiry*, Final report, 26 July 2019, <<https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry>>, viewed 30 September 2019. Treasury conducted a public consultation on the ACCC's Digital Platforms report, which closed on 12 September 2019.

73 For a list of recommendations, see ACCC, *Digital Platforms Inquiry*, Final report, 26 July 2019, p. 30.

Journalism recommendations

- 2.70 A particular focus of the Digital Platforms Inquiry was the impact of digital platforms on the supply of news and journalistic content, and on media content creators, advertisers and consumers.
- 2.71 In the final report, the ACCC made recommendations to:
- provide stable and adequate funding for the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS); and
 - replace the Regional and Small Publishers Jobs and Innovation Package with a targeted grants program that supports the production of original local and regional journalism to provide a greater amount of funding – totalling in the order of AU\$50 million per year.⁷⁴
- 2.72 The committee questioned whether, the ACCC, given its remit, had the expertise to make these recommendations. The ACCC explained that the inquiry’s focus on the media market was:
- ... triggered by concerns we discovered where the media industry is finding it increasingly hard to make money because of the way the digital platforms... grabbed consumers’ attention [and] are dominating more and more advertising.⁷⁵
- 2.73 The ACCC conveyed that in reaching these recommendations, it looked at the media sector and identified the following changes to support the ‘public good’ of journalism. The ACCC said:
- A good part of the public contribution to journalism is through the ABC and the SBS; we said, ‘Keep that going.’ There is a big gap with local journalism, so we said, ‘Bring in a program to support that.’ In the case of the large media companies, we talked about a bargaining code, because they don’t have bargaining power with the main digital platforms. Finally we talked about trying to level the regulatory playing field between the digital platforms and the large media players.⁷⁶

74 ACCC, *Digital Platforms Inquiry*, Final report, 26 July 2019, p. 33, Recommendations 9 and 10.

75 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 18.

76 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 19.

Comparison with the UK

- 2.74 On 13 March 2019, the Digital Competition Expert Panel published its final report into digital competition in the UK (the Furman Inquiry).⁷⁷ The Furman Inquiry recommended updating the rules governing merger and antitrust enforcement, and proposed a set of pro-competition measures for digital markets. The committee suggested that the Furman Inquiry had gone further than the ACCC's Digital Platforms Inquiry, particularly in relation to merger policy and mobility standards.
- 2.75 In relation to Australia's merger laws, the ACCC responded that it had considered the Furman Inquiry's 'balance of harms' approach,⁷⁸ but decided a better approach would be to focus on potential competitors and on data.⁷⁹
- 2.76 When discussing data portability and mobility, the ACCC noted that one of its advantages throughout the inquiry was the information gained through the concurrent implementation of the consumer data right. Specifically, the ACCC highlighted that various practical issues with data mobility, including privacy issues, had influenced its approach. The ACCC also noted that the consumer data right may facilitate further mobility in the future.⁸⁰

Other matters

New car retailing industry

- 2.77 In December 2017, the ACCC reported on its market study of the new car retailing industry. The study focused on consumer guarantees and warranties, access to repair and service information, fuel consumption, emissions and car performance. The final report included a finding that

77 Digital Competition Expert Panel (Professors Jason Furman, Diane Coyle, Amelia Fletcher, Philip Marsden and Derek McAuley), *Unlocking Digital Competition*, Final report, 13 March 2019, < <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel>>, viewed 30 September 2019.

78 The Furman Inquiry recommended that the UK's Competition Markets Regulator assess potential significant mergers and acquisitions using a 'balance of harms' approach, whereby the regulator would consider long-term repercussions, taking into account the scale of impacts as well as their likelihood. Digital Competition Expert Panel, *Unlocking Digital Competition*, Final report, 13 March 2019, pp. 12-13.

79 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 21.

80 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 21.

independent car repairers are reliant on car manufacturers voluntarily sharing electronic information and data necessary for repair and service of new cars.⁸¹

- 2.78 The ACCC found that voluntary commitments by car manufacturers to provide independent repairs with the same technical information as is provided to their dealers have not been successful, and noted that there has been 'only a limited improvement in access'. To address this, the ACCC recommended:

... regulatory intervention to mandate the sharing of technical information with independent repairers on 'commercially fair and reasonable terms', subject to appropriate safeguards.⁸²

- 2.79 The committee asked the ACCC whether, based on similar changes in the United States, the absence of a mandatory code to facilitate independent repairers could be costing Australian customers over \$1 billion a year. The ACCC agreed with the estimate and emphasised:

The voluntary system just was not working. We accumulated a lot of evidence. We got independent experts to help us. We are convinced that some form of mandatory arrangement needs to be put in place and so we strongly recommended that.⁸³

- 2.80 The ACCC noted that the problem for independent mechanics is getting 'progressively worse' with the increasing complexity of modern cars. In response to the committee's question about reform progress, the ACCC stated that it would like a mandatory code to be implemented as soon as possible, but that this is one of many matters currently under consideration by Treasury.⁸⁴

- 2.81 The ACCC also explained that there is complexity around when car manufacturers should be permitted to withhold information on safety, security or environmental grounds under a mandatory code.⁸⁵

81 ACCC, *New car retailing industry: A market study by the ACCC*, 14 December 2017, <<https://www.accc.gov.au/publications/new-car-retailing-industry-market-study-final-report>>, viewed 26 September 2019.

82 ACCC, *New Car Retailing Industry: A market study by the ACCC*, December 2017, p. 3.

83 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 4.

84 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 4.

85 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 4.

Airport monopolies

2.82 When asked about its views on airport monopolies, the ACCC noted that the airlines had given support to the ACCC's proposed negotiate-arbitrate regulatory model. The negotiate-arbitrate framework would involve airports and airlines engaging in commercial negotiations for access to airport infrastructure. However, if either party considered that the negotiations would not lead to a satisfactory commercial outcome, the party could request that an arbitrator be appointed to resolve the dispute. The ACCC outlined that:

With the airports, where you've got large-scale users, business users – we're not talking about dealing with individuals – what we thought was appropriate was a fairly light-handed form of regulation, which would be a negotiate-arbitrate model. It's very hard to negotiate with a monopoly, but if you've got the ability to go to arbitration, which of course is a messy process that no-one wants to do, it can even up the bargaining power.⁸⁶

2.83 The committee asked whether this commercial negotiate-arbitrate model has been used effectively in other sectors. The ACCC replied that the model would be similar to that used in the regulation of gas pipelines, whereby the arbitration is conducted commercially rather than by a regulator.⁸⁷

2.84 When asked about the different approach advocated in the Productivity Commission's recent inquiry into economic regulation of airports,⁸⁸ the ACCC restated its view that monopolies should be regulated unless a compelling reason exists. The ACCC added 'regulating monopolies can improve efficiency because you can put various incentive mechanisms in the regulation'.⁸⁹

86 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 5.

87 As requested by the Council of Australian Governments Energy Council, on 2 July 2018 the Australian Energy Market Commission released a final report into the economic regulation of covered pipelines in the *National Gas Rules*. The rules were consequently updated on 14 March 2019 to help gas pipeline users negotiate lower prices. One of the mechanisms in the updated rules is a clear 'trigger' for pipeline users to start arbitration if negotiations fail.

88 The Productivity Commission released its draft report *Economic Regulation of Airports* on 6 February 2019. It found that the existing airport regulation regime did not require reform, as there is no or insufficient evidence that airports are systematically exercising their market power to the detriment of the community. The final report was handed to Government on 21 June 2019. Information about the inquiry can be found at <<https://www.pc.gov.au/inquiries/completed/airports-2019#report>>, viewed 1 October 2019.

89 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 6.

Petrol pricing

- 2.85 The committee asked the ACCC about petrol prices, and whether it was noticing increases in retail margins. The ACCC responded that margins have ‘crept up a bit over the last 10 years or so’, but emphasised that net margins are commonly only one or two cents per litre.⁹⁰
- 2.86 In response to questions about price cycles, the ACCC stated that the difference between the top and bottom of the cycle is increasing, and that cycles are occurring over longer periods of time.⁹¹ However, the ACCC noted that this increasing gap can sometimes mean the bottom-of-cycle prices are unsustainably low, with companies not generating any profit.⁹²
- 2.87 The ACCC contended that the industry overstates the impact of regulatory burden on petrol prices. It explained that international factors, such as the OPEC cartel, recent events in Saudi Arabia and the US-Australia exchange rate, have the greatest impact on petrol prices.⁹³
- 2.88 The committee asked the ACCC about some recent research which found that tacit collusion among petrol retailers had affected Perth petrol prices.⁹⁴ The ACCC agreed that it was concerned about tacit collusion, and noted that it is a common problem associated with high levels of concentration where the market players are equally positioned.
- 2.89 In response to the committee’s questions about big data being used by monopolists to collude and increase their margins, the ACCC emphasised the importance of giving consumers access to the same data as companies. Due to the wide disparity in petrol prices in major cities, consumers can benefit from using websites and apps, such as the NSW Government-run FuelCheck, to locate cheaper fuel.⁹⁵
- 2.90 The committee pressed the ACCC on whether, given the low take-up of these comparison apps, big companies benefit far more than consumers from the availability of big data. The ACCC commented that there is consistent evidence that, if there is no data openly available in the market, but producers have data, then the producers will use that advantage to tacitly collude to raise prices. It contended that in a situation where

90 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 17.

91 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 17.

92 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 17.

93 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, pp. 17-18.

94 David Byrne and Nicolas de Roos, ‘Learning to coordinate: A study in retail gasoline’, *American Economic Review*, vol. 109, no. 2, pp. 591-619.

95 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 23.

producers can already access the data, 'then adding on to that the ability for consumers to see that data ... helps lower prices.'⁹⁶

- 2.91 The ACCC described a case it ran against Informed Sources Pty Ltd and several petrol companies.⁹⁷ Informed Sources provided a service for companies to send their price data every fifteen minutes to a central source, which would then distribute this data instantly to all users, thus enabling price signalling and tacit collusion. While the ACCC felt the behaviour was anticompetitive, it was difficult to prove a law breach in court, so a settlement was reached whereby the data had to be instantly released to consumers as well as subscribers.⁹⁸
- 2.92 The committee queried whether further powers or alternative approaches would better address tacit collusion than making data available to consumers. The ACCC maintained that empowering consumers to compare prices is a more effective method of reducing prices for consumers. It noted that policy responses would be difficult to design without negatively impacting small businesses, and emphasised that the net margin increase gained by petrol retailers through tacit collusion is likely to be, at most, fifty per cent of between two and four cents per litre.⁹⁹

Price comparison websites and apps

- 2.93 When questioned about websites that purport to compare prices from different providers, the ACCC agreed that there are concerns about some websites not being comprehensive, and having undisclosed financial arrangements with entities included in the price comparison.¹⁰⁰
- 2.94 The ACCC noted the recommendation in the Retail Electricity Pricing Inquiry for a code with mandatory standards for electricity price comparator websites.¹⁰¹ When asked if this could be generalised across sectors, the ACCC commented that, given the prevalence of these, it would not be 'too costly to just insist on a bit of transparency.'¹⁰²

96 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 23.

97 *ACCC v Informed Sources (Australia) Pty Ltd & Ors (Woolworths and Eureka Operations Pty Ltd trading as Coles Express)* FCA Victorian Registry (discontinued 15 December 2015).

98 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 23.

99 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 23.

100 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 7.

101 ACCC, *Restoring electricity affordability and Australia's competitive advantage*, Retail Electricity Pricing Inquiry, Final report, 11 July 2018, p. 150.

102 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 7.

- 2.95 The committee also asked the ACCC about online travel agencies enforcing price parity clauses¹⁰³ to require accommodation providers to offer the best price to online travel sites. The ACCC has previously investigated concerns that these clauses can prevent consumers negotiating better deals directly with the provider or with other sites.¹⁰⁴
- 2.96 The committee noted that while Expedia has undertaken not to enforce parity clauses, Booking.com has not, and asked the ACCC whether it would be beneficial for online travel agencies to be legally prevented from enforcing price parity clauses. The ACCC advised that it has invited Booking.com to make a similar undertaking, and in the meantime the ACCC is continuing to investigate the site's conduct.¹⁰⁵
- 2.97 When asked about the timeframe for this investigation, the ACCC explained that practical problems may cause delays, particularly as the company is based in the Netherlands.¹⁰⁶ It added that depending on what the investigation yields, it may wish to make a recommendation to the Government on this matter.¹⁰⁷

Audit industry

- 2.98 The committee sought the ACCC's view on audit firm rotation and whether there would be positive competitive impacts if audit firm rotations were required in Australia.
- 2.99 The ACCC responded that the issue had not come across its radar, and that issues of the quality and conflicts with auditing come under ASIC's remit. It explained that:

Our interest in audit firms might come about if we felt there was any market sharing or anything like that going on. There have been things put to us about that, which we have responded to. We haven't yet got any evidence of that. If we found evidence of that, we would be

103 Price parity arrangements or most favoured nation (MFN) clauses involve a supplier agreeing to sell a product or service to a buyer for a price that is no more than that provided to any other buyer.

104 ACCC, 'Expedia and Booking.com agree to reinvigorate price competition by amending contracts with Australian hotels', *Media release*, 2 September 2019, <<https://www.accc.gov.au/media-release/expedia-and-bookingcom-agree-to-reinvigorate-price-competition-by-amending-contracts-with-australian-hotels>>, viewed 30 September 2019.

105 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, ACCC, *Transcript*, 18 September 2019, p. 24.

106 Mr Marcus Bezzi, Executive General Manager, Specialised Enforcement and Advocacy Division, ACCC, *Transcript*, 18 September 2019, p. 24.

107 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 24.

incredibly interested. But, in terms of rotation and things like that, our judgement would be that that's an ASIC issue.¹⁰⁸

- 2.100 When asked how it would characterise the Australian audit market, the ACCC qualified that it has not looked closely at the market, but observed more generally that 'it's perhaps not as competitive as you'd like it to be', as a 'lot of the larger companies only want to use one of the four [main audit firms].'¹⁰⁹

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108 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 26.

109 Mr Rod Sims, Chair, ACCC, *Transcript*, 18 September 2019, p. 26.