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

House of Representatives
Standing Committee on Economics

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Canberra

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Chair's foreword

The committee held its first public hearing with the ACCC on 24 February 2016 and examined its role, recent activities, and priorities for the coming year. The committee also queried the ACCC on the implementation of the Competition Policy (Harper) Review recommendations released in March 2015.

The ACCC outlined at the hearing its principal roles under the *Competition and Consumer Act 2010* (the Act) as a competition, consumer and safety regulator, and its additional functions in regulating monopoly infrastructure and analysing the petrol market, among others.

The committee was particularly interested in the ACCC's views on the apparent disconnect between the lowering of global oil prices and Australian petrol prices. The ACCC advised that whereas fixed taxes and levies account for some of this disparity, there has clearly been some profit-taking by both refiners and retailers. The committee notes that the ACCC has engaged with the industry on this issue, and that these higher margins appear to be returning to usual levels. The ACCC must remain vigilant in monitoring whether Australians are paying a fair price at the bowser.

The committee notes also that the ACCC successfully concluded proceedings against petrol retailers in 2015 for sharing information with the purpose of keeping prices higher. The committee expects the ACCC to ensure that such anti-competitive behaviour in the petrol market, and indeed in any market, is quickly identified.

Preventing the use of substantial market power by larger businesses to engage in anti-competitive activities is a central plank of competition law. In this regard, the proposed introduction of an effects test into the Act, as recommended by the Harper Review, was an important topic of discussion at the hearing. The effects test will enable the ACCC to prosecute businesses for activities that have the 'effect' of substantially lessening competition.

The committee will explore the impacts of this and other Harper Review recommendations with the ACCC at future hearings.

On behalf of the committee I would like to thank the Chairman of the ACCC, Mr Rod Sims, and his colleagues for appearing at the public hearing on 24 February 2016. The ACCC has a vital role to play in ensuring Australia's markets operate fairly for both businesses and consumers. The committee will provide important oversight of this into the future.

David Coleman MP
Chair



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Membership of the Committee

Chair	Mr David Coleman MP (from 11 March 2016) Mr Craig Laundry MP (to 18 February 2016)
Deputy Chair	The Hon Ed Husic MP
Members	Mr John Alexander OAM MP Mr Scott Buchholz MP Mr Pat Conroy MP Mr Kevin Hogan MP Mr Craig Kelly MP Mr Craig Laundry MP (to 24 February 2016) Ms Clare O'Neil MP Mr Clive Palmer MP Ms Fiona Scott MP (from 2 March 2016)

Committee Secretariat

Secretary	Mr Stephen Boyd
Inquiry Secretary	Dr Kilian Perrem
Administrative Officers	Ms Jazmine Rakic Mr Danny Miletic



Terms of reference

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



List of abbreviations

ACCC	Australian Competition and Consumer Commission
ANAO	Australian National Audit Office
APRA	Australian Prudential Regulation Authority
CEDA	Committee for Economic Development of Australia
VET	Vocational education and training

Introduction

Background

- 1.1 The House of Representatives Standing Committee on Economics (the committee) is empowered to inquire into, and report on, the annual reports of government departments and authorities tabled in the House, that stand referred to the committee in accordance with the Speaker's schedule.
- 1.2 The 2015 annual report (annual report) of the Australian Competition and Consumer Commission (ACCC) stands referred to the committee in accordance with this schedule. The committee resolved at its meeting on 11 December 2015 that it would conduct an inquiry into the annual report.
- 1.3 The ACCC is an independent Commonwealth statutory authority whose role is to enforce the *Competition and Consumer Act 2010* (the Act) and a range of additional legislation.¹
- 1.4 The ACCC was established in 1995 to administer the *Trade Practices Act 1974* (renamed the *Competition and Consumer Act 2010* on 1 January 2011) and other acts. The ACCC has a Chair, Deputy Chairs, Commissioners and Associate Members. Appointments to the ACCC involve participation by Commonwealth, state and territory governments.²
- 1.5 The ACCC currently comes under the portfolio responsibilities of The Treasury. The ACCC's stated aims include promoting competition, fair trading and regulating national infrastructure for the benefit of all Australians.

1 ACCC website < <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc> > viewed 17 March 2016.

2 ACCC website < <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc> > viewed 17 March 2016.

- 1.6 The ACCC describes its role and priorities on its website and in the annual report in the following terms:
- maintain and promote competition and remedy market failure;
 - protect the interests and safety of consumers and support fair trading in markets;
 - promote the economically efficient operation of, use of and investment in monopoly infrastructure;
 - increase engagement with the broad range of groups affected by what the ACCC does.³
- 1.7 The ACCC service charter further describes its role in relation to markets as follows:
- protecting consumers and ensuring fair markets by enforcing the *Competition and Consumer Act 2010* and the Australian Consumer Law;
 - collecting information from consumers and businesses to help understand what issues cause the most harm to Australian businesses and consumers and where best to use resources;
 - reviewing and assessing company mergers and asset acquisitions, authorisation and notification applications in Australia; and
 - promoting competition in the communication, bulk water, postal, and transport industries.⁴

Scope and conduct of the review

- 1.8 The ACCC appeared before the committee at the first public hearing to review its 2015 annual report in Canberra on 24 February 2016.
- 1.9 The proceedings of the hearing were webcast over the internet, through the Parliament's website, allowing interested parties to view or listen to the proceedings as they occurred. The transcript of the hearing is available on the committee's website.⁵

3 ACCC website <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc>> viewed 17 March 2016.

4 ACCC website <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/service-charter>> viewed 17 March 2016.

5 House of Representatives Standing Committee on Economics, Past Public Hearings and Transcripts, <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/ACCC_2015/Public_Hearings> viewed 24 March 2016.

- 1.10 This report focuses on the issues raised in the annual report and, in particular, on matters raised at the public hearing in Canberra on 24 February 2016.
- 1.11 At the public hearing, the committee examined the current policy settings in competition and consumer law, focussing on the role of the ACCC in regulating mergers, assessing market power and anti-competitive behaviour, and investigating possible cartel activity. Also discussed were the ACCC's activities in monitoring petrol pricing, recent interventions in the supermarket sector, international activities, and the impact of the recent Competition Policy (Harper) Review, which released its final report and recommendations in March 2015.

Current issues in competition and consumer law

Overview

2.1 The Australian Competition and Consumer Commission (ACCC) appeared before the committee on Wednesday 24 February 2016 for the first public hearing as part of the review of its 2015 annual report. The adoption of this review by the committee stemmed from the last part of Recommendation 51 of the Competition Policy (Harper) Review final report released on 31 March 2015:

The ACCC should report regularly to a broad-based committee of the Parliament, such as the House of Representatives Standing Committee on Economics.¹

2.2 Issues raised at the hearing included the overarching role of the ACCC, different aspects of Australian competition and consumer law, petrol pricing, the conduct of supermarkets, the regulation of market power, and other ACCC activities.

Role of the ACCC

2.3 The Chairman of the ACCC, Mr Rod Sims, in his opening statement to the committee outlined the ACCC's principal functions. The Chairman informed the committee that these roles are conducted in accordance with

1 Competition Policy (Harper) Review, *Final Report*, 31 March 2015, p. 82.

the *Competition and Consumer Act 2010* (the Act) in order to 'to enhance the welfare of Australians by promoting competition and fair trading.'²

- 2.4 The Chairman explained the principal roles of the ACCC by highlighting the following examples:
- competition regulator, principally involving the assessment of mergers and enforcing the provisions of competition law;
 - consumer regulator, to investigate any breaches of consumer law which in essence involve misleading or unconscionable conduct by businesses;
 - safety regulator, which involves recalling products that fail to meet safety standards;
 - regulation of monopoly infrastructure, most of which has traditionally involved Telstra;
 - advocacy and market studies;
 - analysis of the petrol market, involving four general studies per year and additional studies of regional markets; and
 - engagement with international counterparts.³

Competition and consumer law

Background

- 2.5 In its 2015 annual report, the ACCC states in relation to its role in competition law:

Competition underpins our market economy and brings innovation, efficiency and dynamic ways to meet consumers' needs, but it needs well-defined boundaries on commercial behaviour. The ACCC has continued to vigorously pursue enforcement activities when market conduct will, or will have the potential to, harm the competitive process.⁴

- 2.6 The ACCC considered close to 320 matters and conducted around 40 public reviews of mergers and acquisitions in 2014-15 to assess whether they would substantially lessen competition.⁵
- 2.7 In relation to consumer law, the ACCC states in its annual report that it was involved in 44 proceedings over the previous year, including a high
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2 Mr Rod Sims, Chairman, Australian Competition and Consumer Commission (ACCC), *Transcript*, 24 February 2016, p. 1.

3 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, pp. 1-2.

4 ACCC, *Annual Report 2014-15*, 2 October 2015, p. 2.

5 ACCC, *Annual Report 2014-15*, 2 October 2015, p. 3.

profile case against Coles supermarkets for engaging in unconscionable conduct in its dealings with certain suppliers. The ACCC also initiated a number of product recalls for failures to meet safety standards.⁶

- 2.8 The Chairman also outlined the priorities for the ACCC's compliance and enforcement policies at a speech given to the Committee for Economic Development of Australia (CEDA) in Sydney on 19 February 2016. These included cartel conduct in government procurement, truth in advertising, and competition and consumer issues in the health sector and industry codes.⁷

Mergers

- 2.9 At the public hearing, the Chairman summarised the principles and some current activities of the ACCC in assessing mergers and takeovers.

Mr Sims stated:

... the essence of the system does not involve formality. The essence of the system says: 'Do not have a merger that has the effect or likely effect of substantially lessening competition.' So companies come to us to get an informal view about whether the merger they are contemplating would, in our view, be likely to substantially lessen competition. We get over 300 approaches a year putting that question to us. Eighty-five per cent of them we pre-assess by having a quick look at them and saying, 'That's fine,' and 15 per cent involve us in quite a lot of work.⁸

- 2.10 The Chairman outlined a number of steps that are taken by the ACCC if there are concerns that a merger will substantially lessen competition. These include putting out a statement of issues known in the trade as 'red-light' concerns. The ACCC will hold discussions with the parties involved and also assess possible entry barriers for smaller players for expansion into the market if the merger was to go ahead.⁹
- 2.11 The Chairman further remarked that mergers necessarily mean a lessening of competition and that this is related to the issue of increased market power. He emphasised that substantial market power is core to what the ACCC looks for.¹⁰

6 ACCC, *Annual Report 2014-15*, 2 October 2015, p. 3.

7 Mr Rod Sims, Chairman, ACCC, *annual CEDA address*, 23 February 2016, see <<http://www.accc.gov.au/speech/accc-compliance-and-enforcement-priorities-for-2016>> viewed 29 March 2016.

8 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 1.

9 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 9.

10 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 10.

Market power and the 'effects test'

- 2.12 The committee asked the ACCC to comment on recent statements from small business associations that the introduction of an 'effects test' would resolve a number of problems in relation to the misuse of market power.
- 2.13 As stated in the Harper Review final report, the effects test refers to proposed changes to section 46 of the Act, which currently:
- ... prohibits corporations that have a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.¹¹
- 2.14 Introducing an effects test would amend this part of the Act so that a firm with substantial market power would be prohibited from actions that have the *effect* of substantially lessening competition.
- 2.15 The ACCC had long argued, as stated in its submission to the Harper Review, that 'the failure of section 46 to consider the effect of conduct by a firm with substantial market power is a gap in the law.'¹²
- 2.16 The ACCC further commented in its submission to the Harper Review that whilst it has never lost a section 46 case in the courts 'on the basis that it has failed to establish an anti-competitive purpose, the impact of the purpose requirement often arises at the earlier, investigative, stage.'¹³ The ACCC further stated in this submission:
- There have been occasions where the ACCC has investigated serious complaints from market participants alleging an anti-competitive effect as the result of unilateral conduct by a dominant firm, but the ACCC has formed the view, based on the documents and evidence available, that despite the anti-competitive effect it would be unable to establish that the conduct had been engaged in for a proscribed purpose. In those circumstances, the ACCC has been unable to commence proceedings against the dominant firm under section 46.¹⁴
- 2.17 As noted in the Harper review final report, a principal argument for introducing the effects test is that competition law should be directed to

11 Competition Policy (Harper) Review, *Final Report*, 31 March 2015, p. 335.

12 ACCC, *Reinvigorating Australia's Competition Policy*, Submission to the Competition Policy (Harper) Review, p. 77.

13 ACCC, *Reinvigorating Australia's Competition Policy*, Submission to the Competition Policy (Harper) Review, p. 77.

14 ACCC, *Reinvigorating Australia's Competition Policy*, Submission to the Competition Policy (Harper) Review, p. 77.

the *effect* of commercial conduct on competition rather than the *purpose* of such conduct as it is the anti-competitive *effect* that is detrimental to competition and consumer welfare. This report cites a further argument in favour of this change that the *purpose* of commercial conduct is more subjective and therefore more difficult to prove.¹⁵

2.18 The Harper Review also notes that some groups are opposed to an effects test because it would ‘chill’ competitive behaviour by firms in the market to the detriment of the consumer.¹⁶ The ACCC states in its submission to the Harper Review however that such concerns are unfounded as they have not been demonstrated in the telecommunications sector which has had its own effects test specified in the Act since 1997.¹⁷

2.19 The Harper Review panel concluded from the evidence that the primary prohibition in section 46 should be re-framed to include an effects test and exclude the current ‘take advantage’ limb as it does not usefully distinguish competitive from anti-competitive unilateral conduct.¹⁸ The relevant Harper recommendation (no. 30) with regard to misuse of market power states:

The primary prohibition in section 46 of the CCA should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.

To mitigate concerns about inadvertently capturing pro-competitive conduct, *the legislation should direct the court*, when determining whether conduct has the purpose, effect or likely effect, of substantially lessening competition in a market, to have regard to:

- the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- the extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.¹⁹

15 Competition Policy (Harper) Review, *Final Report*, 31 March 2015, p. 335.

16 Competition Policy (Harper) Review, *Final Report*, 31 March 2015, p. 335.

17 ACCC, *Reinvigorating Australia's Competition Policy*, Submission to the Competition Policy (Harper) Review, pp. 77, 80.

18 Competition Policy (Harper) Review, *Final Report*, 31 March 2015, p. 61.

19 Competition Policy (Harper) Review, *Final Report*, 31 March 2015, p. 62.

- 2.20 The Government stated in its response to recommendation 30 of the Harper review that it would ‘consult further on options to strengthen the misuse of market power provision’, and noting concerns raised in the submissions to the review about its operation would issue a discussion paper.²⁰
- 2.21 The discussion paper on section 46 was released on 11 December 2015 to stimulate further debate on possible amendments to this section, taking account of Harper recommendation 30. This paper presented six options to amend the misuse of market power provisions, numbered A-F, with A being no change and F being full implementation of the Harper recommendation.²¹
- 2.22 The Chairman reiterated at the public hearing that the ACCC supports the introduction of an effects test and the removal of the ‘take advantage’ component of section 46 because it has caused issues in terms of court interpretation:
- They interpreted that to mean that if you are a big company – and I am putting it at its most pejorative to back the point I am making – you can do what you like to exclude a competitor, provided the steps you take are not steps a small company could take. That is absurd, but that is the way they have interpreted ‘take advantage’. What we are saying and what Harper is saying – and I think at the level I am talking it is completely aligned – is that it should be about substantially lessening competition.²²
- 2.23 The Chairman emphasised that the essence of the law as outlined in section 46 regarding substantially lessening competition is different from the issue of businesses trying to outcompete each other as part of a functioning market economy.²³ The Chairman stated:
- ... certainly my view and, I think, the view of everybody at the ACCC – is that in a strong, functioning, vigorous market economy you actually want businesses to substantially damage their competitors. I mean, they are competing against each other and going against each other all the time... trying to damage one competitor is what you do when you try and outcompete them. Trying to substantially lessen competition is a different matter.²⁴

20 *Australian Government Response to the Competition Policy (Harper) Review*, p. 25.

21 Australian Government, *Options to strengthen the misuse of market power law*, Discussion Paper, December 2015.

22 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 8.

23 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 8.

24 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 8.

2.24 The Chairman further remarked however that whereas the ACCC is fully on board with the essence of Harper with regards to the effects test, it does have a technical issue with the mandatory factors proposed by the Harper review which direct the courts to take into account when determining the effects test:

While they do not look worrisome from a high-level economic point of view, we are worried about what the court would do with them and the onus that they would put on them. What Harper then tried to do was to say 'if you are thinking about what substantially lessening of competition is, if they are doing this sort of stuff then that is okay. But if they are doing all of this sort of stuff then that is bad.'²⁵

2.25 The Chairman indicated that the ACCC was supportive of option E in the Government's Discussion paper which would implement Harper recommendation 30 without the mandatory factors. The Chairman outlined his concerns about implementing option F, which would be the full Harper recommendation. Mr Sims stated:

Keep in mind that when we take someone to court, the onus is on us to provide evidence to a court that is sitting there with a blank sheet of paper. That [the mandatory factors] would force us to demonstrate to the court that there were no efficiency benefits from the behaviour, that beyond the effect of substantially lessening the competition or the purpose, that there were other nasty things that were done. It just introduces a higher evidentiary burden. The bigger explanation is, I think, that when the drafters of our law put 'take advantage' into 46, 41 years ago, they had no idea the courts would interpret it in the way that they have. It is partly what we can see and partly what we cannot see that causes this concern, and considerable concern I have to say.²⁶

2.26 On 16 March 2016, the Government announced that after a period of consultation by the Treasury it would adopt Harper Recommendation 30 in full (option F in the Discussion paper).²⁷

25 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 9.

26 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 9.

27 The Hon Malcolm Turnbull, Prime Minister, *Joint Media Statement: Fixing Competition Policy to Drive Economic Growth and Jobs*, 16 March 2016, see < <https://www.pm.gov.au/media/2016-03-16/joint-media-statement-fixing-competition-policy-drive-economic-growth-and-jobs>>viewed 24 March 2016.

Cartels

2.27 One of the roles of the ACCC is to monitor for possible cartel activity in different markets. The ACCC describes a cartel as follows:

A cartel exists when businesses agree to act together instead of competing with each other. This agreement is designed to drive up the profits of cartel members while maintaining the illusion of competition.²⁸

2.28 The ACCC comments that cartel conduct can include price fixing, dividing markets to shelter them from competition, rigging bids by suppliers, and controlling the output of goods and services available to buyers.²⁹ The ACCC states:

Cartels can be local, national or international. Established cartel members know that they are doing the wrong thing and will go to great lengths to avoid getting caught. Some estimates suggest that while a cartel is operating, the price of affected commodities rises by at least 10 per cent. Worldwide, cartels steal billions of dollars every year.³⁰

2.29 The committee was interested in some instances of cartel activity in Australia that the ACCC had dealt with. The Chairman cited as examples:

- An alleged laundry detergent cartel, whereby the parties coordinated moves to change the size of the detergent container and keep the prices the same;
- Bylong Valley bid-rigging in New South Wales in which the main bidders for a coal lease were alleged to have gotten together to work out an arrangement; and
- Possible cartel activity in the construction industry in Canberra.³¹

2.30 The committee further queried the ACCC on some of the differences that it had with the Harper Review with regard to the ACCC regulation of cartels. The Chairman commented that the essential point 'was over joint ventures where the complaint by industry, which Harper had some sympathy for, was: when can you claim that your cartel is, in fact, a joint venture?' The Chairman stated:

28 ACCC website <<http://www.accc.gov.au/business/anti-competitive-behaviour/cartels>> viewed 15 March 2016.

29 ACCC website <<http://www.accc.gov.au/business/anti-competitive-behaviour/cartels>> viewed 15 March 2016.

30 ACCC website <<http://www.accc.gov.au/business/anti-competitive-behaviour/cartels>> viewed 15 March 2016.

31 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 17.

... our concern is that any cartel could, after the event, be described as a joint venture. We are comfortable with the current law which says that really it has got to be written down. There has got to be evidence in a contract. If you have not done that, do not come along and tell us later it was a joint venture... Any freeing up of that causes us a lot of concern. I have been in the business world for 20 years advising numerous companies on corporate strategy. I have never come across one joint venture that was not written down. So I think that if it is not written down, forget it.³²

Petrol pricing

Background

- 2.31 As indicated in the annual report, the ACCC monitors the downstream petroleum industry, including the refining, importing, wholesale and retail sectors, under Part VIIA of the Act. These activities are intended to keep abreast of industry developments and provide timely information and advice to government and the public.³³
- 2.32 The ACCC further states in its annual report that its fuel monitoring program has three objectives:
- to improve consumer awareness by increasing the information available about the petrol industry;
 - to comply with the direction of the Minister for Small Business by analysing prices, costs and profits in the downstream petroleum industry; and
 - to focus on areas where competition may be less effective and on industry conduct that the ACCC may need to consider more closely.³⁴

Australian petrol prices not reflecting lower global oil prices?

- 2.33 The committee canvassed the views of the ACCC on why the global fall in oil prices is not fully reflected in the price that the Australian consumer pays at the bowser.
- 2.34 The Chairman responded in the first instance that the ACCC's powers under the Act give it an explicit role to monitor petrol prices but no other powers. He further commented that the petrol price at the pump in

32 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 18.

33 ACCC, *Annual Report 2014-15*, 2 October 2015, p. 145.

34 ACCC, *Annual Report 2014-15*, 2 October 2015, p. 145.

Australia could not drop in percentage terms by as much as the oil price because about 50c of the cost of a litre is tax (both GST and excise duty). He further remarked that the lower Australian dollar had offset some of the drop in oil prices.³⁵

2.35 Other components of the pump price mentioned by the Chairman included refiner margins and retail margins. The Chairman stated:

... we have concerns in two areas that underpin our view that Australian consumers have not benefited from the fall in international oil prices as they should. One is that, this is something that no one in Australia can control, the refiner margins expanded so the price of crude oil came down but the refiner margins went up. Traditionally refiner margins were about 8c a litre. They exploded recently to 16c and actually touched 20c a litre. That is the cost of getting it from crude oil to petrol. It is an international price. Much of our petrol is imported as petrol, but some of it comes as crude and gets refined here. Nonetheless, it is an internationally set price.³⁶

2.36 The Chairman further commented that retail margins were also an area of concern for the ACCC as they have been running at 12 to 13 cents a litre, whereas the traditional margin is around 7 cents. He stated:

The combination of those two [refiner and retail margins] has meant that consumers have not benefited fully from the decline in crude prices. We have been making that known. I have written to the petrol companies trying to get them to explain why that is the case. We are hoping that a bit of pressure and the spotlight of public glare will put a bit of pressure on them.³⁷

2.37 The committee further queried why the refiner margin and the retail margins had become so much higher at a time when oil prices were falling. The Chairman commented that a lag in contracts had been the reason given by the refiners for the higher margin, that is, a certain price had been already agreed to. The Chairman further remarked, however:

I think that it is not unfair to say that they felt they could see an opportunity to make a bit more money and they tried to grab a bit of the falling crude oil price. I think that they did that. They were quite open with us in admitting that that was a game that they

35 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 3.

36 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 3.

37 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 3.

could only play for a short period of time. As I say, the latest numbers are that those refiner margins are now coming down.³⁸

2.38 In relation to higher retail margins, the Chairman stated that there was also a lag effect but this would only account for a fraction of the increase:

I think again it is because prices are coming down, crude oil is falling and companies are judging how much they can get away, frankly, in terms of what they hang on to. I think they acknowledge that there is a bit of a lag effect. But I think what they mean by 'lag' is, as I say, not only that three-week period when they have got the petrol in the pump from the previous period but also them thinking they could make prices a little stickier than crude oil prices. I think they are just taking advantage of the opportunity.³⁹

Anti-competitive behaviour in the petrol market

2.39 The Chairman outlined some of the ACCC's activities in investigating anti-competitive behaviour in the petrol market. In one such instance, petrol retailers were exchanging information about their current prices which the ACCC alleged had enabled individual sellers to push up their price and monitor whether others were following. The ACCC's view was that this facilitated higher prices and it thus instituted proceedings in late 2014 which were settled at the end of 2015.⁴⁰

2.40 The Chairman further commented that under this settlement, this pricing information was now to be made available to the consumer which would have a number of positive benefits in terms of finding the best price and rewarding retailers who offer the best value. Other measures include the possible development of apps that would assist with disseminating this information in real time.⁴¹

Diesel

2.41 The committee queried why diesel is more expensive in Australia than in other countries in comparison to petrol. The ACCC responded on notice that different factors contributed to this. One issue is that the excise on diesel is the same as it is on petrol in Australia, whereas for example in New Zealand the tax on diesel is far lower than it is on petrol. Another factor in the view of the ACCC is that there are far more diesel passenger

38 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 4.

39 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 4.

40 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 3.

41 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 3.

vehicles in other countries, such as some European countries, than in Australia which creates a larger and more competitive diesel market in those places.⁴²

Supermarkets

Background

2.42 The Chairman outlined a number of the ACCC's recent activities in the supermarket sector, notably Coles and Woolworths who have a combined market share of over 70 per cent.⁴³

2.43 The annual report cites a number of successful actions taken by the ACCC against the major supermarkets including:

- Proceedings taken against Coles in 2014, for unconscionable conduct towards 200 of its smaller suppliers in which Coles pursued payments from these entities for 'profit gaps' and late deliveries that fell outside of the trading terms;⁴⁴
- Securing a \$2.5 million penalty against Coles Supermarkets for misleading claims on par-baked bread products;⁴⁵ and
- Proceedings against Woolworths Ltd alleging that it had made false or misleading representations about the safety of some of its products.⁴⁶

Unfair treatment of suppliers by the major supermarkets

2.44 The Chairman further remarked at the hearing that the concerns of the Commission in relation to Woolworths and Coles 'have not been so much about competition between them and the effect that has on consumers.'⁴⁷ The Chairman stated:

... they have been more about the fact that Coles and Woolworths are over 70 per cent of the grocery market and so, if you are a supplier of any size, you have to deal with them, and they know that and, in our view, have taken advantage of that to engage in what we successfully alleged, in relation to Coles, was unconscionable conduct in demanding payments from suppliers,

42 ACCC, *Submission 1*, p. [5].

43 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 7.

44 ACCC, *Annual Report 2014-15*, 2 October 2015, p. 68.

45 ACCC, *Annual Report 2014-15*, 2 October 2015, p. 57.

46 ACCC, *Annual Report 2014-15*, 2 October 2015, p. 104.

47 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 7.

which I certainly said at the time was behaviour that I thought was inappropriate in today's business world, and I think the court backed up that comment.⁴⁸

- 2.45 The Chairman informed the committee that the *Food and Grocery Code of Conduct* has emerged as a result of this work by the ACCC which includes good-faith bargaining provisions and prohibits arbitrary payments. The Chairman noted that a focus of the ACCC will be to ensure that this code is effective.⁴⁹

Increasing competition in the supermarket sector

- 2.46 The Chairman remarked that competition is now increasing in the supermarket sector which will be beneficial for the consumer. The Chairman stated:

Coles and Woolworths still have some of the highest margins in the world, so consumers are still paying more than in other countries for their goods from Coles and Woolworths – there is no doubt about that. But I think those margins are under some pressure as ALDI and Costco roll out, so hopefully that will bring about some benefit. In a sense, they are not breaching the act by using their strong position in some markets to raise prices, but, as I say, the rollout of ALDI is helping quite a lot – and Costco as well.⁵⁰

Other ACCC activities

Vocational education and training providers

- 2.47 The ACCC was queried on whether it had investigated claims that certain vocational education and training (VET) providers were offering inducements to secure more students to courses for which they were not necessarily suited.
- 2.48 The Chairman responded that the ACCC was very active in this area and had instigated court proceedings against three VET providers and a broker. He remarked:

... we argued that they had targeted vulnerable people and got them to sign up to a course that really was not suited to those people's needs. Sometimes they did that with inducements of a

48 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 7.

49 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 7.

50 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 7.

free iPad or \$50 at the pub... Our allegations are that the consumers were misled and there was unconscionable conduct. Our concern was partly for the consumers who get a debt that hangs over them and, at least as important, the taxpayer, because the taxpayer was paying fully for the course and no-one ever intended, in many cases, to complete it or to do it, and the completion rates were sometimes very low.⁵¹

- 2.49 The Chairman further commented that the ACCC was hoping that the loans would be reversed and the money paid back.⁵²

Third party repairs

- 2.50 The committee was interested in whether the ACCC had intervened in the recent issue whereby Apple iPhones or iPads would shut down (known as 'error 53') if a mechanical repair had been made by a non-Apple vendor and the system software was then upgraded by the user at a later time.

- 2.51 Apple has subsequently released an update to its software that fixes this problem.⁵³

- 2.52 The Chairman responded that this had come to the attention of the ACCC and it made representations to Apple regarding this matter and that this was a global issue with these products. He remarked that no specific response had been received to his knowledge but that this issue had now been resolved.⁵⁴ He stated:

Whether it was us or whether it was others I do not know, but a large number of issues get sorted out because we get involved. I am proud to say that we have a reputation of having the ability to take people to court, so when we come knocking on the door, it matters. This was a worldwide issue, so I am a bit reluctant to take too much credit, but I will try to take a bit. We certainly did approach Apple on that. As you say, it has now been solved.⁵⁵

- 2.53 The ACCC further commented in relation to the principal of ensuring competition in the after-sales repair markets that they are also active in engaging with entities in the motor industry due to 'protracted tension

51 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 21.

52 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 21.

53 See < <https://support.apple.com/en-au/HT205628> > viewed 24 March 2016.

54 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 21.

55 Mr Rod Sims, Chairman, ACCC, *Transcript*, 24 February 2016, p. 22.

between the brand dealership networks and the after-parts and after-service suppliers and service operators.’⁵⁶ The ACCC stated:

It goes to whether there is a potential third line force under the competition regime by requiring consumers to take motor vehicles or other products back to their service centres. We provide clear advice to consumers so they understand what they are entitled to do without breaching their warranty rights. It is an ongoing issue for us. Every year there is another example of the kind of tension that exists. We continue to maintain a very active dialogue with the industry and with consumer organisations and consumers generally.⁵⁷

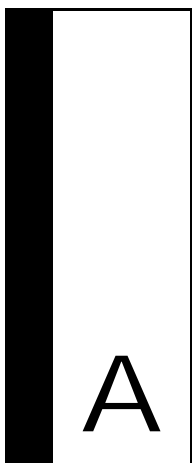
Conclusion

2.54 The ACCC has a crucial role to play in ensuring Australia’s markets operate fairly to the benefit of businesses and consumers alike. The ACCC must remain vigilant against anti-competitive behaviour and practices that breach Australia’s competition and consumer laws. The committee’s role into the future will be to provide thorough oversight of the activities of the ACCC and raise any instances where it believes this vigilance has been lacking. The implementation of the Harper review recommendations and their impact will also be of ongoing interest to the committee.

David Coleman MP
Chair
11 April 2016

56 Mr Nigel Ridgway, Executive General Manager, Consumer, Small Business and Product Safety Division, ACCC, *Transcript*, 24 February 2016, p. 22.

57 Mr Ridgway, Executive General Manager, ACCC, *Transcript*, 24 February 2016, p. 22.



Appendix A – Public hearing details and submission

Public hearing

Wednesday 24 February 2016 – Canberra

Australian Competition and Consumer Commission

Mr Rod Sims, Chairman

Ms Rayne de Gruchy, Chief Operating Officer

Mr Nigel Ridgway, Executive General Manager

Ms Tanya Farrell, Director

The hearing transcript is available online at:

http://www.aph.gov.au/Parliamentary_Business/Committees/House/Economics/ACCC_2015/Public_Hearings

Submission

Submission 1 Australian Competition and Consumer Commission
(Answers to Questions on Notice)