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COMPETITION DEVELOPMENTS IN AUSTRALIA REPORT

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TABLE OF CONTENTS

Part I—Competition law and policy in Australia	2
1.1 Competition law	2
1.2 Competition policy	2
Part II—Competition authorities in Australia.....	4
2.1 The Department of the Treasury	4
2.2 The Australian Competition and Consumer Commission (ACCC)	4
2.3 The Australian Energy Regulator and Australian Energy Market Commission	4
2.4 The National Competition Council.....	4
2.5 The Productivity Commission	5
2.6 The Australian Competition Tribunal.....	5
Part III—Changes to competition law and policies	5
3.1 Council of Australian Governments National Competition Policy Review	5
3.2 Dawson Review	6
3.3 National Access Regime.....	7
3.4 Telecommunications.....	7
3.5 Energy market reform.....	8
3.6 Water.....	8
Part IV—Enforcement of competition and consumer protection activities.....	9
4.1 Cartel enforcement activities	9
4.2 Mergers and acquisition activities	10
4.3 Misuse of market power	13
4.4 Pricing matters	14
4.5 Access to infrastructure facilities	16
4.6 Adjudication	18

Part I—Competition law and policy in Australia

1.1 Competition law

The *Trade Practices Act 1974* is the primary source of Australia’s competition and consumer protection laws. The objective of the legislation is “to enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection”. The *Trade Practices Act 1974* contains the law relating to access to services, antitrust including measures relating to exclusionary provisions, price fixing, exclusive dealing, misuse of market power and mergers, consumer protection and resale price maintenance.

The *Trade Practices Act 1974* prohibits a wide range of anti-competitive practices, including cartel conduct, arrangements that substantially lessen competition, secondary boycotts, misuse of substantial market power, mergers or acquisitions that may substantially lessen competition and resale price maintenance. The *Trade Practices Act 1974* also contains telecommunication-specific competition rules.

1.2 Competition policy

In April 1995, Australia’s National Competition Policy was established by three intergovernmental agreements, including the *Competition Principles Agreement*, signed by the Australian Government and the governments of Australia’s states and territories.

The Competition Principles Agreement laid down principles and processes for reviewing legislation that restricts competition. The guiding principle is that legislation should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs and the objectives of the legislation can only be achieved by restricting competition.

Under National Competition Policy, governments also committed to undertake other reforms to encourage competitive outcomes, including:

- the implementation of competitive neutrality for all significant government business activities operating in a contestable market, which requires that such businesses not benefit commercially simply by virtue of their public ownership;
- the structural reform of public monopolies, where their markets are to be opened to competition or they are to be privatised, to ensure they have no residual advantages over potential competitors;
- the provision of access arrangements to services provided by significant infrastructure facilities (such as electricity grids, airports and communications networks) that would be uneconomic to duplicate, to encourage competition in upstream and downstream markets and reduced prices for related products;
- independent oversight by state and territory governments of the pricing policies of government business enterprises, to ensure that price rises are not excessive;
- the application of competition laws across all jurisdictions (including the scope for exceptions

in certain circumstances), centrally administered by the Australian Competition and Consumer Commission; and

- ensuring commitment to related reforms in the key infrastructure areas of electricity, gas, water and road transport with a view to improving efficiency, implementing nationwide markets and standards, and protecting the environment.

Each year until 2005, the National Competition Council, an independent body established with the agreement of all Australian governments, assessed each government's reform achievements against their National Competition Policy commitments.

Incentives for reform were provided by annual competition payments to the states and territories from the Australian Government. The payments were reduced where the Australian Government accepted recommendations from the National Competition Council for penalties to be imposed on payments to the states and territories for lack of progress with National Competition Policy related reforms. The competition payments represented the states and territories' share of the additional revenue which was raised by the Commonwealth as a result of effective competition reform. By the end of 2005-06, the Australian Government will have paid nearly A\$5 billion in competition payments to the states and territories since 1997-98.

As part of their commitments under National Competition Policy, the Australian, state and territory governments undertook to review and reform legislation that restricts competition.

The objective of the legislation review program is to remove restrictions on competition that are found not to be in the interests of the community such as legislation that restricts entry into markets or constrains competitive behaviour within markets. Governments agreed that legislation should not restrict competition unless it could be shown that the benefits of the restriction to the community as a whole outweigh the costs, and the objectives of the legislation can be achieved only by restricting competition.

All governments developed a timetable for the review and, where appropriate, reform of all existing legislation that restricts competition, by 30 June 2002. Further, it was agreed that proposals for new legislation that restrict competition must be accompanied by evidence that the legislation is consistent with the guiding principle. Governments also committed to systematically reviewing this legislation, after its initial review, at least once every ten years.

The Australian, state and territory governments have continued to progress their legislation review schedules.

On 10 February 2006, in light of the fact that the original National Competition Policy arrangements are now drawing to a close, all Australian governments agreed to a substantial new national reform agenda embracing competition, regulatory reform and human capital streams.

The new competition policy agenda aims to further boost competition, productivity and the efficient functioning of markets by focusing on the key areas of energy, transport and infrastructure regulation. The regulatory reform stream focuses on reducing the burden of regulation.

Part II—Competition authorities in Australia

The principal Australian Government departments and agencies involved in the development, implementation, administration and enforcement of competition policy and laws are:

2.1 The Department of the Treasury

The Department of the Treasury has primary policy responsibility for the competition provisions of the *Trade Practices Act 1974* and National Competition Policy, which includes the provision of policy advice in relation to international aspects of competition policy, and oversight and administration of key agencies, including the Australian Competition and Consumer Commission, the National Competition Council, the Australian Competition Tribunal and the Productivity Commission.

2.2 The Australian Competition and Consumer Commission (ACCC)

The ACCC, formed in 1995, is an independent statutory authority that enforces the *Trade Practices Act 1974* and is both a competition and consumer protection agency. The ACCC is an independent statutory authority headed by a chairman, deputy chair and five full-time commissioners. The role of the ACCC is to promote competition and ensure compliance with the *Trade Practices Act 1974* by identifying and eradicating anti-competitive practices and promoting compliance and consumer protection.

In relation to resources, the total number of staff employed by the ACCC at 30 June 2005 was 519. Staff consist of the following main three areas: mergers 24 staff; enforcement 148 staff (enforcing both competition and consumer protection laws); and advocacy 73 staff. The ACCC's total funding for 2004-05 was A\$123.2 million, comprising the original appropriation of A\$121.8 million, additional appropriation of A\$0.6 million and other revenue of A\$0.8 million. The ACCC's total appropriation in 2005-06 is A\$86.5 million. Additional appropriation that may be granted throughout the year and other revenue is not included in the 2005/06 figure.

2.3 The Australian Energy Regulator and Australian Energy Market Commission

The new Australian Energy Regulator and Australian Energy Market Commission began operations on 1 July 2005. They have assumed functions previously performed by the National Electricity Code Administrator and the ACCC. The Australian Energy Regulator is a new legal entity with independent decision making power, while being a constituent part of the ACCC. It has assumed economic regulatory, enforcement and monitoring functions in relation to the National Electricity Market. The Australian Energy Market Commission will make the National Electricity Rules in relation to these functions under the new National Electricity Law. The ACCC will retain responsibility for regulation of competition matters. These energy market reforms will strengthen the national character of energy markets, reduce regulatory complexity, streamline and enhance the quality of economic regulation across energy markets.

2.4 The National Competition Council

Established in 1995, the National Competition Council acts as a policy advisory body to oversee the implementation of National Competition Policy. The Commission does not, however, set reform agendas or implement reforms, which are the responsibility of governments. The National

Competition Council employed 15 staff at 30 June 2005 and had a total funding of A\$4.0 million in 2005-06.

2.5 *The Productivity Commission*

The Productivity Commission, an independent statutory authority, is the Australian Government's principal review and advisory body on microeconomic policy and regulation, and undertakes public inquiries in response to terms of reference provided by the Australian Government.

The Productivity Commission is currently undertaking public inquiries into:

- waste generation and resource efficiency; and
- conservation of historic heritage places;

and commissioned research studies into:

- economic impacts of migration and population growth;
- standards and accreditation; and
- the role of market mechanisms in rural water use and the environment.

The Productivity Commission has recently finalised the following inquiry and study reports:

- *Review of the Australian Consumer Product Safety System* (report released 7 February 2006);
- *Australia's Health Workforce* (report released 19 January 2006);
- *Review of National Competition Policy Reforms* (report released 14 April 2005).

2.6 *The Australian Competition Tribunal*

The Australian Competition Tribunal (previously known as the Trade Practices Tribunal until 1995) has the main function of hearing appeals from decisions of the ACCC in relation to authorisations and notifications. The Tribunal also has review functions under the access regime when a party is dissatisfied with a decision made by the Minister or ACCC.

Part III—Changes to competition law and policies

3.1 *Council of Australian Governments National Competition Policy Review*

On 3 June 2005, the Council of Australian Governments agreed to immediately commence a review of National Competition Policy, focusing on a possible new national reform agenda, with the review to report to the Council of Australian Governments by the end of 2005. The Council of Australian Governments agreed that the new agenda would draw from, but not be limited to, the recommendations of the Productivity Commission's report, *Review of National Competition Policy*

Reforms.

The COAG review of National Competition Policy was completed in late 2005 by a group of Senior Officials from all jurisdictions, chaired by the Secretary of the Department of the Prime Minister and Cabinet.

COAG considered the review report at its 10 February 2006 meeting and noted that national competition policy reforms to date have permanently increased the level of Australia's Gross Domestic Product by 2.5 per cent, or \$20 billion.

At the February 2006 meeting, all governments agreed to work together to deliver a new national reform agenda comprised of competition, regulatory reform and human capital streams. The competition stream of the national reform agenda will continue and build on the success of the National Competition Policy reforms. It aims to further boost competition, productivity and the efficient function of markets by focusing on further reform and initiatives in the areas of transport, energy and infrastructure regulation. The regulatory reform agenda focuses on reducing the regulatory burden imposed by all three levels of government.

3.2 Dawson Review

Australia undertook an independent review of the competition provisions of the *Trade Practices Act 1974* known as the Dawson Review, which culminated in a report released in April 2003. The report concluded that while the competition provisions of the *Trade Practices Act 1974* have served Australia well, the legislation should be amended to improve its operation by providing for greater accountability, transparency, and timeliness in decision making. A bill to implement the Government's response was first introduced to Parliament on 24 June 2004. However, this bill lapsed due to the federal election in October 2004. The bill was re-introduced to Parliament on 17 February 2005 as the Trade Practices Legislation Amendment Bill (No.1) 2005, with minor amendments to enhance and clarify its operation. The Bill was introduced to the Senate on 10 March 2005 and passed, with amendments, on 11 October 2005. The Bill was returned to the House of Representatives for consideration of the Senate's amendments, including an amendment to remove Schedule 1 (Merger clearances and authorisations) from the Bill. The timing of that further consideration is a matter for Government.

The Bill proposes:

- to establish a voluntary merger clearance system to be used alongside the current informal clearance system. It will provide parties with an optional, parallel system for processing company mergers. Under the new procedure, the ACCC will have 40 days to make a decision on the proposed merger. This 40 day limit would be capable of extension only at the request of the applicant. This will increase the level of certainty for business. Moreover, parties would be presented with reasons for the Commission's decision and be given the opportunity to have the Australian Competition Tribunal review an unfavourable decision;
- to reduce the regulatory burden on small businesses by introducing an optional and alternative notification process for collective bargaining by small business dealing with large business;
- the involvement in a genuine joint-venture enterprise be a defence under price fixing

provisions;

- that intra-party transactions in dual-listed companies are to be treated the same as related party transactions within a group of companies, and that the aggregate size of a dual-listed company can be used to assess its market power;
- that third line forcing be subjected to a “substantial lessening of competition” test. Currently, third line forcing is prohibited absolutely even if it has the effect of promoting competition;
- to enable the ACCC to enter and search a premises and seize material with a magistrate-issued warrant;
- to raise the maximum penalty for companies contravening the Trade Practices Act 1974 to the greater of A\$10 million or three times the gain that they would have made from the contravention (or where gain cannot be readily ascertained, 10 percent of the turnover of the body corporate and all its interconnected bodies corporate). The Court will have the option to exclude an individual implicated in a contravention of the Trade Practices Act 1974 from being a director of a corporation or being involved in its management. Corporations will also be prohibited from indemnifying officers against the imposition of a pecuniary penalty.

3.3 National Access Regime

On 20 February 2004, the Government released its final response to the Productivity Commission’s report on the Review of the National Access Regime for ‘nationally significant’ infrastructure services. The Government’s response supports most of the Productivity Commission’s proposed reforms, and in developing its response, it consulted with state and territory governments. The Government introduced into Parliament, on 2 June 2005, the Trade Practices Amendment (National Access Regime) Bill 2005, to amend Part IIIA of the Trade Practices Act 1974 to give effect to its response to the Productivity Commission’s report. The Bill passed through the House of Representatives on 9 February 2006 and will next be considered by the Senate.

3.4 Telecommunications

In August 2005, the Australian Government announced a package of regulatory adjustments in the lead up to the divestiture of its remaining stake in Telstra. The package includes the operational separation of Telstra’s retail and wholesale/network business areas. This will involve equivalence and transparency measures for both price and non-price business dealings in a move to help ensure Telstra does not use its dominant wholesale/network position to advantage its own retail business in an anticompetitive manner.

Additionally, the ACCC now has the capability to make rules setting out its procedures and processes for declaring new services, assessing access undertakings and exemptions, and arbitrating access pricing disputes. The ACCC has recently issued a position paper outlining its proposed approach for comment.

A revised price control regime for Telstra was implemented on 1 January 2006. Effective until 31 June 2009, the updated regime will narrow the scope and increase the flexibility of the price controls, in particular removing large business customers from the regime, reflecting the increased

competition for these services. Since 1989 Telstra has been subject to price control arrangements, aimed at stimulating competitive outcomes by requiring Telstra to pass on productivity gains to consumers through lower prices for services where price reductions are unlikely to be achieved by effective competitive pressure. These controls apply to such elements as line rentals, local, long-distance, international and fixed to mobile call services.

3.5 Energy market reform

The new Australian Energy Regulator and Australian Energy Market Commission began operations on 1 July 2005. They have assumed functions previously performed by the National Electricity Code Administrator and the ACCC. The Australian Energy Regulator is a new legal entity with independent decision making power, while being a constituent part of the ACCC. The Australian Energy Regulator has assumed economic regulatory, enforcement and monitoring functions in relation to the wholesale electricity market and electricity transmission networks in the National Electricity Market. The Australian Energy Market Commission has assumed responsibility for making the National Electricity Rules in relation to these functions under the new National Electricity Law. The ACCC will retain responsibility for regulation of competition matters. These energy market reforms will strengthen the national character of energy markets, reduce regulatory complexity, streamline and enhance the quality of economic regulation across energy markets.

3.6 Water

On 25 June 2004, the National Water Initiative was considered by Council of Australian Governments and signed by the Australian Government and the governments of New South Wales, Victoria, Queensland, South Australia, the Northern Territory and Australian Capital Territory. Tasmania signed the Initiative on 2 June 2005 and, at the 10 February 2006 Council of Australian Governments meeting, Western Australia announced its intention to sign the Initiative. The Initiative covers a range of areas in which greater compatibility and the adoption of best-practice approaches to water management nationally will bring substantial benefits. In particular, the Initiative will result in:

- expansion of permanent trade in water bringing about more profitable use of water and more cost effective and flexible recovery of water to achieve environmental outcomes;
- more confidence for those investing in the water industry due to more secure water access entitlements, better and more compatible registry arrangements, better monitoring, reporting and accounting of water use, and improved public access to information;
- more sophisticated, transparent and comprehensive water planning that deals with key issues such as the major interception of water, the interaction between surface and groundwater systems, and the provision of water to meet specific environmental outcomes;
- a commitment to addressing over-allocated systems as quickly as possible, in consultation with affected stakeholders, and addressing significant adjustment issues where appropriate; and
- better and more efficient management of water in urban environments, for example through the increased use of recycled water and stormwater.

Consistent with the National Water Initiative, the National Water Commission was recently established as an Australian Government independent statutory agency. The National Water Commission will accredit state and territory National Water Initiative implementation plans, assess progress in implementing the Initiative and advise on actions required to better realise its objectives. The National Water Commission will also undertake the 2005 National Competition Policy assessment of progress with implementing water reform and administer the Water Smart Australia and Raising National Water standards programmes of the Australian Government Water Fund.

Part IV—Enforcement of competition and consumer protection activities

In the 2004-05 financial year, the ACCC Infocentre received a total of 68,231 calls and e-mails, of which 43,827 complaints and inquiries related to the *Trade Practices Act 1974*. Of these, 5,412 were escalated to initial investigation and 174 went into in depth investigation. The ACCC issued 487 Section 155 notices, instituted litigation in 30 separate matters, intervened in one Federal Court matter and accepted 55 section 87B undertakings.

4.1 Cartel enforcement activities

One of the ACCC's current enforcement priorities is cartel behaviour. The *Trade Practices Act 1974* prohibits cartel-type conduct. The prohibition includes agreements between two or more competitors to engage in price-fixing, market sharing, collusive tendering or agreeing sales or production quotas.

The ACCC has a leniency policy for cartel conduct. The policy provides immunity from prosecution for a party who comes forward where the ACCC was unaware of the cartel and immunity from penalties where the ACCC was aware of the cartel but had insufficient evidence to launch proceedings. The leniency policy only applies where the corporation seeking leniency was first through the ACCC's door and satisfies a number of other criteria such as co-operation with the ACCC.

On 2 February 2005, the Australian Government announced that it intends to introduce criminal penalties for serious cartel conduct. The proposed criminal cartel offence will prohibit a person from making or giving effect to an agreement between competitors that contains a provision to fix prices, restrict output, divide markets or rig bids, where the agreement is made or given effect to with the intention of dishonestly obtaining a gain from customers who fall victim to the cartel. In developing its response, the Australian Government had regard to the OECD's 'Recommendation of the Council concerning effective action against hard core cartels'. The legislation reforms are currently before Government.

Recent ACCC cartel activities include:

Visy Group – Corrugated Cardboard Industry

In December 2005, the ACCC instituted proceedings against Visy Industries Holdings Pty Ltd, Visy Industries Australia Pty Ltd and Visy Board Pty Ltd. Proceedings have also been taken against the Chairman, the Chief Executive Officer and former General Manager of the

Visy Group for allegedly being knowingly concerned in or party to the contravening conduct by the Visy respondents.

The ACCC investigations found the Visy Group engaged in conduct in the corrugated fibreboard container industry that was anti-competitive, including engaging in price-fixing and market sharing, in contravention of section 45 of the *Trade Practices Act 1974*. Visy Group's principal competitor, Amcor Ltd, and its former senior executives have to date received immunity from legal proceedings by the ACCC after the company came forward with information about the alleged conduct. The immunity was granted under the ACCC's 2003 Leniency Policy and is conditional upon continuing full cooperation from the company and executives in providing information to the ACCC about the alleged cartel.

Petrol price fixing

The Federal Court imposed penalties totalling A\$23.3m against eight companies and eight individuals for petrol price fixing in the Ballarat region in Victoria. These arrangements had led to a long standing agreement to maintain higher prices for consumers in the Ballarat region. One company and one individual successfully appealed to the Full Federal Court which found that they had not demonstrated a necessary commitment to the price fix. (ACCC v Leahy Petroleum [2004] FCA 1678 – 17 December 2004 and Apco Service Stations Pty Ltd v ACCC [2005] FCAFC 161 – 17 August 2005)

Flour cartel

In 2004, George Weston Foods was fined A\$1.5m because a former divisional chief executive telephoned a competitor seeking to fix the wholesale price of flour even though the competitor did not agree to the scheme. It was found by the court that intent alone was enough. (ACCC v George Weston Foods Limited [2004] FCAFC 161 – 25 August 2004)

Electricity transformer cartel

In 2004, the Federal Court of Australia imposed record penalties of A\$35m in relation to an electricity transformer cartel where, for several years, companies fixed the tender price of power transformers through secret meetings that took place in hotel rooms, airport lounges and private homes across Australia. (ACCC v ABB Power Transmission Pty Ltd [2004] FCA 819 – 7 April 2004)

4.2 Mergers and acquisition activities

Under s50 of the *Trade Practices Act 1974* a merger is prohibited if it would have the effect or would be likely to have the effect of substantially lessening competition in the market. Section 50A extends the prohibition to mergers occurring outside Australia which have an effect on the market in Australia.

On 6 February 2006 the ACCC issued for public comment two draft guides concerning the authorisation and notification processes under the *Trade Practices Act 1974*. The guides have been produced to help people better understand the approach the ACCC will take when considering exclusive dealing notifications and authorisations including how the process works, what

information the ACCC requires and the assessment process. The guides reflect the ACCC's commitment to be timely, consistent and transparent in its assessment of applications for authorisation and notification.

In 2004-05, the ACCC considered 189 mergers, asset sales and joint ventures. Of these, the ACCC opposed two outright, and nine were allowed to proceed, including one merger authorisation, following the provision of court enforceable undertakings to the ACCC under the *Trade Practices Act 1974*.

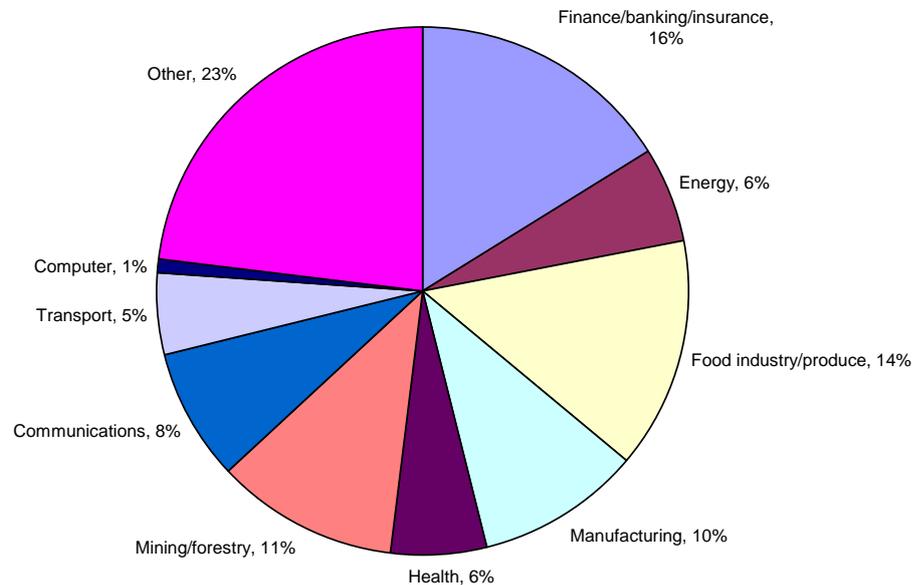
Table 1 highlights the small percentage of merger matters the ACCC has opposed. It shows that the number of matters where, in the ACCC's view, a substantial lessening of competition would, or was likely to, occur has been stable at around five per cent for several years. Table 1 also shows that the number of merger matters considered in 2004–05 is very similar to the number considered in both 2003-04 and 2002-03.

Table 1—Mergers not opposed, opposed and resolved with the ACCC

	Matters not opposed	Matters opposed	Matters resolved	Matters decided (total)
1996-1997	140	5	2	147
1997-1998	165	5	6	176
1998-1999	168	7	10	185
1999-2000	226	4	5	234
2000-2001	252	3	10	265
2001-2002	219	9	9	228
2002-2003	180	9	2	191
2003-2004	183	4	2	189
2004-2005	178	2	9	189

Chart 1 shows merger matters considered in 2004–05 by industry. Finance, banking & insurance, food & produce, and mining & forestry industry mergers formed a larger proportion of mergers considered than in the previous year, with fewer mergers from the transport and communication sectors.

Chart 1—Percentage of mergers by industry



The ACCC communicates with international counterpart agencies when assessing the implications of international mergers and acquisitions. These discussions relate to technical aspects, such as the appropriate market definition, barriers to entry, and emerging market dynamics.

Current major merger matters considered by the ACCC are:

Toll Holdings Limited proposed acquisition of Patrick Corporation Limited

Transport and Logistics group Toll Holdings' made a A\$4.6 billion takeover offer for stevedore company Patrick Corporation Limited. This merger would combine Patrick's port operations with Toll's land-based logistics business to create a rail, road and sea transport leader in the transport industry.

The ACCC's investigation found that the proposed acquisition would be likely to substantially lessen competition in several markets in the transport sector. The ACCC instituted proceedings on 9 February 2006 against Toll Holdings Limited in the Federal Court of Australia over the company's proposed acquisition of Patrick Corporation Limited. The directions hearing has been scheduled for the end of February 2006. The ACCC is seeking an injunction to prevent Toll acquiring any further interest in Patrick, or taking any steps to acquire or exercise substantial influence or control over the business, assets or affairs of Patrick. The ACCC is also seeking a declaration that if Toll was to acquire shares in or assets of Patrick which would enable it to substantially influence or control the business, assets or affairs of Patrick, Toll would be in breach of s.50 of the *Trade Practices Act 1974*.

Pacific Brands Limited's proposed acquisition of all operating assets of the foam business of Joyce Corporation Limited.

Pacific Brands through Dunlop Foams and Joyce are the largest manufacturers of foam in Australia. Market share estimates from industry participants illustrate that the merged entity would have in excess of 65% (by sales) in all the states. The merged entity would also be the only foam supplier in the industry with national coverage. Following market inquiries the ACCC considered the proposed acquisition would be likely to substantially lessen competition in a number of state based markets for foam.

Foster's Group Limited's proposed acquisition of Southcorp Limited

The ACCC noted that the merged firm's market shares in the production of wine and wholesale supply of bottled wine were below merger concentration thresholds that would ordinarily concern the ACCC. Further the ACCC considered that there were a number of wine producers that would be likely to constrain the merged entity and the large liquor retailing stores were in a position to exercise some degree of countervailing power. The ACCC therefore considered that the acquisition was unlikely to substantially lessen competition.

China Light & Power's proposed acquisition of the Australian non-regulated energy assets of Singapore Power

The assets being sold or assigned by Singapore Power included the TXU retail business, a long-term lease over the Torrens Island Power Stations in South Australia, a one-third interest in the SEAGas pipeline, the Western Underground Gas Storage facility located near Port Campbell, and the long-term Master Hedge Agreement with Ecogen Energy which enables hedges to be placed with Ecogen Energy for electricity supply from the Ecogen portfolio (Newport Power Station and the Jeeralang power stations) in Victoria. An important issue was horizontal aggregation of control of generation capacity. In that regard, the ACCC noted the likelihood of new electricity peaking capacity in Victoria being commissioned in the near future as a constraining factor.

4.3 Misuse of market power

In March 2004, a Senate Economics References Committee reported on the effectiveness of the *Trade Practices Act 1974* in protecting small businesses. The report considered a range of issues including those relating to section 46 (misuse of market power), unconscionable conduct (particularly section 51AC) and administration of the *Trade Practices Act 1974*. The Australian Government announced its response to the report on 23 June 2004, accepting 8 of the 17 recommendations. It intends to introduce legislation to implement its response in the near future.

Recent activity in relation to misuse of market power include:

Australian Safeway Stores Pty Limited

A penalty of A\$8.9 million was imposed on 31 January 2006 on Australian Safeway Stores

Pty Ltd for fixing the price of bread and misusing its market power in a number of instances.

The allegations of misuse of market power concerned the supply of bread by certain bakeries to retailers who discounted the price of bread. It was alleged that Safeway refused to accept further supplies of bread from a baker where the baker was supplying retailers who were discounting the price of bread, the space normally occupied by the affected baker being filled with another baker's product. The ACCC alleged that Safeway recommenced purchasing bread from the manufacturer concerned once the discounter ceased discounting.

The case demonstrates the ACCC's resolve to pursue difficult, hard-fought litigation through to a conclusion as legal proceedings were instituted by the ACCC in the Federal Court on 23 December 1996. The Full Court unanimously agreed that the ACCC had established that Safeway had engaged in price-fixing of bread.

4.4 Pricing matters

4.4.1 Telstra

In December 2005, the ACCC issued Telstra with a Consultation Notice in relation to Telstra's decision to increase the price for line rental that it charges its wholesale customers. A Consultation Notice informs Telstra that the ACCC proposes to issue a Part A Competition Notice and provides Telstra with the opportunity to respond accordingly. The issuance of a Part A competition notice allows parties such as carriers and internet service providers to take action to seek damages and compensation for the specified anti-competitive conduct that occurs while the notice is in force. The ACCC is currently considering this response.

4.4.2 Airports

The ACCC published airports regulatory reports for the major seven airports. Under Part VIIA of the *Trade Practices Act 1974*, the ACCC monitors the prices, costs and profits relating to aeronautical services and aeronautical-related services and under the Airports Act it reports on financial accounts and quality of service.

The ACCC reported that, following the removal of price caps on aeronautical charges in 2000-01, average revenue per passenger increased by between 50 and 228 per cent between 2000-01 and 2004-05. However, the rate of increase in average revenue has moderated since the sharp increases of 2001-02 and 2002-03. In 2004-05, increases in average revenue per passenger ranged from 2.6 per cent to 11 per cent. The ACCC also reported that the greater security requirements imposed on airports following 2001 led to increases in average aeronautical expenses.

4.4.3 Airservices Australia

The ACCC received and made its decisions on a price notification from Airservices Australia in 2005-06.

The ACCC did not object to a proposal to alter the structure of prices for a three-year period for aviation rescue and fire fighting services, including increasing the threshold at which charges apply. These changes were proposed following a comprehensive review of the structure of charges for aviation rescue and fire fighting services. The ACCC considered the underlying revenue for the

provision of aviation rescue and fire fighting services in its 2004 decision on Airservices' long term price notification, which covered all of Airservices' declared services.

4.4.4 *Australia Post*

Amendments to the *Australian Postal Corporation Act 1989* have recently been enacted, giving the ACCC the ability to require Australia Post to keep records that are relevant to the ACCC's functions of testing for cross-subsidy, assessing proposals for price increases and dispute inquiry. One of the key reasons behind the requirement on Australia Post to keep records about different parts of its business is to enable the ACCC to assess allegations raised by competitors that Australia Post is competing unfairly by subsidising competitive services with revenues raised from its monopoly services. On 30 March 2005, the ACCC released record keeping rules for Australia Post. The ACCC has since issued a discussion paper to assess the public disclosure requirements for information collected under these record keeping rules.

4.4.5 *Insurance premium monitoring*

The ACCC currently has two monitoring roles with respect to the insurance industry.

- Monitoring of public liability and professional indemnity costs and premiums to assess the impact on premiums of the measures taken by governments to reduce the cost of these classes of insurance. The third of four six-monthly reports was released by the Australian Government in August 2004. The fourth report was released in February 2005.
- Monitoring medical indemnity insurance premiums to assess whether they are 'actuarially and commercially justified'. The second of three annual reports was released by the Australian Government in March 2005.

4.4.6 *Petrol price monitoring*

The ACCC informally monitors the retail prices of petrol, diesel and automotive LPG in the capital cities and around 110 country towns. It also monitors international crude oil and refined product prices, published terminal gate prices of the oil majors and the city-country price differential.

The ACCC also provides information on its website on petrol price cycles in the five largest metropolitan cities the purpose of which is to increase consumers' understanding of petrol price cycles and how to take advantage of them. The website also includes information on what determines petrol prices, country petrol prices and answers to some frequently asked questions, and has links to a number of other websites that have information about petrol prices and petrol pricing issues.

The petroleum industry in Australia has experienced significant changes over recent years, including the entry of the supermarkets, and the ACCC has been closely monitoring the effects that these developments are having on prices and the level of competition in the market.

4.4.7 *Container stevedoring monitoring*

The ACCC released its seventh container stevedoring report in November 2005 examining trends in

prices, costs and profits of the three major stevedoring companies, P&O Ports Pty Ltd, Patrick Stevedores Operations Pty Ltd, and CSX World Terminals Pty Ltd for the period of July 2004 to June 2005. The long-term downward trend in real unit total revenues and costs continued in 2004-05. Unit margins and profitability also fell marginally but remained high. Productivity appears to be levelling off, however there is some new investment in additional capacity and this may give rise to improved productivity and lower unit costs in future monitoring periods.

4.5 *Access to infrastructure facilities*

In 1995, the addition of Part IIIA to the *Trade Practices Act 1974* established a National Access Regime, including a mechanism for state and territory governments to submit access regimes for certification by the Australian Government under the National Access Regime. Under Part IIIA, declaration of a service of an infrastructure facility establishes a right for third parties to negotiate access to the service with recourse to arbitration before the ACCC on the terms and conditions of access. There are in some cases industry-specific access regimes in operation, including the telecommunications-specific access regime under Part XIC of the *Trade Practices Act 1974*.

4.5.1 *Natural gas pipelines*

National Competition Policy commitments on natural gas aim to remove all legislative and regulatory barriers to the free trade of gas, both within and across state boundaries and to provide for third party access to gas pipelines.

In the year 2004-2005, the ACCC released seven final decisions for access arrangements to four gas transmission pipelines, and also assessed annual ring fencing reports for compliance with the national gas code from 19 service providers, reflecting their interests in nine transmission pipelines. Since July 2005, the ACCC released one final decision for an access arrangement to a gas transmission pipeline. The ACCC is currently assessing annual ring fencing reports for compliance with the national gas code from 13 service providers, reflecting their interests in nine transmission pipelines.

4.5.2 *Electricity*

National Competition Policy commitments on electricity aim to facilitate trade across and within state boundaries, and provide for third party access to transmission and distribution infrastructure.

In 1998, the national electricity access code was approved by the ACCC as an industry access code, under Part IIIA of the *Trade Practices Act 1974*. There have been a number of subsequent amendments to the access code that have been accepted by the ACCC. All transmission and distribution network service providers operating in the national electricity market have submitted undertakings to the ACCC, specifying compliance with the access code.

Since 1 July 2005, regulation of transmission networks has been the responsibility of the Australian Energy Regulator. On 8 November 2005, the Australian Energy Regulator issued a draft decision on an application by Directlink to become a regulated transmission network service under the National Electricity Law regime.

4.5.3 Telecommunications

The ACCC issued a draft decision on unconditioned local loop services and line sharing services, rejecting Telstra's undertaking. Telstra has since lodged a fresh undertaking.

The Government has requested the ACCC provide a report on whether its current pricing approach for unconditioned local loop services places an unreasonable burden on the industry. The Government has also requested the ACCC to monitor the development of the unconditional local loop services market on an ongoing basis.

In September 2005, the ACCC released a final report into mobile international roaming. The report expressed concern that prices for international roaming services appear to be very high, with the wholesale charges set by overseas mobile network operators a factor. The report also found that the level of competition in the retail market for international roaming services appears to be improving.

The Federal Court rejected a challenge lodged by Vodafone to the ACCC's pricing principle determination for mobile terminating access services. Mobile terminating access services is used to allow consumers to call mobile users connected to another network. The carrier whose customer initiates the call pays the carrier whose customer receives the call for the mobile terminating access service

The ACCC has provided five interim determinations in mobile terminating access services arbitrations involving access being sought to Vodafone's network by AAPT, Hutchinson Telecommunications, Powertel and Primus. Similar determinations were made for access being sought to Optus' network by AAPT and Telstra.

The ACCC announced a draft decision rejecting the Optus access undertaking to supply its domestic GSM terminating access service on the grounds that the target price was 'substantially above cost'.

The ACCC has announced an inquiry to examine the future regulation of certain key fixed network and wholesale services. The inquiry will look at the broader question of whether regulation of certain fixed services is required, including what combination of services may still need to be regulated, having regard to emerging market, technological and network developments. A discussion paper has been released for comment.

4.5.4 Aviation

On 29 January 2004, the Parliamentary Secretary to the Treasurer of the Australian Government (the Minister) decided, under Part IIIA of the *Trade Practices Act 1974*, not to declare the airside services at Sydney Airport provided by Sydney Airports Corporation Limited in response to an application by Virgin Blue Airlines Pty Ltd. In making this decision, the Minister accepted the recommendation by the National Competition Council that relevant statutory criteria were not satisfied. On 18 February 2004, Virgin Blue applied to the Australian Competition Tribunal for a review of the Minister's decision. On 9 December 2005, the Tribunal handed down its decision to declare airside services at Sydney Airport under Part IIIA of the *Trade Practices Act 1974*. Sydney Airports Corporation Limited filed an application to the Federal Court for judicial review of the

Tribunal's decision on 6 January 2006. The matter will be heard during 2006.

4.5.5 Rail

On 15 June 2004, the Council received an application under Part IIIA of the *Trade Practices Act 1974* from Fortescue Metals Group Ltd for declaration of a service provided through the use of part of the Mount Newman railway line and part of the Goldsworthy railway line in the Pilbara, Western Australia. On 15 December 2004, the Council released a decision that the Mount Newman line service is capable of being considered further for declaration, while the Goldsworthy line service is not because it is part of a production process. A service that constitutes the use of a production process is exempt from declaration under Part IIIA of the *Trade Practices Act 1974*.

The Council released its draft recommendation on Fortescue Metals Group Ltd's application on 4 November 2005, recommending that the Mt Newman rail service be declared. After considering submissions on the draft, the Council will forward its final recommendation to the designated Australian Government Minister, who decides whether or not to declare the service. The Minister's decision is reviewable by the Australian Competition Tribunal.

4.6 Adjudication

The ACCC assesses the public benefit and detriment resulting from certain anti-competitive practices prohibited by the *Trade Practices Act 1974* through the adjudication process. The ACCC will authorise parties to engage in these practices where there is a net public benefit, providing immunity from legal proceedings under the *Trade Practices Act 1974*. A simpler process known as notification provides immunity for exclusive dealing conduct.

In addition, the ACCC assists the Australian Competition Tribunal in its consideration of applications for the review of adjudication decisions.

Adjudication decisions made by the ACCC in 2004-05 are shown in Table 2.

Table 2—Adjudication matters considered – gas, electricity, merger and other

	Authorisation applications	Minor variation applications	Revocation and substitution applications	Revocations of authorisations previously granted	Total
Opening balance	17 (33)	2 (4)	6 (14)	1 (12)	26 (63)
New applications	27 (60)	10 (18)	6 (8)	2 (2)	45 (88)
Applications withdrawn	2 (6)	0 (0)	0 (0)	0 (0)	2 (6)
Applications decided	27 (61)	10 (20)	5 (8)	3 (14)	45 (103)
Balance	15 (26)	2 (2)	7 (14)	0 (0)	24 (42)

Notes: Figures in brackets indicate total applications while figures without brackets indicate number of projects (i.e. some projects involve multiple applications).

The ACCC considered a number of authorisation applications including relating to:

- the Restated Joint Services Agreement between Qantas Airways and British Airways;
- a substitution of the broad immunity in place for the International Air Transport Association;
- a range of collective bargaining arrangements including with respect to: car importers and area service providers at a specified port; chicken growers and chicken meat processors in Victoria; milk vendors and milk processors in South Australia; vegetable growers and vegetable processors in Tasmania; and international airlines with airport operators. The ACCC continues to consider a number of applications relating to collective bargaining in the dairy industry;
- various levy arrangements including with respect to: clay brick and paver industry training; oyster grower research; and the collection of used chemical containers;
- queue management systems for coal export loading services at two ports;
- price caps for after hours medical services;
- a joint venture for the mining, processing and transport of iron ore in north-west Australia; and
- a joint venture shareholder agreement for the management and coordination of the supply chain for bulk grain from silos in Queensland, New South Wales and Victoria.