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for Those Regulated, It Also
Strengthens Enforcers—An ACCC
Perspective

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Australian Competition and Consumer
Commission

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I. INTRODUCTION

Now 40 years old, the Australian Competition and Consumer Commission (“the ACCC”)—with its various predecessors—is one of the mature competition agencies. It has established a strong reputation for effectiveness and independence. It has gained this position because it has become well known as a strong advocate for consumers and competition. It is known as a tenacious and pro-active competition and consumer enforcer that usually succeeds in its enforcement actions. It is also perceived as willing to use all its powers to achieve appropriate outcomes for consumers and promote fair competition. It has a reputation for handling merger decisions well and granting authorizations in an appropriate manner. Over the years it has delivered effectively within its significant regulatory responsibilities in communications, infrastructure, fuel, energy (through the Australian Energy Regulator), and rural water.

This article seeks to describe some of the steps that the ACCC takes to make its processes fair and transparent within the broader system and highlight the benefits that flow for both the broader community and the ACCC from it being more transparent.

II. PRIORITIES, METHODOLOGY, AND DECISION-MAKING FRAMEWORK

The ACCC exercises its powers as a competition, consumer, and regulatory agency in a transparent and accountable manner. Its approach to accountability spans the establishment of the ACCC, the appointment of Commissioners and staff, corporate planning, proper standards for investigative procedures, and public reporting of decisions and outcomes. Its commitment to accountability is supported by governance and management structures and both internal and government-wide systems and processes.

The accountability and transparency of the ACCC decision-making processes is supported by a number of internal and external processes. The ACCC accountability framework for investigations published in 2013 sets out the governance and management structures in place to ensure that the ACCC operates investigations in a transparent and accountable manner.²

Under Australian Government policy independent regulators such as the ACCC are provided with a statement of expectations that outlines the Government’s views about the role and responsibilities of the agency, its relationship with the Government, issues of transparency,

¹Marcus Bezzi is Executive General Manager Competition Enforcement at the ACCC and Nicholas Heys is Director, Enforcement Coordination—the views expressed in this article are those of the authors and should not be attributed to the ACCC.

² Available at <http://www.accc.gov.au/publications/the-acccs-accountability-framework-for-investigations>.

and accountability and operational matters.³ The ACCC has provided a Statement of Intent that responds to the Government's Statement of Expectations for the ACCC.⁴ While the Government acknowledges and respects the independence of the ACCC these statements recognize that the ACCC exists to deliver outcomes for the Australian public within the scope of the Government's broader policy agenda. It is beneficial for all concerned to have these understandings publicized.

Each year the ACCC conducts an extensive "strategic review" of the Australian scene with a view to determining its priorities for enforcement and compliance work in the following year. It consults extensively with representative bodies of consumers and businesses as well as industry ombudsman, other Australian and international regulators, and other relevant groups including its own staff; it extensively interrogates all accessible reliable complaints and intelligence data. All of the information gathered during the ACCC environmental scan is fed into a discussion between ACCC Commissioners and senior officers.

The revised priorities are determined in the first or second Commission meeting each year and then explained in a speech by the ACCC Chairman in February. The revised enforcement and compliance policy is published on the ACCC website.⁵ It is then discussed and used by many businesses and their in-house and external legal advisors to inform their compliance strategies.

The ACCC usually establishes project teams to work within the priority areas to achieve particular outcomes that will include improved compliance with the law by relevant businesses.

This approach means that the ACCC's active engagement with compliance in a particular area will not be a surprise to anyone. It also enables the ACCC to focus its resources on the issues that, after detailed consultation and review of the available evidence, are deemed to be the most important.

III. TRANSPARENCY AND ACCOUNTABILITY IN ENFORCEMENT DECISIONS

The ACCC operates in a largely prosecutorial model of enforcement. When seeking to enforce the law the ACCC must persuade the Court to find a contravention of the law on the basis of the evidence gathered by the ACCC; the accused or respondent then presents its own evidence in defense and can challenge the evidence presented by the ACCC.

Once a hearing commences litigation is almost always completely public. Exceptions can be made to protect highly sensitive confidential information. Decisions about whether a firm has engaged in cartel conduct, anticompetitive vertical restraints, abuse of dominance, or anticompetitive mergers fall within the jurisdiction of the Australian Federal Court.

Australia's constitution creates a separation of powers between the executive of which the ACCC is part and the judiciary of which the Federal Court is part. For this reason the ACCC

³ A copy of the document can be found on the ACCC website, *see* http://www.accc.gov.au/system/files/ACCC_Statement_of_expectations.pdf.

⁴ A copy of the document can be found on the ACCC website, *see* <http://www.accc.gov.au/system/files/ACCC%20Statement%20of%20Intent%20-%202026%20June%202014.pdf>.

⁵ Available at <http://www.accc.gov.au/system/files/ACCC%20Compliance%20and%20Enforcement%20Policy%202015.pdf>.

cannot make findings or determinations that a firm has engaged in anticompetitive conduct. Nor can the ACCC impose penalties or other remedies.

As part of an investigation into allegations the ACCC has a number of internal processes it follows. These procedures and processes are described in some detail on the ACCC website. In addition, aspects of these processes are made more transparent through detailed guidelines or policies. Examples include guidelines on the use of the section 155—coercive notice power and the ACCC policy on immunity and cooperation in cartels cases.

An investigation involves no formal finding that a party has engaged in anticompetitive conduct. Parties under investigation by the ACCC will become aware of the allegations as part of the investigative process. The ACCC's internal processes require various levels of engagement with the target of investigation. This engagement includes:

- Correspondence which sets out the allegations and invites the other party to respond;
- Issuing of formal notices to provide information or give evidence; and
- Meetings with the parties.

As part of an investigation the ACCC will assess the evidence and make a decision to take court action (or refer to the CDPP). The ACCC must prove on the balance of probabilities (in civil penalty cases) and beyond reasonable doubt (in criminal cases) before the Court makes a finding that a firm has engaged in anticompetitive conduct.

The adversarial court process involves disclosure of key information to the party alleged to have engaged in anticompetitive conduct. This includes a comprehensive statement of claim which sets out the allegations as well as disclosure of and access to evidence.

In some circumstance the parties do reach a settlement agreement. In these situations the Court must approve the agreement—this approval is not a mere rubber stamp and can be subject to change.

The Australian competition and consumer law framework does allow, where there is agreement between the parties, for matters to be settled administratively through the acceptance of an undertaking (or agreement) between the parties. Section 87B undertakings under the Australian framework are published in a public register and impose obligations on the parties for a set period of time, often five years.

IV. MERGERS—PROCESSES

The ACCC merger regime has been praised for its flexibility and rigor and assessed as “ticking along efficiently.” This, independent observers note, is despite recent reductions in resources (including a 12.5 percent drop in staff numbers). It has been noted that when it makes a merger decision it is keen to ensure that it can justify the decision.⁶

The ACCC operates an informal merger clearance process that enables parties that are planning a merger to seek the ACCC's view on whether a proposed acquisition is likely to have

⁶ Annual Global Ranking of Competition Regulators by *Global Competition Review* published 1 July 2015.

the effect of substantially lessening competition. There is no legislation underpinning the informal process; rather, it has developed over time so that merger parties can seek the ACCC's view before they complete a merger. The ACCC publishes both analytical merger guidelines and process guidelines to assist merger parties and the public to understand the ACCC's approach to assessing and conducting reviews.

When a merger is notified to the ACCC, or the ACCC becomes aware of a transaction by other means, it determines whether a public review is required. When the ACCC is satisfied that there is a low risk of a substantial lessening of competition, it may decide that a public review of the merger is unnecessary. These mergers are described as being "pre-assessed." A significant proportion of the mergers assessed are pre-assessments which enables the ACCC to respond quickly where there are no substantive competition concerns.

For mergers that undergo a public review, the ACCC maintains an online public register of mergers being considered that publishes indicative timelines for key stages for each review and indicative decision dates. As part of the process, the ACCC may release a Statement of Issues when it has come to a preliminary view that a proposed merger raises competition concerns that require a second-phase review.

At the conclusion of a public review, the ACCC will publish its decision and a summary of the reasons on the public register and, in most cases, will issue a press release. For certain categories of merger decisions, the ACCC will also publish a Public Competition Assessment, which is a detailed summary of a decision and the issues considered.

Ultimately if the ACCC opposes a merger and the parties proceed, the ACCC can apply to the courts for orders that may include injunction, divestiture, or penalties.

In addition to the informal review process, parties can apply to the ACCC for formal merger review⁷ and parties can also apply directly to the Australian Competition Tribunal for merger authorization on the basis that a merger results in public benefits that outweighs any anticompetitive effects.

V. ADJUDICATION

The ACCC's Adjudication function provides parties with a transparent way to manage the potential risk that conduct they wish to engage in may breach the competition provisions of the CCA but they nevertheless consider that they should be able to engage in that conduct because the public benefit outweighs the public detriment.

Parties are able to apply to the ACCC for authorization to engage in certain anticompetitive conduct, for example price-fixing, when there is an offsetting public benefit. The authorization process is transparent and the ACCC will test the public benefit and detriment claims made by an applicant with potentially interested parties.

Generally the authorization process must be completed within a six-month time frame, and includes the ACCC issuing and consulting on a draft decision before it makes a final determination that sets out the conduct the party is entitled to engage in. The ACCC is required

⁷ No applications for formal merger clearance have been made since this clearance option was legislated in 2007.

to keep a public register of all authorization applications. The public register is available on the ACCC's website and includes the status of the particular application, any submissions received from interested parties (subject to confidentiality claims), and the ACCC's draft and final decisions.

The authorization process involves:

- Inviting interested parties to make submissions;
- Conducting market inquiries;
- Receiving extensive information through submissions and market inquiries from interested parties;
- Issuing a draft determination setting out the reasons for why the ACCC may grant or dismiss the application;
- Inviting further submissions in response to the draft determination, including the opportunity to request pre-decision conferences with applicant interested parties; and
- Issuing a final determination.

Authorizations are granted for a set period of time, often three or five years. Parties must make a re-application if they wish to continue with the conduct beyond the set time period. Decisions to grant or dismiss an authorization are subject to a merits review in the Australian Competition Tribunal.

VI. ADDITIONAL TRANSPARENCY MECHANISMS

A. ACCC Accountability/Checks and Balances

As a government agency, the ACCC is held accountable through a number of non-court/tribunal forums. The separation of power between the legislative and executive forms of government provides the Commonwealth Parliament with mechanisms to scrutinize the actions taken by the ACCC. In addition there are other bodies, including the Commonwealth Ombudsman, that can, in limited circumstances, review the conduct and decisions of the ACCC.

The ACCC regularly publishes guidelines and reports about its activities. The publication of this material is complemented by regular meetings with businesses, industry associations, and the regular meetings of ACCC established Consultative Committees. The ACCC also publishes media statements at key decision points of investigations and projects.

The extensive publication of material has a dual purpose: (1) to promote transparency about decisions taken by the organization; and (2) to raise awareness of compliance obligations, including the education of businesses and consumers about their rights.

The ACCC must employ external lawyers to represent it in Court proceedings. The ACCC is also required to operate in accordance with a Ministerial Direction called the Legal Services Direction. Among other things it requires agencies such as the ACCC to act as a "model litigant." These features of the legal framework increase the objectivity of decisions to take and maintain legal action against a business or individual for contraventions of Australia's

competition law. Generally they improve the quality of the cases taken and contribute to the ACCC's record of successful court action.

Recently, the Australian Government introduced a new regulatory performance framework that seeks to further improve the accountability of agencies including the ACCC for their regulatory systems, action, and decisions.

In addition, under Australia's administrative law framework individuals can access certain information through freedom of information requests and there is administrative review or judicial review available of certain administrative decisions and other actions by the ACCC and its officers.

B. Use of Coercive Powers

The ACCC has access to various powers as part of its suite of investigative tools, including (i) search warrants, (ii) issuing notices to parties (s155) that require those parties to produce information and/or give evidence under oath, and (iii) gathering evidence using tools under other legislation including Telecommunication Intercepts.

The use of these powers is subject to review—either through the courts using judicial review or by the independent Commonwealth Ombudsman. The number of times these powers are used is published annually by the ACCC.

C. Improvements in Transparency

A recent review into Australia's competition law framework known as the Competition Policy Review or Harper Review has made a number of recommendations that seek to enhance the accountability of the ACCC and improve transparency around decisions.⁸ The ACCC accepts that improvements can be made. For example, the ACCC has welcomed recommendations that it publish detailed guidance on misuse of market power laws and develop a media code of conduct.⁹

What aids accountability and transparency in any dynamic regulatory system changes as circumstances change. The ACCC as a public institution recognizes the value of continuing to improve its transparency and accountability in order to enhance and maintain a strong reputation for fairly and effectively exercising the power conferred on it for the benefit of Australians.

⁸ Available at <http://competitionpolicyreview.gov.au/final-report/>.

⁹ See ACCC's submission on the Harper Review Final report, pp. 14, 15, 24.