COMPETITION POLICY REVIEW

Final Report

March 2015

Professor Ian Harper
Peter Anderson
Su McCluskey
Michael O'Bryan QC

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COMPETITION POLICY REVIEW

6 March 2015

The Hon. Bruce Billson MP
Minister for Small Business
Parliament House
Canberra ACT 2600

Dear Minister

Competition Policy Review Final Report

In accordance with the Terms of Reference, we are pleased to present the Final Report of the Competition Policy Review.

The Report presents a forward-looking package of reforms to Australia's competition policies, competition laws and competition institutions.

Reinvigorating competition will help to raise Australia's productivity levels and living standards and meet the economic challenges and opportunities we face now and into the future.

The Final Report's 56 recommendations are intended to complement each other. Implementing them will involve all levels of government working together to achieve common national objectives.

In making these recommendations, the Panel has drawn heavily on the expertise and experience of stakeholders garnered through submissions and in consultation meetings.

Nevertheless, the views expressed in this Final Report are our own, and we commend its recommendations to you.

Yours sincerely

Ian Harper
Chair

Peter Anderson
Member

Su McCluskey
Member

Michael O'Bryan QC
Member

Competition Policy Review
Langton Crescent, Parkes ACT 2600 Australia
Phone: 02 6263 2177 | Fax: 6263 2677
contact@competitionpolicyreview.gov.au
www.competitionpolicyreview.gov.au

MESSAGE FROM THE PANEL

This is our Final Report reviewing Australia's competition policy, laws and institutions.

The Panel undertook a stocktake of the competition policy framework across the Australian economy. Although reforms introduced following the Hilmer Review led to significant improvements in economic growth and wellbeing, the Panel believes that renewed policy effort is required to support growth and wellbeing now and into the future. To this end, we have reviewed Australia's competition policy, laws and institutions to assess their fitness for purpose.

Taken together, our recommendations comprise an agenda of reinvigorated microeconomic reform that will require sustained effort from all jurisdictions. We believe this commitment is necessary if Australia is to boost productivity, secure fiscal sustainability and position our economy to meet the challenges and opportunities of a rapidly changing world.

Given the forces for change already bearing on the Australian economy, delaying policy action will make reform more difficult and more sharply felt. An early response will make the reform effort more manageable over time, allowing Australians to enjoy higher living standards sooner rather than later.

The recommendations and views expressed in this Final Report draw upon the expertise and experience of each member of the Panel. Importantly, we have also had the benefit of hearing from a wide cross-section of the Australian community and from participants in all sectors of the economy.

To support this consultation, the Panel released an Issues Paper on 14 April 2014 and a Draft Report on 22 September 2014.

We met with groups representing consumers and those representing business, both large and small. We also met with a variety of individual business people, academics, current and former regulators, and governments, including a number of state and territory Treasurers. During May and June 2014, Panel members attended business forums around the country organised by representative business groups and, during October and November 2014, the Panel hosted public forums to discuss the Draft Report.

The Panel also held a series of workshops during the preparation of the Draft Report and the Final Report to discuss particular issues with subject matter experts. Further, on 23 and 24 October 2014, we convened a conference featuring international and Australian speakers, and including a series of workshops. This conference enabled Panel members to hear a wide range of views on our draft recommendations.

We received almost 350 submissions in response to the Issues Paper and around 600 submissions to the Draft Report. All non-confidential submissions are published on our website www.competitionpolicyreview.gov.au.[1] Around 40 per cent of submissions came from peak and advocacy bodies, around 30 per cent from individuals, around 25 per cent from business, and the remainder from governments. A wide variety of topics was identified, with the top five issues raised most often in submissions to our Draft Report being misuse of market power, retail trading hours, road transport, planning and zoning, and supermarkets.

1 In this Report, references to Issues Paper submissions are in the form (sub, page xx) while references to Draft Report submissions are in the form (DR sub, page xx).

We are aware of other reviews currently in train that are likely to cover sector-specific aspects of competition policy, such as the Energy White Paper, the Review of Coastal Trading and the Agricultural Competitiveness White Paper. We also note the Final Report of the Financial System Inquiry released in December 2014, which included a number of recommendations and findings regarding competition in the financial system, and the Review of the National Broadband Network released in several tranches throughout 2014, which made recommendations and findings regarding telecommunications infrastructure and markets.

The Australian Government has also commenced a Federation White Paper, asked the Productivity Commission to examine the performance of the workplace relations framework and foreshadowed a Tax White Paper. Although the Panel has not made detailed recommendations in these areas, in some cases we have encouraged these reviews to take account of competition issues.

Importantly, the recommendations in this Final Report form a significant contribution to the overall reform agenda offered by this set of reviews.

ACKNOWLEDGEMENTS

The Panel would like to thank everyone who put so much time and effort into providing written submissions and participating in public forums. These contributions provided us with crucial insights into the issues we were asked to consider.

The Panel would also like to thank all those who participated in our targeted policy workshops and particularly the speakers who generously gave their time to present at our international conference:

Professor Gary Banks AO, Professor Caron Beaton-Wells, Professor Bruce Chapman, John Fingleton, Professor Quentin Grafton, Professor George Hay, Associate Professor Deborah Healey, Professor Julian Le Grand, Mary Ann O'Loughlin AM, Michael O'Neill, Professor Graeme Samuel AC, Paul Schoff, Professor Gary Sturgess AM, Kerrin Vautier CMG and Luke Woodward.

We would also particularly like to thank Christopher Jose for expert legal advice.

Finally, the Panel wishes to acknowledge outstanding professional support provided by all members of the Secretariat:

Christine Barron (Secretary), Julie Abramson, Janine Bialecki, Melissa Bray, Russ Campbell, Kevin Cosgriff, Richard Fleming, Geoff Francis, Carol Gisz, Andrew Hunt, David Jones, Rosalie McLachlan, Chris McLennan, Scott Rogers, George Steel and Geoff Whelan.

COMPETITION POLICY REVIEW PANEL

Professor Ian Harper (Chair)

Professor Ian Harper is a Partner at Deloitte Touche Tohmatsu and Professor Emeritus of the University of Melbourne. Professor Harper is an economist whose experience spans academia, government and advising business. He was a member of the 1996-97 Financial System Inquiry (the Wallis Inquiry) and between 2005 and 2009 was inaugural Chairman of the Australian Fair Pay Commission.

Mr Peter Anderson

Mr Peter Anderson is a national business leader and public policy specialist in national and international affairs. He is also a former legal practitioner and educator to small businesses, as well as a senior advisor to governments, including on trade practices. He has experience as a delegate to the International Chamber of Commerce, the Organisation for Economic Co-operation and Development, the International Organisation of Employers and in regional business forums. Mr Anderson recently stepped down from the position of Chief Executive of the Australian Chamber of Commerce and Industry.

Ms Su McCluskey

Ms Su McCluskey is the Chief Executive Officer of the Regional Australia Institute. Ms McCluskey's experience spans senior public sector roles, including Executive Director of the Office of Best Practice Regulation, Consultant Specialist Advisor to the Office of Small Business at the (then) Department of Industry, Tourism and Resources and Assistant Commissioner for Tax Reform — Business Education and Communication at the Australian Taxation Office. Ms McCluskey has significant private sector experience and was Director of Tax and Trade Policy at the Business Council of Australia and General Manager of Policy for the National Farmers' Federation. She is also a beef cattle farmer.

Mr Michael O'Bryan QC

Mr Michael O'Bryan is a Queen's Counsel at the Victorian Bar. Mr O'Bryan has practised extensively in the area of competition law, previously as a partner of the law firm Minter Ellison and currently as a barrister. Mr O'Bryan is a member and past chairman of the Competition and Consumer Committee of the Law Council of Australia.

Left to right: Michael O'Bryan QC, Su McCluskey, Professor Ian Harper (Chair of the Review), Peter Anderson.

ABBREVIATIONS

ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ACCP	Australian Council for Competition Policy (proposed body)
ACL	Australian Consumer Law
ACTU	Australian Council of Trade Unions
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
AIPPI	International Association for the Protection of Intellectual Property
ALRC	Australian Law Reform Commission
APR	Access and Pricing Regulator (proposed body)
ARTC	Australian Rail Track Corporation
BCA	Business Council of Australia
BITRE	Bureau of Infrastructure, Transport and Regional Economics
CCA	*Competition and Consumer Act 2010*
CDPP	Commonwealth Director of Public Prosecutions
CFMEU	Construction, Forestry, Mining and Energy Union
COAG	Council of Australian Governments
CPA	Competition Principles Agreement
CSO	community service obligation
EU	European Union
FSI	Financial System Inquiry
GDP	gross domestic product
IP	intellectual property
IPART	Independent Pricing and Regulatory Tribunal (NSW)
NAPLAN	National Assessment Program — Literacy and Numeracy
NBN	National Broadband Network
NCC	National Competition Council
NCP	National Competition Policy
NDIS	National Disability Insurance Scheme
NDIA	National Disability Insurance Agency
NECF	National Energy Customer Framework
NEM	National Electricity Market
NGO	non-government organisation

NHS	National Health Service (UK)
OECD	Organisation for Economic Co-operation and Development
PBS	Pharmaceutical Benefits Scheme
PC	Productivity Commission
PPP	public-private partnership
RPM	resale price maintenance
SME	small and medium enterprises
TPA	*Trade Practices Act 1974*
TFEU	Treaty on the Functioning of the European Union
Tribunal	Australian Competition Tribunal
UK	United Kingdom
US	United States

EXECUTIVE SUMMARY

Australia has enjoyed continuous economic growth since the early 1990s and weathered the global financial crisis of the late 2000s without a recession. This performance has led some to question whether there is a 'burning platform' for a new round of microeconomic reform.

Evidence presented to the Panel throughout the Review suggests that reform is not only overdue, given stalled reform effort in the 2000s, but critical to improving Australia's productivity performance and to sustaining our living standards into the future.

With Australia's terms of trade receding from their peak and the boom in mining investment past, we must look to productivity-enhancing reforms to underpin rising living standards and to strengthen Australia's fiscal outlook.

Reinvigorating Australia's competition landscape is a central element of a new round of microeconomic reform. To this end, the Panel examines whether Australia's existing competition policy, laws and institutions remain 'fit for purpose', especially in light of the persistent forces for change that will shape the Australian economy now and into the future.

The **rise of Asia and other emerging economies** provides significant opportunities for Australian businesses and consumers but also poses some challenges. A heightened capacity for agility and innovation will be needed to match changing tastes and preferences in emerging economies with our capacity to deliver commodities, goods, services and capital. We need policies, laws and institutions that enable us to take full advantage of the opportunities offered.

Our **ageing population** will give rise to a wider array of needs and preferences among older Australians and their families. Extending choice and contestability in government provision of human services will help people to meet their individual health and aged care needs.

New technologies are 'digitally disrupting' the way many markets operate, the way business is done and the way consumers engage with markets. The challenge for policymakers and regulators is to capture the benefits of digital disruption by ensuring that competition policy, laws and institutions do not unduly obstruct its impact yet still preserve expected safeguards for consumers.

COMPETITION POLICY

Competition policy is aimed at improving the economic welfare of Australians. It is about meeting their needs and preferences by making markets work properly.

In the Panel's view, competition policy should:

- make markets work in the long-term interests of consumers;
- foster diversity, choice and responsiveness in government services;
- encourage innovation, entrepreneurship and the entry of new players;
- promote efficient investment in and use of infrastructure and natural resources;
- establish competition laws and regulations that are clear, predictable and reliable; and
- secure necessary standards of access and equity.

Important unfinished business remains from the original National Competition Policy (NCP) agenda, and new areas have arisen where competition policy ought to apply.

Australia's ageing population will impose greater demands on health and aged care services. Establishing choice and contestability in government provision of human services can improve services for those who most need them. If managed well, this can both empower service users and improve productivity at the same time.

In the area of **human services**, the Panel recommends that:

- user choice should be placed at the heart of service delivery;
- governments should retain a stewardship function, separating the interests of policy (including funding), regulation and service delivery;
- governments commissioning human services should do so carefully, with a clear focus on outcomes;
- a diversity of providers should be encouraged, while taking care not to crowd out community and volunteer services; and
- innovation in service provision should be stimulated, while ensuring minimum standards of quality and access in human services.

In the area of **infrastructure**, the Panel recommends reforming road transport by introducing cost-reflective road pricing in a revenue-neutral way and linked to road construction, maintenance and safety so that road investment decisions are more responsive to the needs and preferences of road users.

Reforms begun in electricity and gas need to be finalised and water reform needs to be reinvigorated.

Anti-competitive regulations remain in place despite significant progress made under NCP. The Panel recommends removing regulations governing retail trading hours and parallel imports, and removing pharmacy location and ownership rules. The Panel also recommends repealing Part X of the *Competition and Consumer Act 2010* (CCA), which exempts liner shipping from the competition laws, and reducing restrictions on sea and air cabotage. The Panel recommends that other regulations restricting competition be reviewed by each jurisdiction, with particular priority given to regulations covering planning and zoning, taxis and ride-sharing, and product standards.

Australia's **intellectual property** regime is a priority for review. The Panel also recommends that the current exception to competition law for conditions of intellectual property licences in the CCA be repealed.

Competitive neutrality remains a matter of concern for many stakeholders, including small businesses. The Panel recommends that competitive neutrality policies be reviewed and updated against best practice and that complaint-handling processes and monitoring be improved.

Government procurement guidelines and decisions can significantly affect the range of goods and services available to consumers. Procurement can also shape the structure and functioning of competition in markets. The Panel recommends that promoting competition should be a central feature of government procurement and privatisation frameworks and processes.

The Panel believes that markets work best when consumers are informed and engaged, empowering them to make good decisions. The Panel sees scope for enhancing Australian consumers' access to data to better inform their decisions.

COMPETITION LAWS

In guiding our consideration of whether Australia's competition laws are fit for purpose, the Panel asked four questions:

- Does the law focus on enhancing consumer wellbeing over the long term?
- Does the law protect competition rather than individual competitors?
- Does the law strike the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship?
- Is the law as clear, simple and predictable as it can be?

Although the Panel considers that our competition laws have served Australia well, the Final Report recommends specific reforms to enhance their effectiveness.

The Panel finds that **section 46**, dealing with the misuse of market power, is deficient in its current form. It does not usefully distinguish pro-competitive from anti-competitive conduct. Its sole focus on 'purpose' is misdirected as a matter of policy and out of step with international approaches.

Section 46 should instead prohibit conduct by firms with substantial market power that has the purpose, effect or likely effect of substantially lessening competition, consistent with other prohibitions in the competition law. It should direct the court to weigh the pro-competitive and anti-competitive impact of the conduct.

The Panel recommends a number of changes to simplify and clarify the operation of the law, to bring to the forefront the competition policy objectives of the law and to reduce business compliance costs. The cartel provisions should be simplified. The price signalling provisions should be removed and replaced, by extending **section 45** governing contracts, arrangements and understandings that affect competition to also cover concerted practices that have the purpose, effect or likely effect of substantially lessening competition.

Further, the prohibition on exclusive dealing in **section 47** should be repealed. Secondary boycott provisions should be retained and effectively enforced. Trading restrictions in awards and enterprise agreements (except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees) should be prohibited by the CCA. Merger approval processes should be streamlined.

The Panel also recommends changes to other approval processes, both authorisation and notification, and introducing a block exemption power for the Australian Competition and Consumer Commission (ACCC), to reduce costs for business, especially small business.

Collective bargaining and collective boycott arrangements should be made more flexible and easier for small business to use. The ACCC should be proactive in assisting small businesses to seek other forms of redress when it decides not to pursue a case on their behalf.

Appendix A to this Report contains model legislative provisions reflecting many of the Panel's recommendations for reforms to the CCA.

COMPETITION INSTITUTIONS

In assessing Australia's competition institutions — their current performance and preparedness for the future — the Panel has identified a gap in Australia's competition framework. To fill this gap, Australia needs an institution whose remit encompasses advocating for competition policy reform and overseeing its implementation. This includes reforms agreed following this Review as well as future reforms.

The Panel recommends replacing the National Competition Council (NCC) with a new national competition body, the **Australian Council for Competition Policy** (ACCP). This should be an independent entity and truly 'national' in scope, established and funded under a co-operative legislative scheme involving the Commonwealth, States and Territories.

Where competition reforms result in disproportionate effects across jurisdictions, competition policy payments should be made to ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform. The ACCP would be responsible for administering payments, based on actual reform implementation.

This new body would be an advocate and educator in competition policy. It would have the power to undertake market studies at the request of any government. It could also consider requests from market participants to either recommend changes to anti-competitive regulations to relevant governments or refer breaches of the law to the ACCC for investigation.

The Panel recommends that, while the ACCC retain both competition and consumer functions, a separate access and pricing regulator be established with responsibility for existing regulatory functions undertaken by the NCC and the ACCC. These regulatory functions would include all those currently performed by the Australian Energy Regulator (AER) but exclude relevant consumer protection and competition functions, which would remain with the ACCC.

The Panel considers that, although the ACCC is a well-regarded and effective body, its performance would be strengthened by including a more diverse range of views and experience at the Commission level. This can be achieved by introducing part-time Commissioners whose commitments beyond the ACCC would broaden the Commission's perspective, and whose part-time status would make them more independent from the day-to-day management of ACCC business.

The Panel also recommends that Commissioners no longer be designated with specific responsibilities, for example, for small business or consumer protection, but that the Commission as a whole be required to have regard to all sectors and interests.

SMALL BUSINESS

The Panel has been especially mindful of the concerns and interests of small business in the context of the Review. Accordingly, this Report contains a number of recommendations relevant for small business.

Recommended changes to strengthen the misuse of market power provision are intended to improve its clarity, force and effectiveness so that it can be used to prevent unilateral conduct that substantially harms competition.

The Panel believes that small business needs greater assurance that competition complaints can be dealt with. The ACCC can play an important role in connecting small business to alternative dispute

resolution services. Developing industry codes with practical and effective dispute resolution processes can also help to ensure that small business has access to justice.

The Panel recommends that the CCA should be reformed to introduce greater flexibility into the notification process for collective bargaining by small business. Improved understanding of the collective bargaining and collective boycott provisions can also promote their use and potentially strengthen the bargaining position of small business in dealing with large business.

Other recommendations to reform competitive neutrality policy and review regulatory restrictions, including standards, occupational licensing, and planning and zoning rules can enable small business to compete more effectively.

RETAIL MARKETS

Competition in retail markets has been an important focus for the Review, including competition in grocery and fuel retailing, regulations on planning, zoning and trading hours, and specific regulations such as those affecting pharmacy and liquor retailing.

The Panel recommends a number of changes that will apply to retail markets to promote competition and benefit consumers.

IMPLEMENTATION

The reform agenda laid out in this Final Report is ambitious, with recommendations to all levels of government. Accordingly, the Report provides a 'road map' for implementation (see Section 29.3). The Panel recognises that individual jurisdictions are already progressing competition policy matters and considers that this Review will add momentum.

A number of the Panel's recommendations can be implemented by jurisdictions independently of each other and may even benefit from a diversity of approaches. To this end, the road map identifies recommendations that can be adopted by governments individually. Nonetheless, the Panel considers that co-operation and collaboration across jurisdictions generally leads to better outcomes.

GUIDE TO THE REPORT

In Part 1 of this Report, the Panel makes the case for reform and spells out the **context** for the Review, including the main challenges and opportunities facing Australia.

Part 2 brings together the Panel's analysis into a set of **recommendations** to reform competition policy, laws and institutions. Competition policy reforms are set out in order of priority so that those with the greatest potential benefit to Australians are identified first.

Recommended changes to competition laws are set out in the order that the provisions appear in the *Competition and Consumer Act 2010* (CCA).

Recommendations on institutions and governance, small business and retail markets are grouped together, and there is a summary of the Panel's views on implementing the recommendations.

Parts 3, 4 and 5 analyse competition policy, laws and institutions in greater depth. The recommendations have been reproduced in these parts but not always in the same order as they appear in Part 2.

Part 3 explores the **competition policy** landscape, beginning with the principles underpinning the original National Competition Policy (NCP) framework and asking whether revisions or extensions are needed in light of the different forces now bearing on the Australian economy. Discussion then turns to a suite of specific issues related to competition policy, including unfinished business from the original NCP reform agenda and new horizons for competition policy.

Part 4 explores Australia's **competition laws** in detail, beginning with general issues, before moving to unilateral conduct, anti-competitive agreements, secondary boycotts and employment-related matters, exemption processes, enforcement and finally the National Access Regime. Part 4 examines areas some observers claim are deficient and considers whether the laws remain fit for purpose in a changing business environment.

Part 5 assesses Australia's **competition institutions**, including the competition regulators, examining their current capabilities and preparedness for the future.

Finally, Part 6 provides a road map to guide **implementation** of the proposed reforms as well as identifying their potential benefits.

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PART 1 — OVERVIEW

1 CONTEXT FOR THE REVIEW

Competition policy, like other arms of government policy, is aimed at securing the welfare of Australians. Broadly speaking, it covers government policies, laws and regulatory institutions whose purpose is to make the market economy better serve the long-term interests of Australian consumers. Properly applied, it can improve the quality and range of goods and services, including social services, available to Australians.

Strengthening the competitiveness of enterprises is a necessary national economic challenge. However, competition policy concerns the competitiveness of markets as a whole, not individual enterprises. Nonetheless, the disciplines of a competitive market compel efficiencies in business conduct, which in turn contributes to the productivity and competitiveness of enterprises.

Policies that strengthen our competition landscape are crucial for Australia as a small, open economy, exposed to competitive forces that originate beyond our borders. Australia's economic development has been propelled by exposure to opportunities elsewhere in the world, with Australian living standards reflecting the beneficial impact of international trade in goods and services — both exports and imports.

Exposure to markets beyond Australia widens choice and opportunities, helping to ensure that Australia remains an attractive place to live, work, raise a family and run a business.

During the 1980s and 1990s successive governments opened the Australian economy to greater competition by lowering import tariffs, deregulating markets for foreign exchange, admitting foreign banks, deregulating domestic aviation and partially deregulating and reforming the waterfront, coastal shipping and telecommunications (see Box 1.1). These initiatives widened consumer choices, lowered prices and exposed local producers to more intense competition from abroad.

Box 1.1: Deepening Australia's integration with the world

The 1980s heralded a new era for Australia, with reforms aimed at integrating the Australian economy more closely with the world economy. Major components of that agenda included trade liberalisation, capital market liberalisation and deregulation of traded services.

Trade liberalisation — reductions in tariff assistance (begun in 1973) and the abolition of quantitative import controls — mainly in the automotive, whitegoods and textile, clothing and footwear industries — gathered pace from the mid-1980s. The effective rate of assistance to manufacturing fell from around 35 per cent in the early 1970s to 5 per cent by 2000.[2]

Capital markets — the Australian dollar was floated in December 1983, foreign exchange controls and capital rationing (through quantitative lending controls) were removed progressively from the early 1980s and foreign-owned banks were allowed to compete — initially for corporate customers and then, in the 1990s, to act as deposit-taking institutions.[3]

From the late 1980s, other changes also occurred in infrastructure, such as the partial deregulation and restructuring of airlines, coastal shipping, telecommunications and the waterfront.

In the 1990s, the competition agenda broadened to include goods and services not typically exposed to foreign competition, like electricity, telecommunications services and rail freight. Many of these were supplied locally by public monopolies or government departments.

In 1995, Commonwealth, state and territory governments agreed to implement a wide-ranging National Competition Policy (NCP) built on the recommendations of the Hilmer Review (see Box 1.2). The NCP reflected a desire to build on the momentum of earlier reforms by extending the reach of choice and competition beyond tradeables to encompass non-tradeable goods and services.

This was not an exercise in driving competition further into the Australian economy for its own sake, but for the longer-term benefits that would flow for Australian living standards.

These expectations were realised. In 2005 the Productivity Commission (PC) estimated that productivity improvements and price reductions flowing from the NCP and related reforms in the 1990s raised Australia's gross domestic product (GDP) by 2.5 per cent.[4]

2 Banks, G 2005, *Structural Reform Australian-Style: Lessons for Others?*, Presentation to the IMF, World Bank and OECD.

3 Ibid.

4 Productivity Commission 2005, *Review of National Competition Policy Reforms*, Report No. 33, Canberra, page XVIII.

Box 1.2: National Competition Policy

In 1995 Australian governments committed to a set of agreements under the NCP, which:

- extended the *Trade Practices Act 1974* (TPA) to previously excluded businesses (unincorporated businesses and state, territory and local government businesses);
- established independent price oversight of state and territory government businesses;
- corporatised and applied competitive neutrality principles so that government businesses did not enjoy a net competitive advantage as a result of public sector ownership;
- structurally reformed public monopolies to separate out industry regulation and, where possible, further disaggregated potentially competitive parts of the monopoly;
- established a third-party access regime for significant bottleneck infrastructure;
- reviewed all legislation restricting competition;
- applied the competition agreements to local government;
- established the National Competition Council (NCC);
- imposed conditions on governments seeking to exempt conduct from the competition law; and
- provided financial assistance to the States and Territories conditional on progress implementing the NCP.

The impact of the NCP reforms is evident, not just in economic statistics, but in everyday experience. For example, prior to the NCP reforms:

- consumers had no choice of electricity or gas provider — they paid regulated tariffs and customer service was poor or non-existent;
- telecommunications services operated as a monopoly, which only ended in 1992 when Australia's second telecommunications provider, Optus, entered the market;
- there were price controls and supply restrictions on food products such as eggs, poultry, milk, rice, and sugar;
- retail trading hours were restricted for most stores, with limited trading on weekends; and
- only lawyers could offer land conveyancing services (conveyancing fees fell by 17 per cent in New South Wales when this regulation was repealed, leading to an annual saving to consumers of at least $86 million).[5]

By contrast, most Australians today can choose among competing providers of gas and electricity services, and they can complain to their energy ombudsman if they are unhappy with the service rendered.

Retail trading hours have been substantially deregulated in most States and Territories. Online shopping allows consumers access, choice and convenience at any time of the day or night. Australia

5 National Competition Council 1999, *National Competition Policy: Some impacts on society and the economy*, Melbourne, page 9.

has more mobile phones than people,[6] and consumers can choose among a vast array of phone plans from a variety of telecommunications providers.

These developments highlight how competition underpins so many aspects of Australia's economy. Its importance in Australia's financial system was recently recognised in the Final Report of the Financial System Inquiry (see Box 1.3).

Box 1.3: Competition in Australia's financial system

On 20 December 2013 the Treasurer, the Hon. Joe Hockey MP, released final terms of reference and appointed an independent committee to undertake a Financial System Inquiry (FSI), chaired by Mr David Murray AO. The FSI was charged with examining how the financial system could be positioned to best meet Australia's evolving needs and support Australia's economic growth. The Final Report of the FSI was released on 7 December 2014.

The FSI considered that competition and competitive markets 'are at the heart of the Inquiry's philosophy for the financial system … [and] … the primary means of supporting the system's efficiency'.[7] The FSI found that:

- competition in Australia's financial system is generally adequate at present, but there is complacency about the level of competition that exists;
- high concentration and increasing vertical integration within some parts of the Australian financial system have the potential to limit the benefits of competition in future;
- a number of specific improvements could be made in particular areas, including the capital adequacy of authorised deposit-taking institutions, superannuation, regulation of the payments system and in relation to new technology; and
- all regulators involved in the financial system should more clearly explain how they have considered the effect of their decisions on competition, and the Australian Securities and Investments Commission's (ASIC's) mandate should explicitly include consideration of competition.

The Australian Government has announced that it will respond to the FSI's recommendations in 2015, after consulting with industry and consumers. This consultation process will end on 31 March 2015.[8]

Reinvigorating microeconomic reform

Australia has enjoyed continuous economic growth since the early 1990s and weathered the global financial crisis of the late 2000s without a recession. During the Panel's consultations, this backdrop led some stakeholders to question whether there was a 'burning platform' for a new round of microeconomic reform.

Evidence presented to the Panel throughout the Review suggests that reform is not only overdue, given stalled reform effort in the 2000s, but critical to improving Australia's productivity performance and to sustaining our living standards into the future.

6 Australian Communications and Media Authority 2014, *Communications report 2013–14,* Melbourne, page 17.

7 Australian Government 2014, *Financial System Inquiry Final Report*, Canberra, page xvi.

8 Hockey, J (Treasurer) 2014, *Release of the Financial System Inquiry Report*, media release 7 December 2014, Canberra.

In the 1990s, Australia benefited from strong productivity growth, reflecting the competition-enhancing reforms undertaken in the 1980s and 1990s. As the Organisation for Economic Co-operation and Development (OECD) 2010 regulatory review of Australia noted:

> Increased exposure to international trade during the 1980s and the product market liberalisation conducted in the 1990s under the National Competition Policy (NCP) framework reduced barriers to entry, and increased competition in the Australian economy. This contributed to an impressive surge in productivity in the 1990s ...[9]

In the 2000s, the driver of Australia's rising living standards changed, as a surge in our terms of trade and a boom in mining investment took over from productivity growth. In fact, multifactor productivity growth (a measure of output produced per unit of combined inputs of labour and capital) deteriorated markedly during this time.[10] Much of this deterioration coincided with a stalling in Australia's microeconomic reform effort.

Now that Australia's terms of trade are receding from their peak and the boom in mining investment is past, as a matter of urgency we must look once again to productivity growth to underpin rising living standards.

The case for further microeconomic reform, and particularly competition policy reform is clear.

Looking ahead, structural change in the Australian economy will continue to subdue average rates of growth in productivity. Productivity growth is lower in service sectors, such as aged care and health, which are expected to expand, while sectors with higher productivity growth, such as financial services, are expected to decline as a share of the economy.[11]

Without reform to improve the productivity of our large and growing services industries, Australia's economy will face increasing challenges, affecting not only the choices of our citizens in their everyday activities, but also the state of our public finances. Providing the services that users want, and delivering them in the way they want, are important elements of making government-funded services sustainable.

Australia must reform its economy, not only to deal with the productivity challenge at home but also to take advantage of global developments, to sustain Australia's capacity to secure rising levels of prosperity.

The industrialisation of developing nations and, in particular, the rise of Asia and the growing Asian middle class offer Australia important growth opportunities. Yet, as outlined below, Australia cannot assume that the rise of Asia will be an uncontested opportunity.

Notwithstanding the economic imperatives, it takes time to implement reforms and for their effects to materialise. The NCP reforms took many years to be agreed and implemented across jurisdictions before the real benefits were fully exploited and our standard of living was materially improved.

A new microeconomic reform agenda will inevitably take time to be formulated, agreed and then implemented. Given the forces for change that Australia already faces, any delay will only make

9 OECD 2010, *OECD Reviews of Regulatory Reform: Australia 2010*, Paris, page 14.

10 Parkinson, M 2014, Fiscal sustainability & living standards — the decade ahead, Speech to the Sydney Institute, Sydney, 2 April.

11 Parkinson, M 2014, *Challenges and opportunities for Australia over the next decade*, Speech to the Association of Mining and Exploration Companies, Perth, 2 July.

reform more difficult, and more sharply felt. Early action will make the reform effort more manageable, allowing Australians to enjoy higher living standards sooner rather than later.

A ROLE FOR COMPETITION POLICY REFORM

As previously noted, competition policy reform is vital to achieving the productivity improvements necessary for higher incomes and jobs growth, most especially by making goods and services markets more competitive. More competitive markets maximise our capacity to adjust rapidly to changing circumstances, arising from both global and domestic sources. Strong competition in goods and services markets encourages innovation, growth in productivity and average income levels, and ultimately the number and quality of Australian jobs.

More competitive markets also improve our quality of life by delivering greater variety and more freedom in our everyday choices. Having more choices open to us, along with greater capacity to exercise informed choice, improves our lives, individually as well as communally. Competition and choice also help to ensure that our economy is agile, flexible and robust to future challenges and opportunities.

Reform is vital as the Australian economy is beset by ongoing forces for change. Some of these forces are long-standing, but others were barely envisaged at the time of the Hilmer Review. For example, online digital technologies were in their infancy in the early 1990s, and were only widely adopted from the mid-1990s onwards.

The rise of China was anticipated, following the economic reforms of Deng Xiaoping, but not really established until well into the 1990s. The effect of Australia's ageing population was again anticipated but has only begun to bite economically as the 'Baby Boom' generation retires from the workforce.

The Australian Government has established the Competition Policy Review to consider how well Australia's competition policy, laws and institutions are travelling two decades on from the Hilmer Review. In particular, to ask how appropriate are current competition policy settings for the challenges that face us now rather than 20 years ago?

Three major forces for change relevant to this Review stand out as influencing the Australian economy now and into the foreseeable future, the:

- industrialisation of developing nations and, in particular, the rise of Asia and the growing Asian middle class;
- ageing of the Australian population and falling workforce participation; and
- diffusion of digital technologies, with their potential to disrupt established patterns of economic activity.

DEVELOPING NATIONS AND THE RISE OF ASIA

The re-emergence of China and India as global economic superpowers is driving fundamental structural change in the global economy. The size and pace of growth in these populous economies is shifting the pattern of world economic growth, favouring suppliers of raw materials and energy commodities like Australia.

However, the global shifts are not confined to the Asian region. Many emerging economies in Europe, Africa and Latin America also supply raw materials and energy in direct competition to

Australia. As the OECD notes, the global economic balance will continue to shift towards current non-OECD areas, including many emerging economies, whose economic structure and export profile will increasingly match those of the OECD countries.

The OECD also notes that, to respond to these shifts over time:

> Further reforms to inject dynamism in labour and product markets, combined with re-designed intellectual property right policies, will be needed to sustain innovation, productivity and employment.[12]

This message resonates for Australia in many ways, since we cannot assume that the rise of Asia will remain an uncontested opportunity. As we try to secure the benefits of this shift in global economic activity, we will face challenges from other nations.

To date, our supply of raw materials and energy has sustained high levels of income growth for Australia. Although their contribution to growth will moderate, exports of commodities to Asia will very likely remain strong for years to come. Moreover, the rise of the Asian middle class will present new opportunities for Australia, especially in traded services such as education, health and financial services.

The enormous growth in Asian consumption is expected to sustain high levels of infrastructure investment, increase consumer demand, and enhance Asia's economic sophistication and global integration. This represents a substantial and broad export opportunity for Australian suppliers of commodities, goods, services and capital.

The benefits of these economic opportunities should reflect in the living standards of everyday Australians. A wider array of products and services to choose from, supplied from a variety of sources, at prices kept low by competition — domestically and from abroad — will be enjoyed widely within the Australian community.

However, the rise of Asia and other emerging economies puts new pressure and expectations on Australia's domestic systems that were built for a particular economic landscape and at a particular time.

AGEING

Australia's population is ageing. The number of Australians aged 75 years and over is projected to increase by around four million between 2012 and 2060 — an increase roughly equivalent to the current population of Sydney.[13] Population ageing will lower expected income growth. As the Baby Boom generation retires, the number of working age people relative to those over the age of 65 will fall.

Population ageing will substantially increase demands on the health and aged care systems. Australian Government real health expenditure per person is expected to more than double over the

12 OECD 2014, *Shifting Gear: Policy Challenges for the next 50 Years*, OECD Economics Department Policy Notes, No. 24, Paris, page 1.

13 Productivity Commission 2013, *An Ageing Australia: Preparing for the Future*, Commission Research paper, Canberra, page 6.

next 40 years, and aged care expenditure per person is expected to more than triple.[14] Improving the efficiency and responsiveness of these sectors will be crucial to meeting the needs and preferences of older Australians with dignity.

Although the ageing of Australia's population is well documented, its impact on our competition framework has not received much attention. Ageing will see greater demands for choice and diversity from Australians over their aged care arrangements, with expectations for new competitive and innovative services to meet a widening array of needs and preferences.

More options, with greater flexibility, adaptability and responsiveness will become the norm, with users having an increasing say in the system — instead of providers dictating outcomes.

THE DIGITAL REVOLUTION

New technologies are transforming the way many markets operate, the way business is done and the way consumers engage with markets. The internet has already had a significant impact on the Australian economy. Australians are typically fast adopters of new technologies (such as smart phones), new applications and software tools. This has in turn encouraged internet service providers to extend and develop the infrastructure required to access internet services more fully.

New technologies are also driving changes in sectors such as energy and transport. For example, 'smart meters' allow consumers to access real-time information on energy pricing and usage , while smart phone applications allow consumers to compare airfares and hotel rates in real time.

Technological innovation is lowering barriers to entry across a range of markets. For example, new ride-sharing services and providers of short-term accommodation are using digital technologies, primarily through smart phone applications, to connect customers and providers in innovative ways and in direct competition with incumbent providers. These examples highlight the potential for digital technologies to disrupt traditional markets.

Innovative, competitive new entrants in a market can lower prices to consumers and widen their choice of providers. However, they can also raise concerns about consumer safety. The community will expect new entrants to challenge existing providers by offering new and better products, while still adhering to expected safeguards against doubtful or dangerous market practices. New entrants should not be exempt from the need to operate in a safe and reliable way, consistent with community expectations.

Community expectations will demand that all providers (both new and incumbent) compete on the basis of the quality, value and responsiveness of the products and services they offer to consumers.

Changes brought about by digitisation and access to the internet are fostering the growth of networks where information and ideas are routinely shared. This 'spillover' of knowledge is a recognised catalyst of innovation, adaptation and invention — the drivers of growth in the 'knowledge economy'.

The use of technology to foster new markets provides more consumers with access to what they want and need, potentially including lower-income consumers. The pervasive presence of knowledge

14 Australian Government 2015, *2015 Intergenerational Report, Australia in 2055*, Canberra, Page xvi-xvii. Real health expenditure per person is projected to more than double from around $2,800 to around $6,500, while real aged care expenditure per person is projected to more than triple from $620 to $2,000.

networks and the power of innovation to lift living standards require Australia's competition policy, laws and institutions to be fit for purpose for the digital age.

FIT FOR PURPOSE

The Competition Policy Review has been tasked with examining whether Australia's competition policy, laws and institutions remain fit for purpose, especially in light of changing circumstances likely to face the Australian economy over the next decade or so. Having a sustainable and durable policy framework is important, for current as well as future generations of Australians.

The Panel identifies six attributes of competition policy as defining its fitness for purpose (see Box 1.4). These attributes are the criteria against which we assess Australia's current competition policy, laws and institutions in this Report. In Part 2 we summarise the Panel's findings and recommendations.

Box 1.4: Fit for purpose

A competition policy that is 'fit for purpose':

- focuses on making markets work in the long-term interests of consumers;
- fosters diversity, choice and responsiveness in government services;
- encourages innovation, entrepreneurship and the entry of new players;
- promotes efficient investment in and use of infrastructure and natural resources;
- includes competition laws and regulations that are clear, predictable and reliable; and
- secures necessary standards of access and equity.

Making markets work in the long-term interests of consumers

Our competition policy, laws and institutions serve the national interest best when focused on the long-term interests of consumers.

Consumers in this context are not just retail consumers or households but include businesses transacting with other businesses. In the realm of government services, consumers can be patients, welfare recipients, parents of school-age children or users of the national road network.

In 1995, the then TPA incorporated an objects clause,[15] stating:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

A focus on the competitive process, rather than individual competitors, and the interests of consumers is a well-established principle of competition policy across the globe.

In an environment where Australia's economic structure will continue to evolve in response to global forces, and markets become increasingly global, fostering competitive processes in the interests of

15 Section 2 of the former *Trade Practices Act 1974*. Now section 2 of the *Competition and Consumer Act 2010*.

consumers becomes an ever-changing and challenging task. Disruptive technologies increasingly challenge the way our markets work, and by extension, our existing regulatory architecture.

As it becomes more challenging and complex to ensure that markets operate efficiently in the interests of consumers, we must continue to adhere to fundamental principles but allow flexibility in their application. In particular, we must foster the smooth entry and exit of suppliers in response to changing consumer tastes, needs and preferences — which means removing or lowering barriers to entry (and exit) wherever possible.

We also need flexible regulatory arrangements that can adapt to changing market participants, including those beyond our borders, and to new goods and services that emerge with rapidly evolving technology and innovation. Market regulation should be as 'light touch' as possible, recognising that the costs of regulatory burdens and constraints must be offset against the expected benefits to consumers.

Specifically, we need to allow success to emerge in response to market-driven factors rather than prescribing rules that support firms of particular sizes at the expense of others. Doing the latter compromises the long-term interests of consumers. Success in the market should be driven by consumer interests, not the special interests of suppliers or providers.

Our competition laws rightly censure anti-competitive trading terms or abuse of market power, but such interventions should be targeted and proportionate. Technology can be a game-changer for businesses of all sizes and can allow small, nimble firms to compete on a global scale, without any prerequisite economies of scale in order to succeed.

Fostering diversity, choice and responsiveness in government services

Choice is a powerful dynamic force for improving our lives. Enabling our individual requirements and preferences to be expressed through choice encourages governments to adapt their services to better serve our needs.

On the other hand, choice is not about having unlimited options or facing a bewildering array of possibilities. It is about having our needs and preferences met easily and affordably, in a timely fashion, and at a place and time of our choosing — which may well be outside standard business hours.

Given the size and pervasiveness of government in the Australian economy, as funder, provider and regulator, we need to consider new ways to foster diversity, choice and responsiveness in government services.

In the future, Australians will demand more government services, especially in health and education as our population ages and life-long learning becomes a more important means of securing rewarding employment. These demands are also likely to increase as Australians adjust to a more changeable, less certain economic and social environment.

Designing markets for government services may be a necessary first step as governments contract out or commission new forms of service delivery, drawing on public funds. Over time, a broader, more diverse range of providers may emerge, including private for-profit, not-for-profit and government business enterprises, as well as co-operatives and mutuals.

If managed well, moving towards greater diversity, choice and responsiveness in government services can both empower consumers and improve productivity.

Encouraging innovation, entrepreneurship and the entry of new players

In the coming decades, the technological change we have witnessed in the recent past is likely to accelerate, most especially in the field of information and communications technology. The explosion in information available to all market participants has both better informed those on the buy-side of transactions and allowed those on the sell-side to target their goods and services more accurately.

The information revolution is just one facet of a rapidly evolving technology landscape. New techniques and applications utilising information are fostering new ideas and ways of doing business. Such innovations fundamentally challenge existing laws and policies, founded as they often are on the premise of a stable and predictable marketplace with known participants.

Australians eagerly embrace new ideas when they offer us something of value, including innovations from new players entering markets like never before. But our existing laws and institutions often struggle to keep pace. Sometimes this is the inevitable consequence of an unanticipated shock, but it can also be because existing laws and policies have rightly or wrongly instituted some form of preferment to incumbent market participants.

New entry exerts a positive discipline on existing market players, encouraging them to be more innovative and responsive to consumer needs. By contrast, locking in long-term preferment risks Australia falling behind other countries, as potential new approaches and innovations pass us by.

Our competition policy, laws and institutions need to be sufficiently adaptable to allow new entry to make innovative and potentially lower-cost products and services available to Australian consumers.

They also need to recognise that new technologies can provide alternative avenues to address the needs and concerns of the community rather than falling back on existing and, at times, out-dated regulatory frameworks (see Box 1.5).

A competition policy that is fit for purpose must strike a balance between the long-term benefits to consumers of allowing new entrants to establish themselves in a market and protecting the public against dishonest or dangerous practices. It requires flexible and adaptable regulatory interventions, enabling and requiring new providers to operate within appropriate legal frameworks.

Box 1.5: Technological versus regulatory solutions to market failure –ride-sharing apps

Markets may sometimes be inefficient due to information asymmetries. This occurs when one party to a transaction has more information about the goods or services on offer than the other.

This type of problem was first identified by economist George Akerlof, who concluded that the presence of information asymmetries could drive down the average quality of goods in a market, since sellers of high-quality goods would be unable to distinguish themselves from sellers of low-quality goods — and hence would not get a price premium.[16] Without a higher price, sellers of high-quality goods would withdraw them from the market, driving the average quality down.

16 Akerlof, G A 1970, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism', *The Quarterly Journal of Economics,* Vol. 84, No. 3, The MIT Press, Cambridge.

Box 1.5: Technological versus regulatory solutions to market failure –ride-sharing apps *(continued)*

Although markets can develop solutions to overcome information problems, governments have also resorted to regulation to help overcome information problems. Examples of such regulation include mandatory warranties, mandatory disclosure, and laws prohibiting misleading and deceptive conduct.

However, while regulation can assist in making markets work better, it is not necessarily a complete solution. It requires ongoing enforcement and gives sellers that have met a minimum standard little incentive to improve.

Recently, technology has emerged that offers an alternative to regulation in helping to solve information problems.

For example, in the context of personal transport services, Uber and Lyft[17] coordinate users and providers of ride-sharing services using internet apps where mandatory feedback from both customers and operators is used to encourage good service standards and passenger behaviour. Such ride-sharing apps, which allow passengers and drivers to post feedback on each other, enable drivers and passengers to establish and trade on their reputations.

However, such innovative solutions to information problems in markets can pose challenges for regulators. Where regulation is inflexible, it may prevent markets from responding to innovative service offers that do not fit neatly within existing regulated categories. Regulation must be reviewed regularly to ensure that it is still required and not inhibiting the emergence of new service offerings.

Promoting efficient investment in and use of infrastructure and natural resources

Australia faces an unprecedented opportunity to thrive over coming decades, as the middle class in Asia and beyond burgeons. However, optimising our national interest will require wise and efficient investment in and use of our existing and planned physical and electronic infrastructure, and policies that maximise the return on our natural resources.

To improve our standard of living and quality of life, and sustain high income growth, we need to move goods and services rapidly and responsively across both our nation and our borders. We need to make adequate investment in our land, sea and air transport systems, and telecommunications and electronic commerce infrastructure, and ensure they are used efficiently by those who need them, when they need them.

A competition policy that is fit for purpose facilitates mechanisms to signal efficient investment in and use of our infrastructure. The original NCP framework introduced price signals to guide investment in and use of electricity and gas, and telecommunications networks. Steps forward were also made in improving our rail and air infrastructure. But much more remains to be done across all transport modes, including roads, and infrastructure more broadly.

Pricing or other signals that guide allocation of our natural resources towards their highest-value use will optimise their potential to support Australian living standards into the future. In this regard, we

17 Lyft ride-sharing services do not operate in Australia.

need to ensure that planning, zoning and environmental regulations governing the use of our land and other natural resources, including water, are applied sensibly.

Competition laws and regulations that are clear, predictable and reliable

Australians expect consumers to be dealt with fairly and on reasonable terms, and businesses to refrain from conduct that damages the competitive process (and ultimately consumers). They expect laws to be clear, predictable and reliable and administered by regulators (and applied by the judicial system) without fear or favour. Our competition law must ensure that market participants, big and small, can compete in a way that allows the most efficient and responsive players to thrive.

These principles are particularly important where market participants differ in their capacity or financial means to engage with the legal or regulatory process. Difficulty in accessing justice in matters of competition policy or consumer protection can undermine broader confidence in our regulatory institutions.

There is a natural tension between designing specific laws and regulations to deal with problems that emerge at a point in time and building in flexibility to cope with changing market circumstances as they arise. Laws that are less predictable in their immediate application may nevertheless prove more reliable over time as they are adapted through the judicial process to encompass novel developments.

This is especially relevant when new technologies are rapidly altering market conditions faced by businesses and consumers. The more tightly specified our laws, the more likely they are to lag behind developments in markets and possibly act against the long-term interests of consumers.

A competition policy that is fit for purpose should enshrine competition law that is sufficiently general in its design to accommodate evolving ways of doing business or engaging with consumers, but sufficiently reliable and predictable in its application to avoid discouraging innovation and entrepreneurship.

Securing necessary standards of access and equity

Australians expect the benefits and opportunities afforded by a well-functioning market economy to be enjoyed widely, not reserved for the privileged few, or those with the necessary information and resources to exploit the benefits of choice or responsiveness. For choice to deliver real benefits, consumers not only need proper access to information, but it must also be in the right form for them to assess it, and they must have the capacity to act on it.

Access and equity dictate necessary standards and genuine opportunities that all consumers should be able to enjoy, making genuine choice, responsiveness and innovation available to all. Many government services have not previously been exposed to competition because of concerns about the impact on vulnerable consumers, especially in regard to access (usually around pricing but also quality) and outcomes that may accentuate inequality.

Well-functioning markets, governed by policies and laws that are fit for purpose, can help to deliver access and equity. When opportunities and choices are limited (through poor market regulation and/or government decisions) questions of distributive justice or fairness often arise. Markets that cater to a wide range of consumer tastes and incomes can help to promote fair outcomes. However, when lower-income or vulnerable consumers are denied basic opportunities and choice, especially in their dealings with government, concerns about access and equity become more pronounced.

As governments around the world have sought to improve their service delivery, many have explored new forms of contracting or commissioning service provision from providers in the private for-profit or not-for-profit sectors. As experience with improved contract and market design has evolved, important lessons have been learnt and improvements made. There is much of value here from which Australian governments can profitably draw.

A competition policy that is fit for purpose recognises the need for all Australians to share in the benefits of choice, responsiveness and innovation, especially but not exclusively in government services.

PART 2 — FINDINGS AND RECOMMENDATIONS

The Review's Terms of Reference require an assessment of Australia's competition policy, laws and institutions to determine whether they remain fit for purpose, especially in light of the opportunities and challenges facing Australia into the foreseeable future.

In this Part, we summarise the findings of this assessment and set out recommendations to address deficiencies the Panel has identified.

Chapter 2 presents the Panel's recommendations for priority areas of reform in **competition policy.**

These are informed by a set of competition principles attuned to the challenges and opportunities likely to face the Australian economy in coming decades. A key lesson from the National Competition Policy (NCP) experience is the importance of an agreed framework, which can then be applied by governments in their own jurisdictions and adapted to local conditions as necessary.

A further lesson from NCP is that all reform initiatives cannot be progressed simultaneously. The Panel recognises the importance of assigning priorities to reform initiatives so that those with the greatest potential benefit to Australians are progressed first. Moreover, priorities will change as technology changes — for instance, the development of the National Broadband Network (NBN) and mobile telephony infrastructure have meant that access to the 'unbundled local loop' (i.e., the copper network) is a less significant issue than it was in 1995.

Competition policy reforms most likely to generate large net benefits are those that: benefit a sizeable part of the economy or have deep links to other sectors; remove a significant barrier to competition; or subject activities with significant government involvement to greater contestability and consumer choice.

Chapter 3 outlines the Panel's recommendations for changes to the ***Competition and Consumer Act 2010*** (CCA).

The Panel has viewed reform of the CCA through the lens of fitness for purpose. In some areas, we recommend substantive changes to the way the law is drafted. In other areas, our recommended changes go to clarifying and simplifying the law.

On some issues, the Panel finds the law itself fit for purpose but shares concerns expressed by stakeholders, especially small business, about access to remedies under the law.

Chapter 4 outlines the Panel's recommendations on the **institutional structures** most likely to sustain enduring reform.

Like the Hilmer Review, we recognise that policy reform will only gain and sustain momentum if it is supported by all jurisdictions.

Australia has been well served by its competition policy institutions, yet this is not sufficient reason to retain the framework in its current form. The flagging momentum of competition reform points to the need for reinvigoration through strong institutional frameworks.

The Panel has identified a clear gap in the competition framework: an institution is needed to advocate for competition reform and to oversee the implementation of reforms instituted by governments in the wake of this Review.

Chapter 5 outlines the Panel's recommendations relating to concerns that **small business** has raised with us.

Access to remedies has been a roadblock for many small businesses, and the Panel finds that access should be improved. We recommend that the collective bargaining framework should be enhanced and made more flexible. We also make recommendations on competitive neutrality and regulations that can restrict the way small businesses operate.

Chapter 6 highlights recommendations made in other parts of this Report addressing issues raised with the Panel that relate to **retail markets**, particularly supermarkets.

Chapter 7 presents the Panel's views on the best method to **implement** a national competition reform agenda. We also recommend economic modelling of the package of recommendations in this Review, which will inform governments' discussions of policy proposals they will pursue.

2 COMPETITION POLICY

2.1 A SET OF COMPETITION PRINCIPLES

As originally crafted, the National Competition Policy (NCP) reflected the challenges Australia faced more than 20 years ago. The focus of the NCP reforms was on exposing some previously sheltered activities to competition and applying a more national approach to competition issues.

The six elements of competition policy identified in the Hilmer Review[18] were:

- limiting anti-competitive conduct of firms;
- reforming regulation which unjustifiably restricts competition;
- reforming the structure of public monopolies to facilitate competition;
- providing third-party access to certain facilities that are essential for competition;
- restraining monopoly pricing behaviour; and
- fostering 'competitive neutrality' between government and private businesses when they compete.

The Panel endorses competition policy that focuses on making markets work in the long-term interests of consumers. Legislative frameworks should continue to limit anti-competitive conduct of firms. However, through its commercial arrangements entered into with market participants, the Crown (whether in right of the Commonwealth, state, territory or local governments) also has the potential to harm competition.

The Panel therefore concludes that the anti-competitive conduct provisions of the *Competition and Consumer Act 2010* (CCA) should cover government activities that have a trading or commercial character.

Moreover, the Crown's capacity to enhance or harm competition reaches beyond the scope of the CCA and includes a range of policies and regulations. In particular, procurement, which ranges from buying goods and services through to public-private partnerships (PPPs) and privatisations, should be designed with competition policy in mind.

The Panel believes that the focus of competition policy should be widened beyond infrastructure public monopolies and government businesses, to encompass the provision of government services more generally.

By promoting user choice and encouraging a diversity of providers, competition policy plays an important role in improving performance in sectors such as human services. Choice and diversity have the potential to improve outcomes for users, especially but not only by stimulating innovation.

Independent regulation can encourage market entry since it provides a level of certainty about the regulatory environment. Similarly, separating the interests of providers from those of funders and

18 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page xvii.

regulators encourages accountability, innovation and a level playing field between public and other providers.

The Panel believes that declaration and third-party access to infrastructure should only be mandated when it is in the public interest. The onus of proof should lie with those seeking access to demonstrate that it would promote the public interest rather than on infrastructure owners to demonstrate that access would be contrary to the public interest.

Acknowledging the diverse circumstances of each jurisdiction, the Panel supports the flexibility built into the NCP for the Australian Government and state and territory governments to decide how best to implement competition principles in their jurisdictions. Competition policy should continue to apply explicitly to local government.

Agreeing a set of principles would guide the Australian Government, state, territory and local governments in implementing those aspects of competition policy for which they are responsible. The principles in Recommendation 1 broaden the NCP agenda to include all government services in trade or commerce and promote the role of choice.

In applying these principles the Panel endorses a 'public interest' test as a central tenet of competition policy. The Panel recommends continuing with the NCP public interest test, namely that legislation or government policy should not restrict competition unless:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation or government policy can only be achieved by restricting competition.

Recommendation 1 — Competition principles

The Australian Government, state and territory and local governments should commit to the following principles:

- Competition policies, laws and institutions should promote the long-term interests of consumers.
- Legislative frameworks and government policies and regulations binding the public or private sectors should not restrict competition.
- Governments should promote consumer choice when funding, procuring or providing goods and services and enable informed choices by consumers.
- The model for government provision or procurement of goods and services should separate the interests of policy (including funding), regulation and service provision, and should encourage a diversity of providers.
- Governments should separate remaining public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities.
- Government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership.
- A right to third-party access to significant bottleneck infrastructure should be granted where it would promote a material increase in competition in dependent markets and would promote the public interest.
- Independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers.

Applying these principles should be subject to a public interest test, such that legislation or government policy should not restrict competition unless:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation or government policy can only be achieved by restricting competition.

For further detail on competition principles, see Chapter 8.

2.2 Determining priority areas for reform

The Panel recognises the importance of assigning priorities to reform initiatives so that those with the greatest potential benefit to Australians are progressed first.

In determining priority areas for competition policy reform, the Panel has asked five questions:

- Will this reform help the Australian economy adjust to the forces for change identified in Part 1 of this Report?
- Will this reform promote choice, diversity and innovation in markets for private and/or government goods and services?
- Will this reform help to raise productivity growth and hence Australian living standards over time?
- Will this reform stimulate competition or contestability in markets by lowering barriers to entry or exit?
- Will this reform help to complete unfinished business from the original NCP agenda or address specific issues raised in the Review's Terms of Reference?

If the answer to one or more of these questions is 'yes', then the reform is placed on the Panel's priority list. The remaining sections of this chapter present the Panel's recommendations in respect of each of its priority areas for reform.

2.3 Human services

Access to high-quality human services — including health, education and community services — is vital to the lives of all Australians. Good health makes it easier for people to participate in society; education can help put people on a better life pathway; and quality community services, including aged care and disability care and support, can provide comfort, dignity and increased opportunities to vulnerable Australians.

Given the size of the human services sector (which is set to increase further as Australia's population ages),[19] even small improvements will have profound impacts on people's standard of living and quality of life.

The Panel notes that governments are making significant changes across human services sectors, with policies reflecting the unique characteristics of each jurisdiction and the service in question. These changes include a clearer focus on user choice and innovation in service delivery.

As a first step, where governments are involved in human services sectors as a provider, separating the interests of both the regulator and policy-maker (including funding) from the interests of the provider can help to ensure that decisions are made in the best interests of users. Regulation and policy decisions that are independent of government provision can encourage a more certain and stable environment, which can in turn encourage a diversity of new providers.

19 Australian Government 2015, *2015 Intergenerational Report, Australia in 2055*, Canberra.

But governments cannot distance themselves from the quality of services delivered to Australians. An ongoing market stewardship function means that governments will retain responsibility for overseeing the impact of policies on users.

The Panel considers that a 'presumption of choice' could have significant benefits in many human services sectors. Putting users in control of the human services they access — either through direct payments, personal budgets, entitlements or choice — drives service providers to become more responsive to individual requirements.

However, the Panel acknowledges that choice is not the only important objective in the area of human services. Equity of access, universal service provision and minimum quality are also important to all Australians.

In considering whether it should recommend change in this area, the Panel does not wish to discourage or crowd out the important contribution that not-for-profit providers and volunteers currently make to the wellbeing of Australians.

Where governments retain some control over the delivery of human services, a diversity of service providers and high-quality outcomes for users can be encouraged through careful commissioning. Governments need to allow room for providers to innovate in response to changing user demands, and to benchmark the performance of providers, credibly threatening to replace those that do not meet the needs of users.

The Panel recognises that some markets will not have sufficient depth to support a number of providers — including, for example, certain services in remote and regional areas. Ensuring access to services and maintaining and improving service quality in these cases increases the emphasis on well-designed benchmarking of services.

The Panel is satisfied that deepening and extending competition policy in human services is a priority reform. Lowering barriers to entry can stimulate a diversity of providers, which expands user choice. Small gains in productivity (driven by competition) in these large and growing sectors of the Australian economy have the potential to deliver large gains across the community.

Reforms in this area can also exert a powerful demonstration effect. If competition produces conspicuous improvements in users' access to and experience of a particular human service, this will strengthen the case for reform across a wider range of government services.

Recommendation 2 — Human services

Each Australian government should adopt choice and competition principles in the domain of human services.

Guiding principles should include:

- User choice should be placed at the heart of service delivery.
- Governments should retain a stewardship function, separating the interests of policy (including funding), regulation and service delivery.
- Governments commissioning human services should do so carefully, with a clear focus on outcomes.
- A diversity of providers should be encouraged, while taking care not to crowd out community and volunteer services.
- Innovation in service provision should be stimulated, while ensuring minimum standards of quality and access in human services.

When developing implementation plans, governments can expand on these principles to achieve their goals.

For example, in putting **user choice** at the heart of service delivery, governments should:

- recognise that users are best placed to make choices about the human services they need and design service delivery, wherever possible, to be responsive to those choices;
- recognise that access to quality services will be a prerequisite for effective choice and that accessibility will be particularly important in remote and regional areas;
- ensure that users have access to relevant information to help them exercise their choices, including, where appropriate, feedback from previous users of services;
- in sectors where choice may be difficult, make intermediaries or purchase advisors available to help users make decisions, with policies designed to align the incentives of purchase advisors with the best interests of users;
- ensure that a default option is available for users unable or unwilling to exercise choice;
- lower financial and non-financial switching costs to enable switching wherever possible — for example, users should not 'lose their place in the queue' if they switch providers, or need to undergo further eligibility assessment; and
- offer disadvantaged groups greater assistance in navigating the choices they face through, for example, accessible communications channels that suit their needs.

In undertaking their **stewardship** role, governments should:

- foster a diverse range of service models that best meet the needs of individuals and the broader community;
- co-design markets with human services providers to build on the trust and relationships that already exist between service providers and users;
- separate their interest in policy (including funding) and regulation from provision;
- vest rule-making and regulation with a body independent of government's policy (including funding) role;

- allow funding to follow people's choices; and
- fund community service obligations in a transparent and contestable manner.

In **commissioning** human services, governments should:

- encourage careful commissioning decisions that are sensitive and responsive to individual and community needs, and recognise the contribution of community organisations and volunteers;
- ensure that commissioned services are contestable and service providers face credible threats of replacement for poor performance;
- establish targets and benchmarks for service providers based on outcomes, not processes or inputs; and
- offer financial rewards for performance above specified targets.

In encouraging a **diversity** of service providers, governments should:

- allow independent regulators to license any provider that meets and maintains prescribed standards, where minimum standards address quality requirements without raising artificial barriers to entry; and/or
- directly commission services with co-ordination and processes that:
  - avoid monopoly providers developing over time; and
  - specify contracts with duration periods that balance the need to afford providers some level of certainty without excluding potential competitors for extended periods of time; and
- in support of their role as market stewards, undertake commissioning that:
  - provides for sufficient information and feedback loops to improve the design and targeting of contracts over time, including by identifying the relative strengths of different types of service provider;
  - recognises the integrated nature of many human services and their joint role in contributing to end-user outcomes, and the relative strengths of different providers in different parts of a co-ordinated service supply chain; and
  - is co-ordinated over time, where possible, maximising opportunities for contracts with overlapping timeframes and supporting a diversity of providers in the market at any point in time.

In encouraging innovation in service delivery, governments should:

- encourage experimental service delivery trials whose results are disseminated via an intergovernmental process; and
- encourage jurisdictions to share knowledge and experience in the interest of continuous improvement.

For further detail on human services, see Chapter 12.

2.4 TRANSPORT

Road transport

Road transport is a major input for business-to-business transactions and, with the rapid growth of online purchases, an increasingly important component of end-point sales to consumers. An efficient road system is also essential for urban and regional access and amenity.

Even small changes in productivity in this sector can cascade through the economy, boosting productivity and output in other sectors. Also, given the size of the road transport sector, enhanced productivity in road transport can deliver large gains to the economy.

However, roads are the least reformed of all infrastructure sectors, with institutional arrangements around funding and provision remaining much the same as they were 20 years ago.

More effective institutional arrangements are needed to promote efficient investment in and usage of roads, and to put road transport on a similar footing with other infrastructure sectors. Lack of proper road pricing leads to inefficient road investment and distorts choices between transport modes, particularly between road and rail freight.

The advent of new technology presents opportunities to improve the efficiency of road transport in ways that were unattainable two decades ago. Road user charges linked to road construction, maintenance and safety should make road investment decisions more responsive to the needs and preferences of road users. As in other network sectors, where pricing is introduced, it should be overseen by an independent regulator.

A critical concern of stakeholders, shared by the Panel, is that road pricing should not be an additional impost on road users. To ensure any reform is revenue-neutral, indirect taxes and charges, such as fuel excise and registration fees, should be reduced as road pricing is introduced. This would make the road sector more like other infrastructure sectors, since road authorities would charge directly and transparently for road use, and allocate the revenue raised to the network's construction and operating costs. Cost-reflective pricing should lead to better road investment decisions, which will make the community and road users better off.

Recommendation 3 — Road transport

Governments should introduce cost-reflective road pricing with the aid of new technologies, with pricing subject to independent oversight and revenues used for road construction, maintenance and safety.

To avoid imposing higher overall charges on road users, governments should take a cross-jurisdictional approach to road pricing. Indirect charges and taxes on road users should be reduced as direct pricing is introduced. Revenue implications for different levels of government should be managed by adjusting Australian Government grants to the States and Territories.

Liner shipping (Part X) and cabotage (coastal shipping and aviation)

The Review's Terms of Reference (3.3.5) require it to consider whether existing exemptions from the competition law and/or historic sector-specific arrangements are still warranted. This includes Part X of the CCA, which exempts international liner cargo shipping from certain competition provisions, including cartel conduct, contracts, arrangements or understandings that affect competition, and exclusive dealing.

Liner shipping is a vital mechanism through which goods cross Australia's borders, both for export and import. Many items moved by sea cannot be transported by air because of their weight or volume. These include not only finished goods but also intermediate inputs for Australian businesses.

The importance of international trade to Australia's economy, and the prospects for stronger growth in trade as Asia develops, focus attention on the need for efficient and competitive marine transportation.

Part X of the CCA allows liner shipping operators to enter into agreements among themselves in relation to the freight rates to be charged, and the quantity and kinds of cargo to be carried, on particular trade routes, and to register those agreements with the Registrar of Liner Shipping (an office created under Part X). Registration confers an exemption from the cartel conduct prohibitions and sections 45 and 47 of the CCA. Although the test for registering a conference agreement under Part X involves assessing the agreement's 'overall benefit' to Australia, it does not expressly require assessing its competitive effects. Also, the test is not assessed by the primary competition regulator, the Australian Competition and Consumer Commission (ACCC), but by the Registrar of Liner Shipping.

No other industry enjoys legislative exemption from Australia's competition laws. This is despite the fact that other industries have similar economic characteristics to the liner shipping industry, particularly the international airline industry. If participants in other industries wish to make agreements that would otherwise contravene the competition law, they are required to seek authorisation from the ACCC.

The Panel therefore considers that Part X should be repealed and the liner shipping industry should be subject to the normal operation of the CCA.

The ACCC should be given power to grant block exemptions (see Recommendation 39 and Section 22.3) for conference agreements that meet a minimum standard of pro-competitive features. For example, conference agreements that co-ordinate scheduling and the exchange of capacity, while allowing confidential individual service contracts and not involving a common conference tariff and pooling of revenues and losses, should be eligible for a block exemption. Other forms of agreement that do not qualify for the block exemption, and thereby risk contravening Part IV provisions, should be subject to individual authorisation.

Repeal of Part X will mean that existing liner shipping agreements will no longer be exempt from the competition law and some may contravene it. A transition period will therefore be needed to establish which agreements qualify for the block exemption and for other agreements to either seek authorisation or be modified if needed to comply with the CCA. The Panel considers a transition period of two years should be sufficient.

The Panel is aware that the Australian Government is undertaking a separate review of coastal shipping regulations but observes that cabotage restrictions raise the cost and administrative complexity of coastal shipping services. The Panel notes that restrictions on air cabotage are stricter than shipping cabotage and that the current blanket restrictions are likely to be inefficient. Cabotage restrictions that are not in the public interest should be removed.

Recommendation 4 — Liner shipping

Part X of the CCA should be repealed.

A block exemption granted by the ACCC should be available for liner shipping agreements that meet a minimum standard of pro-competitive features (see Recommendation 39). The minimum standard of pro-competitive features to qualify for the block exemption should be determined by the ACCC in consultation with shippers, their representative bodies and the liner shipping industry.

Other agreements that risk contravening the competition provisions of the CCA should be subject to individual authorisation, as needed, by the ACCC.

Repeal of Part X will mean that existing agreements are no longer exempt from the competition provisions of the CCA. Transitional arrangements are therefore warranted.

A transitional period of two years should allow for the necessary authorisations to be sought and to identify agreements that qualify for the proposed block exemption.

Recommendation 5 — Cabotage — coastal shipping and aviation

Noting the current Australian Government Review of Coastal Trading, cabotage restrictions on coastal shipping should be removed, unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the government policy can only be achieved by restricting competition.

The current air cabotage restrictions should be removed for all air cargo as well as passenger services to specific geographic areas, such as island territories and on poorly served routes, unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the restrictions can only be achieved by restricting competition.

Introducing an air cabotage permit system would be one way of regulating air cabotage services more effectively where necessary.

For further detail on transport, see Section 11.3.

2.5 Intellectual property

Disruptive technologies, especially digital technologies, are a pervasive force for change in the Australian economy. New technologies foster innovation, which in turn drives growth in living standards. Access to and creation of intellectual property (IP) will become increasingly important as Australia moves further into the digital age.

Australians are enthusiastic adopters and adapters of new technology. We stand to benefit greatly by exploiting technology to its full extent in our business production processes and as end-consumers. Our IP policy settings should encourage this.

Nevertheless, an appropriate balance must be struck between encouraging widespread adoption of new productivity-enhancing techniques, processes and systems on the one hand, and fostering ideas and innovation on the other. Excessive IP protection can not only discourage adoption of new technologies but also stifle innovation.

Given the influence of Australia's IP rights on facilitating (or inhibiting) innovation, competition and trade, the Panel believes the IP system should be designed to operate in the best interests of Australians.

The Panel therefore considers that Australia's IP rights regime is a priority area for review.

Determining the appropriate extent of IP protection is complex. IP rights can help to break down barriers to entry but, when applied inappropriately, can also reduce exposure to competition and erect long-lasting barriers to entry that fail to serve Australia's interests over the longer term. This risk is especially prevalent in commitments entered into as part of international trade agreements.

The Panel is concerned that Australia has no overarching IP policy framework or objectives guiding changes to IP protection or approaches to IP rights in the context of negotiations for international trade agreements.

Recommendation 6 — Intellectual property review

The Australian Government should task the Productivity Commission to undertake an overarching review of intellectual property. The Review should be a 12-month inquiry.

The review should focus on: competition policy issues in intellectual property arising from new developments in technology and markets; and the principles underpinning the inclusion of intellectual property provisions in international trade agreements.

A separate independent review should assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions. Such an analysis should be undertaken and published before negotiations are concluded.

The Panel considers it appropriate that commercial transactions involving IP rights, including the assignment and licensing of such rights, be subject to the CCA, in the same manner as transactions involving other property and assets.

Subsection 51(3) of the CCA provides a limited exception from most of the competition law prohibitions for certain types of transactions involving IP. The exception covers conditions in licences or assignments of IP rights in patents, registered designs, copyright, trademarks and circuit layouts where, broadly, the condition relates to products that are the subject of the application of the IP right. The exception does not extend to the prohibitions relating to misuse of market power and resale price maintenance.

It is important to note that subsection 51(3) does not exempt all transactions involving IP rights from competition law; it only exempts certain conditions in a licence or assignment. For example, the transfer of IP rights, whether by licence or assignment, which results in an increase in market power and a consequential substantial lessening of competition is subject to sections 45 and 50; the decision by an IP owner to refuse to license IP rights to another person is subject to the potential application of section 46.

The rationale for excepting conditions in licences or assignments of IP rights is flawed. The rationale assumes that the imposition of conditions in licences and assignments cannot extend the scope of the exclusive rights granted to the IP owner and therefore cannot harm competition (beyond the effect of the original grant of the IP right). In many instances, that will be the case; but in those instances the licence or assignment would not contravene the competition law in any event, making the exception unnecessary. However, in other instances, the assumption will not apply. In fields with multiple and competing IP rights, such as the pharmaceutical or communications industries, cross-licensing arrangements can be entered into to resolve disputes that impose anti-competitive

restrictions on each licensee. The Panel considers that arrangements of this type should be examinable under the competition law.

In most comparable countries, no equivalent to subsection 51(3) exists. None of the US, Canada or Europe provides an exemption from its competition laws for conditions of IP transactions.

The Panel considers that the IP licensing exception in subsection 51(3) of the CCA should be repealed.

However, as is the case with other vertical supply arrangements, IP licences should remain exempt from the per se cartel provisions of the CCA insofar as they impose restrictions on goods or services produced through application of the licensed IP.

IP licensing or assignment arrangements that are at risk of breaching Part IV of the CCA (which covers anti-competitive practices), but which are likely to produce offsetting public benefits, can be granted an exemption from the CCA through the notification or authorisation processes.

In addition, the block exemption power recommended by the Panel (see Recommendation 39) could be used to specify 'safe harbour' licensing restrictions for IP owners.

Recommendation 7 — Intellectual property exception

Subsection 51(3) of the CCA should be repealed.

For further detail on intellectual property, see Chapter 9.

2.6 Regulatory restrictions

The NCP reforms substantially reduced the amount of anti-competitive regulation. Governments made a concerted effort to examine and reform regulation that restricted competition where those restrictions were not in the public interest.

However, the regulation review process, begun under the NCP, has flagged and reinvigoration is now needed. Three areas require governments' attention:

- initiating a **new round of regulatory reviews**;
- **priority areas for review** (planning and zoning, taxis and ride-sharing, and mandatory product standards); and
- areas for **immediate reform** action (trading hours, parallel imports and pharmacy).

A new round of regulatory reviews

Submissions raise many examples of regulatory restrictions on competition, including product standards, taxi licensing, professional and occupational licensing, broadcast media rules, liquor and gambling regulation, private health insurance regulation, agricultural marketing rules and air services restrictions.

Cumulatively, such restrictions can have a significant impact on the economy. Many sectors facing regulatory restrictions supply critical inputs to other business activities. Accordingly, a new round of national regulatory reviews is required. A national approach will provide momentum, impose discipline on all jurisdictions, and foster the emergence of a nationally consistent business regulatory environment.

Rigorous, transparent and independent assessment of whether regulations are in the public interest, with the onus of proof on the party wishing to retain anti-competitive regulation, is important to ensure that regulations serve the long-term interests of consumers. In that vein, the Panel acknowledges submissions expressing concern about excessive deregulation, and accepts that many regulations are essential for other policy reasons. We need *better* regulation rather than no regulation at all.

Opportunities will also arise to examine regulations when reviews are undertaken for other purposes. For example, Australian Government reviews in the communications portfolio[20] should consider the impact of current restrictions on competition in that sector.

Certain activities can be exempted from the operation of the competition law under Part IV of the CCA (apart from the merger laws) through authorisation in Commonwealth, state or territory legislation (subsection 51(1) of the CCA). The Panel believes that such jurisdictional exemptions for conduct that would normally contravene the competition law should be examined to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.

Recommendation 8 — Regulation review

All Australian governments should review regulations, including local government regulations, in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Legislation (including Acts, ordinances and regulations) should be subject to a public interest test and 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.

Factors to consider in assessing the public interest should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

Jurisdictional exemptions for conduct that would normally contravene the competition law (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.

The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform.

The review process should be overseen by the proposed Australian Council for Competition Policy (see Recommendation 43) with a focus on the outcomes achieved rather than processes undertaken. The Australian Council for Competition Policy should publish an annual report for public scrutiny on the progress of reviews of regulatory restrictions.

For further detail on regulatory restrictions, see Chapter 10.

20 See, for example: Australian Government 2014, *Spectrum Review*, Australian Government Department of Communications, viewed 9 February 2015, <http://www.communications.gov.au/consultation_and_submissions/spectrum_review>.

Priority areas for review

The Panel has identified three priority areas that should be reviewed immediately — planning and zoning rules, taxi regulation and product standards. Across jurisdictions these will vary in their complexity and in their potential benefits, reflecting both the form of the restrictions and the extent of reform previously undertaken.

Planning and zoning

Land is an important input to the production of goods and services and a source of amenity for consumers. Even small policy improvements in this area could yield large benefits to the economy.

Planning systems by their nature create barriers to entry, diversification or expansion, including through limiting the number, size, operating model and mix of businesses. This can reduce the responsiveness of suppliers to the needs of consumers.

Planning regulations should work in the long-term interests of consumers. They should not restrict competition unless the benefits of the restriction to the community as a whole outweigh the costs, and the objectives of the regulations can only be achieved by restricting competition. Subjecting planning regulations to the public interest test will ensure they do not inappropriately limit entry to markets.

Governments around the country recognise the concerns raised by poorly designed planning and zoning systems, and reviews are either underway or have recently been completed in a number of jurisdictions.

An opportunity exists to ensure that, when undertaking these reviews or implementing their findings, enhanced competition is a central objective. That a number of reviews are already underway also provides the opportunity to compare across jurisdictions to determine best practice as a basis for updating and improving current requirements.

An independent body, such as the proposed Australian Council for Competition Policy (ACCP) (see Recommendation 43), should work with States and Territories to oversee incorporation of competition policy principles in planning and zoning rules. The ACCP should also report to jurisdictions on progress in implementing these principles.

Recommendation 9 — Planning and zoning

Further to Recommendation 8, state and territory governments should subject restrictions on competition in planning and zoning rules to the public interest test, such that the rules 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 rules can only be achieved by restricting competition.

The following competition policy considerations should be taken into account:

- Arrangements that explicitly or implicitly favour particular operators are anti-competitive.
- Competition between individual businesses is not in itself a relevant planning consideration.
- Restrictions on the number of a particular type of retail store contained in any local area is not a relevant planning consideration.
- The impact on the viability of existing businesses is not a relevant planning consideration.
- Proximity restrictions on particular types of retail stores are not a relevant planning consideration.
- Business zones should be as broad as possible.
- Development permit processes should be simplified.
- Planning systems should be consistent and transparent to avoid creating incentives for gaming appeals.

An independent body, such as the Australian Council for Competition Policy (see Recommendation 43) should be tasked with reporting on the progress of state and territory governments in assessing planning and zoning rules against the public interest test.

For further detail on planning and zoning, see Section 10.1.

Taxis and ride-sharing

Reform of taxi regulation in most jurisdictions is long overdue. Regulation limiting the number of taxi licences and preventing other services from competing with taxis has raised costs for consumers, including elderly and disadvantaged consumers, and hindered the emergence of innovative passenger transport services. Regulation of taxi and hire car services should be focused on ensuring minimum standards for the benefit of consumers rather than on restricting competition or supporting a particular business model. An independent body should oversee the regulations.

Taxi regulation should be reviewed taking competition into account. Those jurisdictions that have undertaken or are undertaking reviews should implement the reforms.

For further detail on taxi regulation, see Section 10.2.

Product standards

Given that product standards (requirements that goods have certain characteristics) can raise barriers to entry, especially where they are referenced in law (either directly or indirectly) and mandate particular technologies or systems rather than performance outcomes, it is appropriate that they be subject to review. Standards that are not mandated by government should also be reviewed periodically to ensure they do not restrict competition unnecessarily. For example, an Australian Standard that differs unnecessarily from an international standard could limit import competition.

For further detail on product standards, see Section 10.3.

Recommendation 10 — Priorities for regulation review

Further to Recommendation 8, and in addition to reviewing planning and zoning rules (Recommendation 9), the following should be priority areas for review:

- **Taxis and ride-sharing**: in particular, regulations that restrict numbers of taxi licences and competition in the taxi industry, including from ride-sharing and other passenger transport services that compete with taxis.
- **Mandatory product standards**: i.e., standards that are directly or indirectly mandated by law, including where international standards can be adopted in Australia.

Recommendation 11 — Standards review

Given the unique position of Australian Standards under paragraph 51(2)(c) of the CCA, Australian Standards that are not mandated by government should be subject to periodic review against the public interest test (see Recommendation 8) by Standards Australia.

Areas for immediate reform

The Panel identifies the following areas for immediate reform, noting that each area was also identified and reviewed through the NCP process:

- restrictions on retail trading hours (see Recommendation 12);
- parallel import restrictions (see Recommendation 13); and
- pharmacy ownership and location rules (see Recommendation 14).

Retail trading hours

State and territory governments have deregulated retail trading hours to varying degrees over recent years. This has generally widened choices for consumers. Yet consumers continue to seek greater diversity in how and when they shop, as seen in the rapid take-up of online shopping.

The growing use of the internet for retail purchases is undermining the original intent of restrictions on retail trading hours. When consumers can switch to online suppliers outside regulated trading hours, restrictions on retail trading hours merely serve to disadvantage 'bricks and mortar' retailers relative to their online competitors.

In any event, as more bricks and mortar stores opt for an online presence to counter this disadvantage, the notion of restricted trading hours becomes less meaningful. Customers are already deciding when and how they wish to make purchases. Retailers should be given freedom to respond by deciding for themselves when to open and close their bricks and mortar stores, referring after-hours customers to their online portals.

Regulation of retail trading hours varies across Australia. The Australian Capital Territory, Northern Territory, Victoria, Tasmania and New South Wales have almost completely deregulated retail trading hours, whereas Western Australia, South Australia and Queensland retain significant restrictions.

The Panel believes that deregulation of retail trading hours is overdue, and that remaining restrictions should be removed as soon as possible. To the extent that jurisdictions choose to retain restrictions, these should be strictly limited to Christmas Day, Good Friday and the morning of ANZAC Day. Any public holiday trading restrictions should be applied as broadly as possible to avoid discriminating among different types of retailers.

The Panel notes that a general policy of deregulating trading hours should not prevent jurisdictions from imposing specific restrictions on trading times for alcohol retailing or for gambling services in order to achieve the policy objective of harm minimisation. As noted in Section 10.4, it is certainly not the Panel's view that promoting competition should always trump other legitimate public policy considerations. Instead, regulatory restrictions should be subject to a public interest test to ensure that the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the regulation can only be achieved by restricting competition.

The Panel emphasises that deregulation of trading hours does not mean that retailers are obliged to trade 24 hours a day, seven days a week or that all retailers will adopt identical trading hours. Rather, deregulation allows retailers to decide for themselves when to open for trade (with the limited exceptions noted above), as is currently the case in those jurisdictions where retail trading hours are already deregulated. In making this decision, retailers will take into account customer demand and other factors such as labour costs, and requirements of tenancy agreements.

Recommendation 12 — Retail trading hours

Remaining restrictions on retail trading hours should be removed. To the extent that jurisdictions choose to retain restrictions, these should be strictly limited to Christmas Day, Good Friday and the morning of ANZAC Day, and should be applied broadly to avoid discriminating among different types of retailers. Deregulating trading hours should not prevent jurisdictions from imposing specific restrictions on trading times for alcohol retailing or gambling services in order to achieve the policy objective of harm minimisation.

For further detail on retail trading hours, see Section 10.5.

Parallel import restrictions

Parallel import restrictions are similar to other import restrictions (such as tariffs) in that they benefit local producers by shielding them from international competition. They are an implicit tax on Australian consumers and businesses.

The impact of changing technology and shifting consumer purchasing practices (such as purchasing books online) means that some of these restrictions are easily circumvented. However, removing remaining parallel import restrictions would promote competition and potentially lower prices for consumers.

Many of the concerns raised in submissions around relaxing parallel import restrictions, including concerns about consumer safety, counterfeit products and inadequate enforcement, could be addressed directly through regulation and information. The threat of parallel imports may also induce international suppliers to re-think their regional arrangements.

Relaxing parallel import restrictions should deliver net benefits to the community, provided appropriate regulatory and compliance frameworks and consumer education programs are in place. Transitional arrangements should be considered to ensure that affected individuals and businesses are given adequate notice in advance.

Recommendation 13 — Parallel imports

Restrictions on parallel imports should be removed unless it can be shown that:

- the benefits of the restrictions to the community as a whole outweigh the costs ; and
- the objectives of the restrictions can only be achieved by restricting competition.

Consistent with the recommendations of recent Productivity Commission reviews, parallel import restrictions on books and second-hand cars should be removed, subject to transitional arrangements as recommended by the Productivity Commission.

Remaining provisions of the *Copyright Act 1968* that restrict parallel imports, and the parallel importation defence under the *Trade Marks Act 1995,* should be reviewed by an independent body, such as the Productivity Commission.

For further detail on parallel imports, see Section 10.6.

Pharmacy

Some ongoing regulation of pharmacy is justified to: uphold patient and community safety; ensure pharmacists provide consumers with appropriate information and advice about their medication; provide equitable access to medication, regardless of a patient's wealth or location; and manage costs to patients and government.

The Australian Government's National Medicines Policy establishes objectives against which medicines are provided and regulations set. The current anti-competitive regulations on the location of pharmacies, or the requirement (with limited exceptions) that only pharmacists own pharmacies, do not appear to serve the objectives of the National Medicines Policy, including the quality of advice provided to consumers. Such restrictions limit both consumers' ability to choose where to obtain pharmacy services and suppliers' ability to meet consumers' demands.

Governments do not need anti-competitive regulation to ensure pharmacies meet community expectations of safety, access and standard of care. A range of alternatives is available, including:

- imposing obligations directly on pharmacies as a condition of their licensing and/or remuneration;
- tendering for the provision of pharmacy services in certain rural or remote areas; or
- a community service obligation, as currently applies to pharmacy wholesaling.

The Panel accepts that competition between pharmacies is not sufficient on its own to meet the access objectives of the National Medicines Policy in rural and remote areas of Australia. The supply of medicines in remote areas is already partly conducted through channels other than retail pharmacies, including through Aboriginal Health Services. That is unlikely to change, even if the current pharmacy location and ownership rules are reformed.

To secure access to medicines for all Australians, governments should consider tendering for the provision of pharmacy services in underserved locations and/or funding through a community service obligation. Since access to medicines is less likely to be an issue in urban settings, the rules targeted at pharmacies in urban areas should continue to be eased at the same time that mechanisms are established to address specific issues concerning access to pharmacies in rural locations.

The Panel recognises that changes to pharmacy location and ownership rules will have a significant impact on the pharmacy sector and that a transition period will therefore be necessary. The Panel

also notes that the current Fifth Community Pharmacy Agreement expires on 1 July 2015, and negotiations for the next agreement are underway. These negotiations provide an opportunity for the Australian Government to implement a further targeted relaxation of the pharmacy location rules as part of a transition towards their eventual removal.

Negotiations will be well underway when this Report is delivered. If changes during the initial years of the new agreement prove too precipitate, there should be provision for a mid-term review to incorporate easing of the location rules later in the life of the Fifth Agreement.

The Panel notes that the recent National Commission of Audit also recommended 'opening up the pharmacy sector to competition, including through the deregulation of ownership and location rules'.[21]

Recommendation 14 — Pharmacy

The Panel considers that current restrictions on ownership and location of pharmacies are not needed to ensure the quality of advice and care provided to patients. Such restrictions limit the ability of consumers to choose where to obtain pharmacy products and services, and the ability of providers to meet consumers' preferences.

The Panel considers that the pharmacy ownership and location rules should be removed in the long-term interests of consumers. They should be replaced with regulations to ensure access to medicines and quality of advice regarding their use that do not unduly restrict competition.

Negotiations on the next Community Pharmacy Agreement offer an opportunity for the Australian Government to implement a further targeted relaxation of the location rules, as part of a transition towards their eventual removal. If changes during the initial years of the new agreement prove too precipitate, there should be provision for a mid-term review to incorporate easing of the location rules later in the life of the next Community Pharmacy Agreement.

A range of alternative mechanisms exist to secure access to medicines for all Australians that are less restrictive of competition among pharmacy service services providers. In particular, tendering for the provision of pharmacy services in underserved locations and/or funding through a community service obligation should be considered. The rules targeted at pharmacies in urban areas should continue to be eased at the same time that alternative mechanisms are established to address specific issues concerning access to pharmacies in rural locations.

For further detail on pharmacy, see Section 10.7.

2.7 COMPETITIVE NEUTRALITY

Stakeholders overwhelmingly support the principle of competitive neutrality and call for Australian governments to recommit to competitive neutrality policy. The Organisation for Economic Co-operation and Development (OECD) also recently stated that, among member nations, Australia has the most complete competitive neutrality framework, backed by separate implementation and complaint-handling mechanisms.

21 Australian Government 2014, *Towards Responsible Government - The Report of the National Commission of Audit Phase One*, Canberra, page xlii.

But implementing competitive neutrality remains an area of concern for many stakeholders, including small business. The Review's Terms of Reference also direct it to consider the proper boundaries for government in economic activity.

The Panel considers that competitive neutrality policies should be reviewed and updated. Clearer guidelines should be provided on the application of competitive neutrality policies during the start-up stages of government businesses and the period of time over which start-up government businesses should earn a commercial rate of return. The tests used to identify significant business activities should also be reviewed.

Transparency could also be improved by requiring government businesses to report publicly on compliance with competitive neutrality policy and governments to respond publicly to the findings of complaint investigations.

Since each jurisdiction is able to adopt its own approach to competitive neutrality, cross-jurisdiction comparisons can be used to determine 'best practice' as a basis for updating policies and improving current arrangements.

Competitive neutrality policies benefit consumers in markets where both governments and other providers deliver services. This will be especially important in areas where competition policy has yet to reach, such as human services. In these areas, getting the right competitive neutrality policy settings in place will be crucial to securing the benefits of a diverse range of innovative providers. Again, cross-jurisdiction comparisons will help to assess the best ways of achieving competitive neutrality in human services markets. Such feedback could be incorporated into guidelines and practices.

Recommendation 15 — Competitive neutrality policy

All Australian governments should review their competitive neutrality policies. Specific matters to be considered should include: guidelines on the application of competitive neutrality policy during the start-up stages of government businesses; the period of time over which start-up government businesses should earn a commercial rate of return; and threshold tests for identifying significant business activities.

The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy (see Recommendation 43).

Recommendation 16 — Competitive neutrality complaints

All Australian governments should increase the transparency and effectiveness of their competitive neutrality complaints processes. This should include at a minimum:

- assigning responsibility for investigation of complaints to a body independent of government;
- a requirement for government to respond publicly to the findings of complaint investigations; and
- annual reporting by the independent complaints bodies to the proposed Australian Council for Competition Policy (see Recommendation 43) on the number of complaints received and investigations undertaken.

Recommendation 17 — Competitive neutrality reporting

To strengthen accountability and transparency, all Australian governments should require government businesses to include a statement on compliance with competitive neutrality principles in their annual reports.

The proposed Australian Council for Competition Policy (see Recommendation 43) should report on the experiences and lessons learned from the different jurisdictions when applying competitive neutrality policy to human services markets.

For further detail on competitive neutrality, see Chapter 13.

2.8 GOVERNMENT PROCUREMENT AND OTHER COMMERCIAL ARRANGEMENTS

Government procurement guidelines and decisions can affect the range of goods and services ultimately available to consumers. Procurement can also shape the structure and functioning of competition in markets.

Tender documents have traditionally been written in a prescriptive fashion and with an overarching focus on value for money. Although risk management and value for money are both important considerations, too narrow a focus on these factors can constrain choice, innovation and responsiveness in government-commissioned provision of goods and services.

Tendering with a focus on outcomes, rather than outputs, and trials of less prescriptive tender documents could encourage bidders to suggest new and innovative methods for achieving a government's desired result. Education and information sessions can also help a broader range of businesses understand the procurement process.

Competition principles, particularly those promoting choice and a diversity of providers, should be incorporated into procurement, commissioning, PPP and privatisation policies and practices. Procurement and privatisation policies and practices should also be subject to a public interest test, such that policies and practices should not restrict competition unless the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the policy can only be achieved by restricting competition.

Recommendation 18 — Government procurement and other commercial arrangements

All Australian governments should review their policies governing commercial arrangements with the private sector and non-government organisations, including procurement policies, commissioning, public-private partnerships and privatisation guidelines and processes.

Procurement and privatisation policies and practices should not restrict competition unless:

- the benefits of the restrictions to the community as a whole outweigh the costs; and
- the objectives of the policy can only be achieved by restricting competition.

An independent body, such as the Australian Council for Competition Policy (see Recommendation 43), should be tasked with reporting on progress in reviewing government commercial policies and ensuring privatisation and other commercial processes incorporate competition principles.

For further detail on government procurement and commercial arrangements, see Chapter 14.

2.9 ELECTRICITY AND GAS

The Panel acknowledges significant progress in the reform of Australia's electricity and gas sectors. However, reforms have not been finalised and the benefits are yet to be fully realised.

Competition reforms in energy have been a success but have slowed. In Victoria and Queensland, the National Energy Retail Law has yet to be applied without major derogations, undermining the benefits of a national law. Continuing regulation of retail energy prices by jurisdictions other than South Australia, Victoria and New South Wales (though it continues to regulate retail gas prices) perpetuates the distortion of price signals and compromises timely investment in energy infrastructure. The Panel notes that the Queensland Parliament recently legislated to deregulate electricity prices in South East Queensland from 1 July 2015.

The Panel strongly supports moves towards including the Northern Territory and Western Australia into the National Electricity Market, noting that no physical connection is required to do so.

The Panel also supports a detailed review of competition in the gas sector, echoing the proposal within the Eastern Australian Domestic Gas Study, and encourages the Australian Government to commit to undertake such a review through the Energy White Paper.

Recommendation 19 — Electricity and gas

State and territory governments should finalise the energy reform agenda, including through:

- application of the National Energy Retail Law with minimal derogation by all National Electricity Market jurisdictions;
- deregulation of both electricity and gas retail prices; and
- the transfer of responsibility for reliability standards to a national framework administered by the proposed Access and Pricing Regulator (see Recommendation 50) and the Australian Energy Market Commission (AEMC).

The Panel supports moves to include Western Australia and the Northern Territory in the National Electricity Market, noting that this does not require physical connection.

The Australian Government should undertake a detailed review of competition in the gas sector.

For further detail on electricity and gas, see Section 11.1.

2.10 WATER

Reform of water has been slower than reform in other sectors. A more national approach to water reform may re-establish its momentum.

If States and Territories implement the principles contained in the National Water Initiative, this will help to re-build momentum in water reform in both the rural and urban sectors. The Panel notes that, in general, urban water pricing fails to reflect its cost of provision and this is discouraging private sector participation in providing urban water.

The National Water Initiative outlines principles for best-practice pricing of urban water and the Panel sees benefit in the ACCP working with state and territory regulators to assist jurisdictions in applying those principles, allowing for necessary jurisdictional differences. Following this, the ACCP

should work with all States and Territories to develop plans for fully implementing the National Water Initiative.

The Panel expects that, should any of the regulatory functions in water markets be transferred to a national framework, the national aspects would be administered by the proposed Access and Pricing Regulator (APR). Notwithstanding, States and Territories should retain the option to transfer national regulation to the APR or to a suitably accredited state regulator.

Recommendation 20 — Water

All governments should progress implementation of the principles of the National Water Initiative, with a view to national consistency. Governments should focus on strengthening economic regulation in urban water and creating incentives for increased private participation in the sector through improved pricing practices.

State and territory regulators should collectively develop best-practice pricing guidelines for urban water, with the capacity to reflect necessary jurisdictional differences. To ensure consistency, the Australian Council for Competition Policy (see Recommendation 43) should oversee this work.

State and territory governments should develop clear timelines for fully implementing the National Water Initiative, once pricing guidelines are developed. The Australian Council for Competition Policy should assist States and Territories to do so.

Where water regulation is made national, the responsible body should be the proposed national Access and Pricing Regulator (see Recommendation 50) or a suitably accredited state body.

For further detail on water, see Section 11.2.

2.11 INFORMED CHOICE

Globalisation, competition and technological innovation have expanded the range of businesses from which Australian consumers can choose to purchase goods and services. The Panel is also recommending that user choice be placed at the heart of human services delivery, and that governments further their efforts to encourage a diversity of providers.

Greater choice can act as a powerful force to drive innovation in markets for goods and services, but it also means that consumers need to know more about markets if they are to secure the best deals.

The Panel believes that markets work best when consumers are informed and engaged, empowering them to make good decisions. Empowering consumers requires that they have access to accurate, easily understood information about products and services on offer.

But just providing information is not enough to guarantee good choices by consumers. The 'right' type of information must also be provided, so consumers can (and want to) act on the available information. Insights from psychology and behavioural economics suggest that consumers can have behavioural traits that prevent them from making good use of even well-presented information. Governments should take account of these findings to ensure that consumers are able to enjoy the full benefits of competition and choice.

Businesses are collecting more and more data, notably through customer loyalty cards, to better understand their customers. The Panel sees scope for Australian consumers' access to data to be improved to better inform their decisions.

Recommendation 21 — Informed choice

Governments should work with industry, consumer groups and privacy experts to allow consumers to access information in an efficient format to improve informed consumer choice.

The proposed Australian Council for Competition Policy (see Recommendation 43) should establish a working group to develop a partnership agreement that both allows people to access and use their own data for their own purposes and enables new markets for personal information services. This partnership should draw on the lessons learned from similar initiatives in the US and UK.

Further, governments, both in their own dealings with consumers and in any regulation of the information that businesses must provide to consumers, should draw on lessons from behavioural economics to present information and choices in ways that allow consumers to access, assess and act on them.

For further detail on informed choice, see Chapter 16.

3 Competition Law

3.1 Simplification

The Panel has asked the following questions in guiding its consideration of whether the *Competition and Consumer Act 2010* (CCA) is fit for purpose:

- Does the law focus on enhancing consumer wellbeing over the long term?
- Does the law protect competition rather than protecting individual competitors?
- Does the law strike the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship?
- Is the law as clear, simple and predictable as it can be?

The Panel supports the general form and structure of the CCA, that is:

- The law prohibits specific categories of anti-competitive conduct, with economy-wide application.
- Only conduct that is anti-competitive in most circumstances is prohibited per se — other conduct is prohibited only if it has the purpose, effect or likely effect of substantially lessening competition.
- Contraventions of the law are adjudicated by a court, with proceedings able to be initiated by a public regulatory authority or through private suit.
- Business can seek exemption from the law in individual cases on public benefit grounds.

Recommendation 22 — Competition law concepts

The central concepts, prohibitions and structure enshrined in the current competition law should be retained, since they are appropriate to serve the current and projected needs of the Australian economy.

However, the Panel considers that the competition law provisions of the CCA, including the provisions regulating the granting of exemptions, are unnecessarily complex.

Complex law imposes costs on the economy: direct costs caused by the need for legal advice and prolonged legal disputation; and indirect costs caused by business and regulatory uncertainty.

The competition law provisions of the CCA would benefit from simplification, while retaining their underlying policy intent.

Recommendation 23 — Competition law simplification

The competition law provisions of the CCA should be simplified, including by removing overly specified provisions and redundant provisions.

The process of simplifying the CCA should involve public consultation.

Provisions that should be removed include:

- subsection 45(1) concerning contracts made before 1977; and
- sections 45B and 45C concerning covenants.

For further detail on competition law concepts, see Chapter 17.

3.2 Application to Government Activities in Trade or Commerce

As a consequence of the Hilmer Review, the CCA was extended to apply to the Crown, but only insofar as the Crown carries on a business, either directly or through an authority of the Crown.

There are many circumstances in which the Crown (whether as a department or an authority) undertakes commercial transactions but does not carry on a business. This is particularly the case in procurement, whether for delivering large infrastructure projects or the regular requirements of the health or education systems.

Through commercial transactions entered into with market participants, the Crown (whether in right of the Commonwealth, state, territory or local governments) has the potential to harm competition (see Recommendation 18). The Panel considers that the Hilmer reforms should be carried a step further, with the Crown subject to the competition law insofar as it undertakes activity in trade or commerce.

Recommendation 24 — Application of the law to government activities

Sections 2A, 2B and 2BA of the CCA should be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake activity in trade or commerce.

This recommendation is reflected in the model legislative provisions in Appendix A.

For further detail on the application of competition laws to government activities, see Section 14.2.

3.3 Market Definition

The Panel considers that the competition law provisions of the CCA are correctly focused on conduct that damages competition in markets in Australia and that the current definition of 'market' (being a market in Australia) is appropriate.

This reflects the object of the law to protect the welfare of Australians. There is no sound reason for Australian law to regulate conduct affecting competition in overseas markets.

However, this should not mean that the CCA ignores forces of competition arising outside Australia but which affect Australian markets. Frequently, the sources of competition in Australian markets

originate globally, especially as increasing numbers of Australian consumers purchase goods and services online from overseas suppliers.

The definition of the term 'competition' in the CCA is important. The CCA has been framed to take account of all sources of competition that affect markets in Australia, with the term defined to include competition from imported goods and services.

Nevertheless, given the importance of ensuring that global sources of competition are considered where relevant, the current definition of 'competition' in the CCA should be strengthened so that there can be no doubt that it includes competition from *potential* imports of goods and services, not just *actual* imports.

The Panel does not intend that this change would expand market definitions in the competition law to include every product and service that could conceivably be imported into Australia, but only clarify that the credible threat of import competition is a relevant component of a competition analysis.

Recommendation 25 — Definition of market and competition

The current definition of 'market' in section 4E of the CCA should be retained but the current definition of 'competition' in section 4 should be amended to ensure that competition in Australian markets includes competition from goods imported or capable of being imported, or from services rendered or capable of being rendered, by persons not resident or not carrying on business in Australia.

This recommendation is reflected in the model legislative provisions in Appendix A.

For further detail on market definition, see Section 18.1.

3.4 EXTRA-TERRITORIAL REACH OF THE LAW

The Panel considers that the competition law provisions of the CCA ought to apply to firms engaging in conduct outside Australia if that conduct relates to trade or commerce within Australia or between Australia and places outside Australia. The application of the law in those circumstances ought not to depend on whether the firm is incorporated in, or carries on business within, Australia.

Private actions are also an important part of the competition law framework. The requirement for private parties to seek ministerial consent in connection with proceedings involving conduct that occurs outside Australia is an unnecessary roadblock to possible redress for harm suffered as a result of a breach of Australian competition law.

Recommendation 26 — Extra-territorial reach of the law

Section 5 of the CCA, which applies the competition law to certain conduct engaged in outside Australia, should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions. Instead, the competition law should apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia.

The in-principle view of the Panel is that the foregoing changes should also be made in respect of actions brought under the Australian Consumer Law.

This recommendation is reflected in the model legislative provisions in Appendix A.

For further detail on extra-territorial reach of the law, see Section 23.2.

3.5 CARTELS

Cartel conduct between competitors is anti-competitive in most circumstances and should be prohibited per se. The Panel supports the intent of the cartel conduct prohibitions, including the combined criminal and civil sanctions.

However, the Panel sees significant deficiencies in the current framework of the cartel prohibitions, particularly having regard to its criminal sanctions. Specifically, the Panel considers that:

- The provisions are excessively complex, which undermines compliance and enforcement.
- The cartel provisions, consistent with Australia's competition laws generally, should be confined to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on a business within Australia.
- Given the potential for criminal sanctions, the provisions ought to be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility.
- Joint ventures and similar forms of business collaboration should not be subject to cartel prohibitions and should only be unlawful if they substantially lessen competition.
- Similarly, trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including IP licensing) should not be subject to cartel prohibitions, and should only be unlawful if they substantially lessen competition.

Recommendation 27 — Cartel conduct prohibition

The prohibitions against cartel conduct in Part IV, Division 1 of the CCA should be simplified and the following specific changes made:

- The provisions should apply to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on business within Australia.
- The provisions should be confined to conduct involving firms that are actual or likely competitors, where 'likely' means on the balance of probabilities.
- A broad exemption should be included for joint ventures, whether for the production, supply, acquisition or marketing of goods or services, recognising that such conduct will be prohibited by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition.
- An exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including intellectual property licensing), recognising that such conduct will be prohibited by section 45 of the CCA (or section 47 if retained) if it has the purpose, effect or likely effect of substantially lessening competition.

This recommendation is reflected in the model legislative provisions in Appendix A.

The Panel also considers that the per se prohibition of exclusionary provisions, as defined in section 4D, is no longer necessary since, in practice, such conduct is materially the same as cartel conduct in the form of market sharing.

Accordingly, the Panel believes that the prohibition against exclusionary provisions should be removed from the CCA.

Recommendation 28 — Exclusionary provisions

The CCA should be amended to remove the prohibition of exclusionary provisions in subparagraphs 45(2)(a)(i) and 45(2)(b)(i), with an amendment to the definition of cartel conduct to address any resulting gap in the law.

This recommendation is reflected in the model legislative provisions in Appendix A.

For further detail on cartel conduct, see Section 20.1.

3.6 ANTI-COMPETITIVE DISCLOSURE OF INFORMATION

The Panel considers that, in their current form, the prohibitions against 'price signalling' in the CCA do not strike the right balance in distinguishing between anti-competitive and pro-competitive conduct. Being confined in their operation to a single industry (banking), the current provisions are also inconsistent with the principle that the CCA should apply to all businesses generally.

The Panel considers that public price disclosure can help consumers make informed choices and is unlikely to raise significant competition concerns. Accordingly, the Panel believes there is no sound basis for prohibiting public price disclosure, either in the banking industry or more generally.[22]

Private price disclosure to a competitor will generally have more potential to harm competition, as it may be used to facilitate collusion among competitors. However, private disclosure may be necessary under some business circumstances or in the ordinary course of business, particularly in connection with joint ventures or similar types of business collaboration. For that reason, a per se prohibition has the potential to overreach.

The Panel considers that anti-competitive price signalling does not need its own separate Division in the CCA; rather, price signalling can be addressed by extending section 45 to cover concerted practices that have the purpose, effect or likely effect of substantially lessening competition.

The word 'concerted' means jointly arranged or carried out or co-ordinated. Hence, a concerted practice between market participants is a practice that is jointly arranged or carried out or co-ordinated between the participants. The expression 'concerted practice with one or more other persons' conveys that the impugned practice is neither unilateral conduct nor mere parallel conduct by market participants (e.g., suppliers selling products at the same price).

The Panel proposes that such conduct would only be prohibited if it can be shown that the concerted practice has the purpose, effect or likely effect of substantially lessening competition. The Panel considers that the word 'concerted' has a clear and practical meaning and no further definition is required for the purposes of a legal enactment.

The Panel does not consider that the cartel conduct prohibitions should be expanded to include concerted practices. The Panel considers that imposing criminal sanctions for cartel conduct should require proof of a contract, arrangement or understanding between competitors.

Recommendation 29 — Price signalling

The 'price signalling' provisions of Part IV, Division 1A of the CCA are not fit for purpose in their current form and should be repealed.

Section 45 should be extended to prohibit a person engaging in a concerted practice with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition.

This recommendation is reflected in the model legislative provisions in Appendix A.

For further detail on anti-competitive disclosure of information, see Section 20.2.

3.7 MISUSE OF MARKET POWER

An effective provision to deal with unilateral anti-competitive conduct is a necessary part of the competition law. This is particularly the case in Australia, where the small size of the Australian

22 The Panel notes that the prohibition on certain public disclosures also applies to disclosures of a corporation's capacity or commercial strategy. The Report does not deal with these matters separately, since the Panel considers that the same issues arise as in the case of public price disclosure.

economy frequently leads to concentrated markets. The Panel considers that section 46 can be re-framed in a manner that will improve its effectiveness in targeting anti-competitive unilateral conduct and focus it more clearly on the long-term interests of consumers.

The Panel regards the threshold test of 'substantial degree of power in a market' as appropriate and well understood. In contrast, the 'take advantage' limb of section 46 is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct. This test has given rise to substantial difficulties of interpretation, which have been revealed in the decided cases, undermining confidence in the effectiveness of the law.

Perhaps more significantly, the test is not best adapted to identifying a misuse of market power. Business conduct should not be immunised merely because it is often undertaken by firms without market power. Conduct such as exclusive dealing, loss-leader pricing and cross-subsidisation may all be undertaken by firms without market power without raising competition concerns, while the same conduct undertaken by a firm with market power might raise competition concerns.

Further, the focus of the prohibition on showing the purpose of damaging a competitor is inconsistent with the overriding policy objective of the CCA to protect competition, and not individual competitors. The prohibition ought to be directed to conduct that has the purpose or effect of harming the competitive process.

The Panel also considers that the supplementary prohibitions, which attempt to address concerns about predatory pricing,[23] do not advance the policy intent of section 46.

Accordingly, the Panel proposes that the primary prohibition in section 46 be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the conduct has the purpose, effect or likely effect of substantially lessening competition in that or any other market. The proposed test of 'substantial lessening of competition' is the same test as is found in section 45 (anti-competitive agreements), section 47 (exclusive dealing) and section 50 (mergers) of the CCA, and the test is well accepted within those sections.

Conduct undertaken by a firm with substantial market power can have pro-competitive and anti-competitive features. The issue for courts, and for firms assessing their own conduct, is to weigh the pro-competitive and anti-competitive impacts of the conduct to decide if there has been a substantial lessening of competition. To clarify the law and mitigate concerns about over-capture, the Panel proposes that section 46 include legislative guidance with respect to the intended operation of the section. Specifically, 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:

- increases competition in a market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- lessens competition in a market, including by preventing, restricting or deterring the potential for competitive conduct in a market or new entry into a market.

The proposed reform to section 46 is intended to improve its clarity, force and effectiveness so that it can be used to prevent unilateral conduct that substantially harms competition and that has no economic justification.

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23 *Competition and Consumer Act 2010* subsections 46(1AAA) and (1AA).

Recommendation 30 — Misuse of market power

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.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of market power and anti-competitive purpose may be determined.

Authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision.

This recommendation is reflected in the model legislative provisions in Appendix A.

For further detail on misuse of market power, see Section 19.1.

3.8 UNCONSCIONABLE CONDUCT

Both the business and the wider community expect business to be conducted according to a minimum standard of fair dealing. There are sound economic and social reasons for enshrining minimum standards of fair dealing within the law.

The Panel has heard concerns expressed by small businesses and suppliers in respect of behaviours of larger businesses in their supply chains. The business unconscionable conduct provisions were introduced specifically to address these concerns.

Enforcing business-to-business unconscionable conduct provisions is an important function of the Australian Competition and Consumer Commission (ACCC). The Panel notes the recent Federal Court declarations in two proceedings instituted by the ACCC that Coles engaged in unconscionable conduct in 2011 in its dealings with certain suppliers. These cases indicate that the current unconscionable conduct provisions are working as intended to meet their policy goals.

Active and ongoing review of these provisions should occur as other matters arise. If deficiencies in the operation of the provisions become evident, they should be remedied promptly.

For further detail on unconscionable conduct, see Section 19.4.

3.9 PRICE DISCRIMINATION

The Panel recognises that some small businesses and consumers have concerns about the impacts of price discrimination. However, the former prohibition on price discrimination (contained in the former section 49 of the CCA) was found likely to result in price inflexibility, which would undermine consumer welfare.

In relation to international price discrimination, the Panel considers that any attempt to prohibit this would face significant implementation difficulties. A prohibition on international price discrimination could also have significant negative consequences, ultimately limiting consumer choice. Instead, the Panel favours encouraging the development and use of lawful market-based mechanisms to put downward pressure on prices.

Recommendation 31 — Price discrimination

A specific prohibition on price discrimination should not be reintroduced into the CCA. Where price discrimination has an anti-competitive impact on markets, it can be dealt with by the existing provisions of the law (including through the Panel's recommended revisions to section 46 (see Recommendation 30)).

Attempts to prohibit international price discrimination should not be introduced into the CCA on account of significant implementation and enforcement complexities and the risk of negative unintended consequences. Instead, the Panel supports moves to address international price discrimination through market solutions that empower consumers. These include removing restrictions on parallel imports (see Recommendation 13) and ensuring that consumers are able to take lawful steps to circumvent attempts to prevent their access to cheaper legitimate goods.

For further detail on price discrimination, see Section 19.3.

3.10 VERTICAL RESTRICTIONS (OTHER THAN RESALE PRICE MAINTENANCE)

As a general principle, the Panel believes that the CCA should not interfere with trading conditions agreed between buyers and sellers in connection with acquiring and supplying goods and services, unless those conditions have the purpose, effect or likely effect of substantially lessening competition.

Section 47 prohibits most vertical restrictions only if they have the purpose, effect or likely effect of substantially lessening competition. The one exception is third-line forcing. Under the CCA, third-line forcing is prohibited per se — that is, regardless of the purpose or effect of the conduct.

The Panel sees no need for third-line forcing to be singled out from other forms of vertical trading conditions and be prohibited per se. As notifications to the ACCC demonstrate, third-line forcing is a common business practice and rarely has anti-competitive effects.

Recommendation 32— Third-line forcing test

Third-line forcing (subsections 47(6) and (7) of the CCA) should only be prohibited where it has the purpose, effect or likely effect of substantially lessening competition.

The Panel agrees with the view expressed in many submissions that section 47 is unnecessarily complex and therefore difficult for business to understand and apply. The section focuses attention

on particular forms of vertical restraints and directs attention away from the central issue — whether the restriction is anti-competitive.

The amendments to section 46 recommended in this Report (see Recommendation 30) will render section 47 redundant. Section 45 will apply to all vertical restraints (including third-line forcing) included in a contract, arrangement or understanding; section 46 will apply if a corporation refuses to supply goods or services because the acquirer will not agree to accept a vertical restraint (including third-line forcing). As amended, section 45 and section 46 would apply the same competition test as in section 47.

Section 46 has an additional limitation not expressed in section 47: the prohibition only applies to a corporation that has substantial market power. However, this will not limit the effectiveness of the law. It is well accepted that vertical restrictions will not substantially lessen competition unless they are imposed by a corporation with substantial market power.

The Panel therefore recommends that section 47 be repealed, simplifying the competition law.

If section 46 is not amended as recommended, the Panel considers that section 47 should be simplified along the lines proposed in the Draft Report. The Panel has included a simplified form of section 47 in the model legislative provisions in Appendix A. The model form takes account of submissions received in response to the Draft Report.

Recommendation 33 — Exclusive dealing coverage

Section 47 of the CCA should be repealed and vertical restrictions (including third-line forcing) and associated refusals to supply addressed by sections 45 and 46 (as amended in accordance with Recommendation 30).

For further detail on vertical restrictions (other than resale price maintenance), see Section 20.3.

3.11 Resale price maintenance

The appropriateness of a per se prohibition on resale price maintenance (RPM) has been debated for many years, both in Australia and overseas. When the per se prohibition was enacted in Australia in the mid-1970s, it reflected the law in many comparable jurisdictions. However, over the last 20 years some countries — particularly the US and Canada — have moved away from the per se prohibition of RPM. Other jurisdictions, including Europe and New Zealand, have retained the per se prohibition.

At this time, the Panel sees no sufficient case for changing the prohibition of RPM from a per se prohibition to a competition-based test. However, it would be appropriate to allow business to seek exemption from the prohibition more easily. This could be achieved through allowing RPM to be assessed through the notification process, which is quicker and less expensive for businesses than authorisation. This change would also have the advantage of allowing the ACCC to assess RPM trading strategies more frequently, and thereby provide better evidence as to the competitive effects of RPM in Australia.

A general tenet of the competition law is that companies within a corporate group are treated as a single economic entity and are not considered to be competitors. For that reason, the prohibitions in

sections 45 and 47 do not apply to trading arrangements entered into between related companies.[24] A similar principle ought to apply to RPM. Currently, there is no exemption for RPM between a manufacturer and a retailer that is a subsidiary of the manufacturer.

Recommendation 34 — Resale price maintenance

The prohibition on resale price maintenance (RPM) in section 48 of the CCA should be retained in its current form as a per se prohibition, but notification should be available for RPM conduct.

This recommendation is reflected in the model legislative provisions in Appendix A.

The prohibition should also be amended to include an exemption for RPM conduct between related bodies corporate, as is the case under sections 45 and 47.

For further detail on resale price maintenance, see Section 20.4.

3.12 MERGERS

The Panel considers that the current prohibition of mergers that are likely to substantially lessen competition in Australian markets is appropriate.

Concerns have been raised that Australia's merger law does not give proper consideration to global markets within which many businesses compete. Some submissions argue that the term 'market' in the CCA is defined as a market 'in Australia' and that causes the competition analysis to be narrowly focused. As noted above (see Section 3.3), although the Panel considers that the CCA correctly focuses upon conduct that damages competition in markets in Australia (to protect Australian consumers), the CCA has been framed to take account of all sources of competition that affect Australian markets. Recommendation 25 is intended to strengthen that principle.

Although some submissions raise concerns that the ACCC opposes too few mergers, others question whether the ACCC's application of the CCA is constraining Australian businesses from achieving efficient scale through mergers to become globally competitive. To compete effectively, businesses must continuously pursue economic efficiency. In many industries, efficiency requires scale. Businesses may pursue mergers to achieve efficient scale to compete more effectively in global markets.

In many markets in Australia, achieving efficient scale will not substantially lessen competition because of the constraining influence of imports. Such mergers are allowed under the CCA. However, in some markets, the opposite will be the case: the influence of imports may be weak and unable to constrain the resulting market power of the merged businesses. When that occurs, conflicting interests emerge: the gain to the businesses that wish to merge through achieving greater efficiency against the potential detriment to Australian consumers arising from reduced competition.

The Panel considers that the CCA has sufficient flexibility to allow such issues to be adjudicated and determined by the ACCC or the Australian Competition Tribunal (the Tribunal). The merger authorisation process applies a public benefit test that covers all potential benefits and detriments, including economies of scale. There may be occasions where it is in the public interest to allow a

24 *Competition and Consumer Act 2010*, subsections 45(8) and 47(12).

particular merger to achieve efficient scale to compete globally, notwithstanding that the merger adversely affects competition in Australia.

Nonetheless, the Panel considers that the administration of the merger law can be improved.

There is widespread support for retaining the ACCC's informal merger review process. However, strong concerns have been expressed about the timeliness and transparency of the process.

The Panel considers that it is not sensible to attempt to regulate an informal process which, by definition, operates outside any formal legal framework. The flexibility of the informal process is widely recognised as being beneficial and should not be interfered with. However, the public interest is served by timely merger decisions and by transparency in the public administration of the merger law. The Panel sees scope for further consultation between the ACCC and business representatives, with the objective of developing an informal review process that delivers more timely decisions. The Panel also considers that ex-post evaluations of some merger decisions could be undertaken by the proposed Australian Council for Competition Policy (ACCP) (see Recommendation 44) to draw lessons for future merger reviews (but not to overturn past decisions).

The Panel considers that concerns about the timeliness and transparency of merger review processes can also be addressed through a more streamlined formal exemption process. The current formal exemption processes are excessively complex and prescriptive, being a formal clearance application to the ACCC and an alternative authorisation application to the Tribunal. This has deterred the use of these mechanisms and fuelled complaints about the way the informal process is applied to large mergers that involve contested facts and issues.

The Panel also considers that, if a more streamlined formal exemption process were introduced, it would be preferable for the ACCC to be the first instance decision-maker rather than the Tribunal. Having regard to its composition and powers, the ACCC is better suited to investigation and first-instance decision making in administering the competition law (including mergers), while the Tribunal is better suited to an appellate or review role.

The Tribunal's review of the ACCC's decision should be based upon the material that was before the ACCC, but the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied that there is sufficient reason. A full rehearing, with an unfettered ability for parties to put new material before the Tribunal, would be likely to dampen the incentive to put all relevant material to the ACCC in the first instance, and may lead to delays if the Tribunal has to deal with large amounts of new evidence. On the other hand, circumstances may arise in which it is reasonable to allow new evidence to be provided to the Tribunal. Further, the Tribunal may also consider that it would be assisted by hearing directly from witnesses relied on by the ACCC, through questioning by the parties and/or the Tribunal.

Creeping acquisitions

Concerns about 'creeping acquisitions' typically arise where a business with a substantial degree of market power acquires many small competitors over time.

A legitimate question arises regarding whether, in assessing the likely effect of a proposed merger, the merger provisions of the CCA should also take account of the aggregate effect of the corporation's previous acquisitions within, for example, the prior three years. The complicating factor is that market conditions may have altered materially over the period chosen. Such a change would impose additional costs associated with merger review. On balance, in the absence of evidence of harmful acquisitions proceeding because of a gap in the law on creeping acquisitions, the Panel does not consider that a sufficiently strong case for change has been made.

Recommendation 35 — Mergers

There should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal merger review process.

The formal merger exemption processes (i.e., the formal merger clearance process and the merger authorisation process) should be combined and reformed to remove unnecessary restrictions and requirements that may have deterred their use. The specific features of the review process should be settled in consultation with business, competition law practitioners and the ACCC.

However, the general framework should contain the following elements:

- The ACCC should be the decision-maker at first instance.
- The ACCC should be empowered to authorise a merger if it is satisfied that the merger does not substantially lessen competition or that the merger would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.
- The formal process should not be subject to any prescriptive information requirements, but the ACCC should be empowered to require the production of business and market information.
- The formal process should be subject to strict timelines that cannot be extended except with the consent of the merger parties.
- Decisions of the ACCC should be subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines.
- The review by the Australian Competition Tribunal should be based upon the material that was before the ACCC, but the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied that there is sufficient reason.

Merger review processes and analysis would also be improved by implementing a program of post-merger evaluations, looking back on a number of past merger decisions to determine whether the ACCC's processes were effective and its assessments borne out by events. This function could be performed by the Australian Council for Competition Policy (see Recommendation 44).

For further detail on mergers, see Chapter 18.

3.13 Secondary boycotts and employment-related matters

The negotiation of employment terms and conditions (remuneration, conditions of employment, hours of work or working conditions of employees) has always been excluded from most of the competition law provisions of the CCA by paragraph 51(2)(a). The reason for this exclusion is that the negotiation and determination of employment terms and conditions is governed by a separate regulatory regime, currently contained in the *Fair Work Act 2009*. The policy rationale is that labour markets are not in all respects comparable to other product or service markets. As a general principle, the Panel agrees with that view.

However, two categories of employment-related conduct do not fall within that general exclusion:

- secondary boycotts, which are prohibited by sections 45D, 45DA and 45DB; and
- trading restrictions in industrial agreements, which are prohibited by sections 45E and 45EA.

Secondary boycotts

A strong case remains for the CCA to retain the prohibition of secondary boycotts. A sufficient case has not been made to limit the scope of the secondary boycott prohibition, nor to broaden the scope of the exception for employment-related matters.

The Panel did not receive compelling evidence of actual secondary boycott activity falling within the environmental and consumer protection exception in the CCA. In the absence of such evidence, the Panel does not see an immediate case for amending the exception. However, if such evidence arises from future boycott activity, the exceptions should be reassessed.

Some industry organisations, especially in building, construction and mining, believe that public enforcement of the secondary boycott provisions is inadequate, a point emphasised in the Interim Report of the Royal Commission into Trade Union Governance and Corruption.[25] Timely and effective public enforcement serves as a deterrent to boycott activity and needs to exist both in regulatory culture and capability. The Panel believes that the ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law.

It would be useful for the ACCC to report the number of complaints it receives about different parts of the CCA, including secondary boycotts, and the manner in which the complaints are resolved.

Further, the Panel sees no reason why the maximum pecuniary penalties for breaches of secondary boycott provisions should be lower than those for other breaches of the competition law.

Recommendation 36 — Secondary boycotts

The prohibitions on secondary boycotts in sections 45D-45DE of the CCA should be maintained and effectively enforced.

The ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law. It should also publish in its annual report the number of complaints made to it in respect of different parts of the CCA, including secondary boycott conduct and the number of such matters investigated and resolved each year.

The maximum penalty level for secondary boycotts should be the same as that applying to other breaches of the competition law.

Trading restrictions in industrial agreements

Section 45E of the CCA prohibits a person (an employer) from making a contract, arrangement or understanding with an organisation of employees that contains a provision restricting the freedom of the employer to supply goods or services to, or acquire goods or services from, another person. Section 45EA prohibits a person from giving effect to such a contract, arrangement or understanding. The Panel considers that sections 45E and 45EA are important provisions that protect trading freedoms.

25 Heydon J. D., AC QC 2014, *Royal Commission into Trade Union Governance and Corruption Interim Report*, Volume 2, page 1106.

There appears to be a possible conflict between the intended operation of sections 45E and 45EA and the regulation of awards and industrial agreements under the Fair Work Act. This issue has been brought into focus by the 2012 decision of the Full Court of the Federal Court, *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108.

It appears to be lawful under the *Fair Work Act 2009* to make awards and register enterprise agreements that place restrictions on the freedom of employers to engage contractors or source certain goods or non-labour services. The Panel considers it desirable that this apparent conflict be resolved.

The Panel favours competition over restrictions and believes that businesses should generally be free to supply and acquire goods and services, including contract labour, should they choose. Accordingly, the Panel considers that sections 45E and 45EA should be amended so that they expressly apply to awards and industrial agreements, except to the extent they deal with the remuneration, conditions of employment, hours of work or working conditions of employees.

The Panel considers that the ACCC should be given the right to intervene in proceedings (i.e., to be notified, appear and be heard subject to time limits) before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA. The ACCC and Fair Work Commission should establish a protocol to govern these arrangements.

Further, the present limitation in sections 45E and 45EA, such that the prohibition only applies to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation', to deal, should be removed, and the maximum penalty for breaches of these provisions should be in line with those for breaches of the rest of the competition law.

Recommendation 37 — Trading restrictions in industrial agreements

Sections 45E and 45EA of the CCA should be amended so that they apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.

Further, the present limitation in sections 45E and 45EA, such that the prohibitions only apply to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation,' to deal, should be removed.

These recommendations are reflected in the model provisions in Appendix A.

The ACCC should be given the right to intervene in proceedings before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA. A protocol should be established between the ACCC and the Fair Work Commission.

The maximum penalty for breaches of sections 45E and 45EA should be the same as that applying to other breaches of the competition law.

For further detail on secondary boycotts, and trading restrictions in industrial agreements, see Chapter 21.

3.14 EXEMPTION PROCESSES

The exemption processes of authorisation and notification included in the CCA are important. They recognise that, in certain circumstances, particular conduct may not harm competition or may give rise to public benefits that outweigh any competitive harm.

Like much of the CCA, the authorisation and notification procedures have become overly complex, which imposes costs on business. Wherever possible, the Panel supports removing unnecessary complexity.

Significant steps can be taken to simplify the authorisation and notification procedures. First, in respect of authorisation, it should be permissible to apply for authorisation of a business arrangement through a single application and without regard to the specific provisions of the CCA that might be contravened by the proposed conduct.

Second, for both authorisation and notification, the ACCC should be empowered to grant the exemption (other than in respect of the per se prohibitions) if it is satisfied that either the proposed conduct is unlikely to substantially lessen competition or that the proposed conduct is likely to result in a net public benefit.

Each of these changes would assist in focusing the exemption process on the issues of substance and away from technicalities.

Recommendation 38 — Authorisation and notification

The authorisation and notification provisions in Part VII of the CCA should be simplified to:

- ensure that only a single authorisation application is required for a single business transaction or arrangement; and
- empower the ACCC to grant an exemption from sections 45, 46 (as proposed to be amended), 47 (if retained) and 50 if it is satisfied that the conduct would not be likely to substantially lessen competition or that the conduct would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.

This recommendation is reflected in the model legislative provisions in Appendix A.

The Panel also considers that the ACCC should be empowered to grant a block exemption in respect of specified conduct in particular market conditions. This would enable the ACCC to create 'safe harbours' for businesses where they engage in conduct that is unlikely to substantially lessen competition, and avoid the time and resources required to seek an authorisation or notification.

Recommendation 39 — Block exemption power

A block exemption power, exercisable by the ACCC, should be introduced and operate alongside the authorisation and notification frameworks in Part VII of the CCA.

This power would enable the ACCC to create safe harbours, where conduct or categories of conduct are unlikely to raise competition concerns, on the same basis as the test proposed by the Panel for authorisations and notifications (see Recommendation 38).

The ACCC should also maintain a public register of all block exemptions, including those no longer in force. The decision to issue a block exemption would be reviewable by the Australian Competition Tribunal.

The Panel's recommended form of block exemption power is reflected in the model legislative provisions in Appendix A.

For further detail on authorisation, notification and block exemption, see Chapter 22.

3.15 ENFORCEMENT AND REMEDIES

The Panel supports the enforcement regime under the CCA, which confers both public and private enforcement rights in respect of the competition law.

In relation to public enforcement by the ACCC, there appears to be general approval of the severity of the sanctions for contravention of the competition law. However, the Panel agrees with the view of the ACCC that the current sanction for a corporation failing to comply with section 155 of the CCA is inadequate.

Compulsory evidence-gathering powers under section 155 of the CCA bolster the ACCC's ability to enforce the CCA. The Panel recommends that the fine a court may award for non-compliance with section 155 be increased to the same level as the fine for non-compliance with notice-based evidence-gathering powers in the *Australian Securities and Investments Commission Act 2001*. The ACCC should also be able to use section 155 to investigate possible contraventions of court-enforceable undertakings accepted by the ACCC under section 87B of the CCA.

Compulsory evidence-gathering powers can also impose a regulatory burden on recipients of compulsory notices. The Panel acknowledges concerns raised in submissions about the costs of compliance with section 155 notices issued by the ACCC. This is in part due to the increased use of technology leading to more electronic material being retained by businesses that may need to be searched in order to comply with a notice.

Means are available to reduce the regulatory burden associated with section 155 notices. First, the ACCC should accept a responsibility to frame section 155 notices in the narrowest form possible, consistent with the scope of the matter being investigated. Secondly, in complying with a section 155 notice, the recipient should be required to undertake a reasonable search, taking into account factors such as the number of documents involved and the ease and cost of retrieving the documents. That requirement could most effectively be introduced into the CCA by a statutory defence based on the criteria of a reasonable search.

Recommendation 40 — Section 155 notices

The section 155 power should be extended to cover the investigation of alleged contraventions of court-enforceable undertakings.

The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age. Section 155 should be amended so that it is a defence to a 'refusal or failure to comply with a notice' under paragraph 155(5)(a) of the CCA that a recipient of a notice under paragraph 155(1)(b) can demonstrate that a reasonable search was undertaken in order to comply with the notice.

The fine for non-compliance with section 155 of the CCA should be increased in line with similar notice-based evidence-gathering powers in the *Australian Securities and Investments Commission Act 2001*.

Private enforcement of the competition law is an important right. However, there are many regulatory and practical impediments to the exercise of such a right. It is important to find ways to reduce those impediments.

Section 83 of the CCA is intended to facilitate private actions by enabling findings of fact made against a corporation in one proceeding (typically a proceeding brought by the ACCC) to be prima facie evidence against the corporation in another proceeding (typically a proceeding brought

by a private litigant). Many ACCC proceedings are resolved by a corporation making admissions of fact that establish the contravention, but it is uncertain whether section 83 applies to admissions as well as findings of fact.

The effectiveness of section 83 as a means of reducing the cost of private 'follow-on' proceedings would be enhanced if the section were amended to apply to admissions of fact made by a corporation in another proceeding, as well as findings of fact.

Concerns are expressed in submissions about the impact that extending section 83 to admissions of fact could have on the willingness of respondents to co-operate in cartel matters or settle matters with the ACCC, compromising the effectiveness of public enforcement of the CCA. The Panel doubts that this change to section 83 would materially alter the assessment by a respondent whether or not to settle an ACCC proceeding. Amongst other considerations, section 83 merely makes the admitted fact prima facie evidence of that fact in the follow-on proceeding. The respondent company remains free, should it so choose, to adduce evidence in the follow-on proceeding contrary to the admitted fact.

The proposed amendment to section 83 would remove doubt about its operation in the context of factual admissions and reduce the costs and risks of proceedings brought by persons who may have suffered loss and damage by reason of admitted contravening conduct.

Recommendation 41 — Private actions

Section 83 of the CCA should be amended so that it extends to admissions of fact made by the person against whom the proceedings are brought in addition to findings of fact made by the court.

This recommendation is reflected in the model legislative provisions in Appendix A.

In respect of contravening conduct that occurs overseas, a foreign corporation should be subject to Australian competition law regardless of whether it carries on business in Australia. Given that competition laws and policies are now commonplace around the world, there is no reason why private parties should have to seek ministerial consent before launching a proceeding that involves overseas conduct. This is addressed in Recommendation 26.

The Panel considers that small business needs greater assurance that competition complaints can be dealt with. Recommendation 53 deals with small business access to remedies.

For further detail on enforcement and remedies, see Chapter 23.

3.16 National Access Regime

The National Access Regime (contained in Part IIIA of the CCA) was originally established to enable third-party access to identified bottleneck infrastructure where it was apparent that economic efficiency would be enhanced by promoting competition in markets that were dependent upon access to that infrastructure.

The bottleneck infrastructure identified by the Hilmer Review included electricity wires, gas pipelines, telecommunication lines, freight rail networks, airports and ports. Distinct access regimes have emerged for these different types of infrastructure, reflecting their distinct physical, technical and economic characteristics. Those regimes appear to be achieving the original policy goals

identified by the Hilmer Review such that, today, Part IIIA plays only a limited role in regulating that bottleneck infrastructure.

However, the Panel acknowledges that Part IIIA continues to provide a legislative framework upon which industry-specific access regimes are based. Part IIIA is both a model and a 'backstop'. Accordingly, Part IIIA has an indirect role in supporting many industry-specific access regimes, even though its direct role is only limited.

The Panel has been told of the potential need for future access regulation of airport and port infrastructure. However, imposing an access regime upon privately developed single-user infrastructure is more likely to be inefficient than efficient, and impede the competitiveness of Australian industry.

The Panel agrees with the conclusion of the recent Productivity Commission (PC) inquiry that the National Access Regime is likely to generate net benefits to the community, but that its scope should be confined to ensure its use is limited to the exceptional cases, where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third-party access.

In its report, the PC recommended the following changes to the declaration criteria in Part IIIA:

- that criterion (a) will be satisfied if access to an infrastructure service on reasonable terms and conditions through declaration (rather than access per se) would promote a material increase in competition in a dependent market;
- that criterion (b) will be satisfied where total foreseeable market demand for the infrastructure service over the declaration period could be met at least cost by the facility;
- as an alternative recommendation, that criterion (b) will be satisfied where it would be uneconomical for anyone (other than the service provider) to develop another facility to provide the service; and
- that criterion (f) will be satisfied if access on reasonable terms and conditions through declaration would promote the public interest.

The Panel agrees with the PC's proposed change to criterion (a), but considers that criterion (a) sets too low a threshold for declaration. The burdens of access regulation should not be imposed on the operations of a facility unless access is expected to produce efficiency gains from competition that are significant. This requires that competition be increased in a market that is significant and that the increase in competition be substantial.

The Panel supports the PC's alternative recommendation in respect of criterion (b). The alternative recommendation maintains the current language for criterion (b), while clarifying that duplication of the facility by the owner of the existing facility is not a relevant consideration.

As recently interpreted by the High Court in the Pilbara rail access case, criterion (b) asks a practical question whether it would be economically feasible, in other words profitable, for another facility to be developed — if it would, the facility is not a bottleneck. The Panel considers that maintaining the 'economically feasible' test for criterion (b) will best promote the competition policy objectives underpinning Part IIIA. Under that test, access regulation will only be considered where there is a bottleneck problem that needs to be addressed. Absent a bottleneck problem, competition and economic efficiency will be advanced if market participants are free to negotiate private arrangements concerning access.

The Panel considers that re-framing criterion (b) such that it requires an evaluation of whether a facility is a natural monopoly suffers from a number of shortcomings. These include that it can be trivially satisfied in the case of facilities that have been built with spare capacity and that it requires the decision-maker to evaluate least cost solutions in complex industries, burdened by information asymmetries where the risk of error is high.

The Panel supports the PC's recommendations in relation to criterion (f).

Decisions to declare a service under Part IIIA, or determine terms and conditions of access, are very significant economic decisions where the costs of making a wrong decision are likely to be high. The Panel favours empowering the Australian Competition Tribunal to undertake a merits review of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, while maintaining suitable statutory time limits for the review process.

Recommendation 42 — National Access Regime

The declaration criteria in Part IIIA of the CCA should be targeted to ensure that third-party access only be mandated where it is in the public interest. To that end:

- Criterion (a) should require that access on reasonable terms and conditions through declaration promote a substantial increase in competition in a dependent market that is nationally significant.
- Criterion (b) should require that it be uneconomical for anyone (other than the service provider) to develop another facility to provide the service.
- Criterion (f) should require that access on reasonable terms and conditions through declaration promote the public interest.

The Competition Principles Agreement should be updated to reflect the revised declaration criteria.

The Australian Competition Tribunal should be empowered to undertake a merits review of access decisions, while maintaining suitable statutory time limits for the review process.

For further detail on the National Access Regime, see Chapter 24.

4 INSTITUTIONS AND GOVERNANCE

4.1 A NATIONAL COMPETITION BODY

Several lessons may be drawn from Australia's experience of implementing the National Competition Policy (NCP):

- All jurisdictions need to commit to the policy and its implementation.
- Oversight of progress should be independent and transparent to 'hold governments to account'.
- The benefits of reform need to be argued and, where possible, measured.

Governance arrangements to implement reforms must be established in the context of Australia's federal structure. Many of the competition policy reforms outlined in this Report are overseen by state and territory governments. Although the Reform of the Federation White Paper may recommend changes to the way responsibilities are allocated across the Federation, it is reasonable to presume that all levels of government will continue to have a role in implementing competition policy reforms.

All Australian governments must have confidence in the governance arrangements for a reinvigorated round of competition policy reform to succeed.

The Panel believes that reinvigorating competition policy requires leadership from an institution specifically constituted for the purpose. Leadership encompasses advocacy for competition policy, driving implementation of the decisions made and conducting independent, transparent reviews of progress.

The National Competition Council (NCC), which oversaw the NCP, now has a considerably diminished role. It has been put to the Panel that the NCC no longer has the capacity to provide leadership in this domain. Recommendation 50 proposes that the remaining functions of the NCC, associated with the National Access Regime, be transferred to a new national access and pricing regulator. The NCC could then be dissolved.

The Productivity Commission (PC) is the only existing body with the necessary credibility and expertise to undertake this function, given its role as an independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. But the PC's work is driven by the Australian Government and, if it were to have the competition policy function as well, its legislation and governance would need significant change.

The Australian Energy Market Commission (AEMC) is an example of an independent, national organisation, operating in an area of state government responsibility that has a governance structure supported by the Australian Government and the States and Territories. This is achieved through the AEMC's establishment under state legislation, which is then applied in other States and Territories and at the Commonwealth level. The national character of the organisation is further strengthened through the composition of the Commission itself, with state and territory Commissioners as well as a Commonwealth Commissioner.

The Panel considers that a new national competition body — the Australian Council for Competition Policy (ACCP) — should be established with a mandate to provide leadership and drive implementation of the evolving competition policy agenda.

The ACCP cannot be accountable to just one jurisdiction but must be accountable to them all. Similarly to the AEMC, it should be created by state and territory legislation applied by all participating jurisdictions. The ACCP should have a five-member board, consisting of two state and territory-nominated members and two members selected by the Australian Government, plus a Chair. Nomination of the Chair should rotate between the Australian Government and the States and Territories. The Chair should be appointed on a full-time basis and other members on a part-time basis.

Although members would be nominated and appointed by governments, their role should be to view competition policy from a national perspective and not to represent jurisdictional interests.

Recommendation 43 — Australian Council for Competition Policy — Establishment

The National Competition Council should be dissolved and the Australian Council for Competition Policy (ACCP) established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda.

The ACCP should be established under legislation by one State and then by application in all other States and Territories and at the Commonwealth level. It should be funded jointly by the Australian Government and the States and Territories.

The ACCP should have a five-member board, consisting of two members nominated by state and territory Treasurers and two members selected by the Australian Government Treasurer, plus a Chair. Nomination of the Chair should rotate between the Australian Government and the States and Territories combined. The Chair should be appointed on a full-time basis and other members on a part-time basis.

Funding should be shared by all jurisdictions, with half of the funding provided by the Australian Government and half by the States and Territories in proportion to their population size.

4.2 FUNCTIONS OF THE NATIONAL BODY

The ACCP should have a broad role. In particular, the ACCP should advise governments on how to adapt competition policy to changing circumstances facing consumers and business. The ACCP should therefore develop an understanding of the state of competition across the Australian economy and report on it regularly.

The Panel sees advocacy for competition as a central function of the ACCP. Too often this has fallen by default to the Australian Competition and Consumer Commission (ACCC), which can be an uneasy role for a regulator to fulfil.

The ACCP should also act as an independent assessor of progress on reform, holding governments at all levels to account. Priority areas for reform identified in this Report could form an initial program of work for the ACCP.

Recommendation 44 — Australian Council for Competition Policy — Role

The Australian Council for Competition Policy should have a broad role encompassing:

- advocacy, education and promotion of collaboration in competition policy;
- independently monitoring progress in implementing agreed reforms and publicly reporting on progress annually;
- identifying potential areas of competition reform across all levels of government;
- making recommendations to governments on specific market design issues, regulatory reforms, procurement policies and proposed privatisations;
- undertaking research into competition policy developments in Australia and overseas; and
- ex-post evaluation of some merger decisions.

The effectiveness of the ACCP could be enhanced by assigning it a market studies function, which would create a consistent, effective and independent way for governments to seek advice and recommendations on recurrent and emerging competition policy issues.

Given the potential for conflicts between the ACCC's investigation and enforcement responsibilities and the scope of a market studies function, the Panel believes it is appropriate to vest such a power with the ACCP rather than the ACCC.

The market studies function would have a competition policy focus and complement, but not duplicate, the work of other bodies, such as the PC. For example, States and Territories could request the ACCP to undertake market studies of the provision of human services in their jurisdiction, as part of implementing the principles of choice and diversity of providers set out in Recommendation 2.

The use of mandatory information-gathering powers can help to ensure that a market study builds an accurate picture of the market but, on the other hand, may create an adversarial environment where participants show reluctance to co-operate and share information with the market studies body. The approach adopted by the PC — inviting interested parties to comment on issues and undertaking independent research, with mandatory legal powers as a backstop — appears to achieve desired outcomes.

For further detail on the establishment and functions of the ACCP, see Chapter 25.

Recommendation 45 — Market studies power

The Australian Council for Competition Policy (ACCP) should have the power to undertake competition studies of markets in Australia and make recommendations to relevant governments on changes to regulation, or to the ACCC for investigation of potential breaches of the CCA.

The ACCP should have mandatory information-gathering powers to assist in its market studies function; however, these powers should be used sparingly.

The NCP recognised that different circumstances across the jurisdictions could lead to different approaches to either the scope or timing of reform. In agreeing with this approach, the Panel considers that the ACCP should be able to receive referrals from jurisdictions collectively as well as individually.

This would ensure that each jurisdiction has the freedom to identify its own concerns, while allowing the ACCP the flexibility to consider whether those concerns have broader or cross-jurisdictional impacts.

In addition, the Panel considers that all market participants, including small business and regulators, should have the opportunity to raise issues they would like to see become the subject of market studies. Funding could be set aside in the ACCP budget to undertake studies in addition to those referred by governments. The decision would rest with the ACCP as to which of these outside requests it might take up, and it would not be obliged to agree to all requests.

To give the ACCP the capacity to focus on the priorities of governments and market participants, the Ministerial Council on Federal Financial Relations would need to oversee priorities and resourcing .

Recommendation 46 — Market studies requests

All governments, jointly or individually, should have the capacity to issue a reference to the Australian Council for Competition Policy (ACCP) to undertake a competition study of a particular market or competition issue.

All market participants, including small business and regulators (such as the ACCC), should have the capacity to request market studies be undertaken by the ACCP.

The work program of the ACCP should be overseen by the Ministerial Council on Federal Financial Relations to ensure that resourcing addresses priority issues.

For further detail on market studies, see Section 25.6.

The competition policy environment is not static. New technologies can raise new issues and resolve older ones. The Panel considers that governments would benefit from an annual analysis of developments in the competition policy environment.

This would provide more detail on the specific priority issues or markets that should receive greater attention. It could also include recommending review mechanisms, particularly for more heavily regulated markets, to ensure more burdensome or intrusive regulatory frameworks remain fit for purpose.

Commenting on best practice and international developments would provide opportunities for governments to consider whether the outcomes of different approaches to reform in other jurisdictions apply within their own.

Recommendation 47 — Annual competition analysis

The Australian Council for Competition Policy should be required to undertake an annual analysis of developments in the competition policy environment, both in Australia and internationally, and identify specific issues or markets that should receive greater attention.

For further detail on competition analysis, see Section 25.9.

4.3 COMPETITION PAYMENTS

The Panel heard widespread support for the competition payments made by the Australian Government to state and territory governments under the NCP to recognise that the Australian Government received a disproportionate share of the increased revenue flowing from NCP reforms.

Although the quantum of the payments was not large compared to total state and territory revenues, the Panel consistently heard that their existence provided an additional argument that could be used to support reform. However, the Panel was also told that their effectiveness was limited by not being applied to the Australian Government nor consistently to local government.

On the other hand, as noted by the PC, a focus on payments and penalties 'has from time to time almost certainly misled the community as to the main rationale for reform …'[26] This appears to underlie the observation, made by many stakeholders, that progress with competition policy reform waned once competition payments ceased.

That said, there is a case to be made that the benefits of reform, including any fiscal dividend, should be commensurate with the reform effort made. The differing revenue bases of the Commonwealth and the States and Territories mean that revenue may not flow in proportion to reform effort.

The PC should be tasked to undertake a study of reforms agreed to by the Australian Government and state and territory governments to estimate their effect on revenue in each jurisdiction. The ACCP could then assess whether reforms had been undertaken to a sufficient standard to warrant compensation payments. That assessment would be based on actual implementation of reforms, not on the basis of undertaking reviews or other processes.

Recommendation 48 — Competition payments

The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Australian Government and state and territory governments to estimate their effect on revenue in each jurisdiction.

If disproportionate effects across jurisdictions are estimated, competition policy payments should ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform.

Reform effort should be assessed by the Australian Council for Competition Policy based on actual implementation of reform measures, not on undertaking reviews.

For further detail on competition payments, see Section 25.5.

4.4 COMPETITION AND CONSUMER REGULATOR

The Panel believes that enforcement of competition policy and enforcement of consumer protection matters are complementary and recommends both continue to be administered by one body.

Having a single body:

- fosters a pro-market culture;

26 Productivity Commission 2005, *Review of National Competition Policy Reforms*, Canberra, page 152.

- facilitates co-ordination and depth across the functions;
- provides a source of consistent information to business and consumers about their rights; and
- provides administrative savings and skills enhancement through pooling information, skills and expertise.

A single body also ensures that the issues of small business are not overlooked, as could be the case if the competition and consumer functions were separated into different bodies.

However, the Panel notes that tensions can also arise between the two functions, so it is important that the ACCC continues to maintain an appropriate balance between its competition-related regulatory tasks and its role in protecting consumers.

Recommendation 49 — ACCC functions

Competition and consumer functions should be retained within the single agency of the ACCC.

For further detail on ACCC functions, see Section 26.1

4.5 Access and Pricing Regulator

The Panel accepts that the functions of competition, consumer protection and economic regulation have synergies that can assist the ACCC to perform its functions and allow it to develop both wide and deep skills in understanding the operation of markets.

However, the culture and analytical approach required to regulate an industry differ from those typically characteristic of a competition law enforcement agency. There is also a risk that an industry regulator's views about the structure of a particular market could influence a merger decision.

The Panel therefore sees benefit in focusing the ACCC on its competition and consumer functions and separating out its current access and pricing functions into a separate, dedicated regulator. Amalgamating all Australian Government price regulatory functions into a single body will sharpen focus and strengthen analytical capacity in this important area of regulation.

The new body would subsume the access and pricing functions of the ACCC including: declaration and access arbitration functions under the telecommunications access regime in Part XIC of the *Competition and Consumer Act 2010* (CCA); price monitoring functions under the *Water Act 2007*; and access arbitration functions under the National Access Regime.

It would also include the functions of the Australian Energy Regulator (AER). The Panel notes strong support, especially in consultation with state governments, for energy regulation to be separated out from the ACCC. Including these functions in a new Access and Pricing Regulator would avoid the possibility of an industry-specific regulator being susceptible to 'capture' by the regulated industry. Therefore, the new body should not have responsibility for only one industry.

The proposed body would also take on the NCC's functions under the National Access Regime and under the National Gas Law, which would allow the NCC to be dissolved. This would result in the Access and Pricing Regulator undertaking both the declaration function under the National Access Regime and the current ACCC role in arbitrating the terms and conditions, where a facility is declared but terms and conditions are not able to be commercially negotiated.

The Panel does not foresee any conflict in a single regulator performing both functions and anticipates that there may be benefits. The Panel notes that, under the current telecommunications access regime (in Part XIC of the CCA), the ACCC performs both the declaration and arbitration functions.

The Access and Pricing Regulator could, over time, assume responsibility for other functions, if and when they were elevated into a national framework. For example, submissions propose the rail and water sectors as potential candidates for transfer, should States and Territories choose to do so.

Recommendation 50 — Access and Pricing Regulator

The following regulatory functions should be transferred from the ACCC and the NCC and be undertaken within a single national Access and Pricing Regulator:

- the telecommunications access and pricing functions of the ACCC;
- price regulation and related advisory roles of the ACCC under the *Water Act 2007* (Cth);
- the powers given to the ACCC under the National Access Regime;
- the functions undertaken by the Australian Energy Regulator under the National Electricity Law, the National Gas Law and the National Energy Retail Law;
- the powers given to the NCC under the National Access Regime; and
- the powers given to the NCC under the National Gas Law.

Other consumer protection and competition functions should remain with the ACCC. Price monitoring and surveillance functions should also be retained by the ACCC.

The Access and Pricing Regulator should be constituted as a five-member board. The board should comprise two Australian Government-appointed members, two state and territory-nominated members and an Australian Government-appointed Chair. Two members (one Australian Government appointee and one state and territory appointee) should be appointed on a part-time basis.

Decisions of the Access and Pricing Regulator should be subject to review by the Australian Competition Tribunal.

The Access and Pricing Regulator should be established with a view to it gaining further functions if other sectors are transferred to national regimes.

For further detail on functions of the proposed Access and Pricing Regulator, see Chapter 27.

4.6 ACCC GOVERNANCE

The ACCC is established under the CCA as a statutory authority. It is governed by a Chairperson and other persons appointed as members of the Commission (usually called Commissioners). Decisions are made by the Chairperson and Commissioners meeting together (or as a division of the Commission), save where a power has been delegated to a member of the Commission. The Commission is assisted by its staff. The Chairperson and Commissioners are appointed on a full-time basis, resulting in their performing executive roles — although this isn't conferred by legislation.

The Panel considers that the ACCC is a well-regarded and effective body, but its performance would be strengthened by including a more diverse range of views and experience at the Commission level. This can be achieved by introducing part-time Commissioners whose commitments beyond the ACCC

— including, potentially, in business, consumer advocacy and academic roles — would broaden the Commission's perspective. The part-time Commissioners would, of necessity, be non-executive members of the Commission, standing apart from the agency's day-to-day operations.

The Panel recommends that half of the ACCC Commissioners be appointed on a part-time basis, that Deputy Chair positions be abolished and that the Chairperson be appointed on either a full-time or a part-time basis.

The Panel sees no need to continue sectoral Commissioner positions within the ACCC, noting that all Commissioners are required to exercise decision-making functions across the range of the ACCC's operations. Furthermore, under section 7 of the CCA, the Minister is already required to consider whether nominees have knowledge of, or experience in, consumer protection and small business matters for all potential appointments to the Commission. The Panel feels this is sufficient to ensure appropriate consideration of sectoral interests in appointments.

The ACCC should report regularly to a broad-based committee of the Parliament, such as the House of Representatives Standing Committee on Economics, to build profile and credibility for the agency as well as subjecting it to direct accountability to the Parliament.

Recommendation 51 — ACCC governance

Half of the ACCC Commissioners should be appointed on a part-time basis. This could occur as the terms of the current Commissioners expire, with every second vacancy filled with a part-time appointee. The Chair could be appointed on either a full-time or a part-time basis, and the positions of Deputy Chair should be abolished.

The Panel believes that current requirements in the CCA (paragraphs 7(3)(a) and 7(3)(b)) for experience and knowledge of small business and consumer protection, among other matters, to be considered by the Minister in making appointments to the Commission are sufficient to represent sectoral interests in ACCC decision-making.

Therefore, the Panel recommends that the further requirements in the CCA that the Minister, in making all appointments, be satisfied that the Commission has one Commissioner with knowledge or experience of small business matters (subsection 10(1B)) and one Commissioner with knowledge or experience of consumer protection matters (subsection 7(4)) be abolished.

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

For further detail on ACCC governance, see Section 26.2.

Some submissions criticise the ACCC's use of the media as undermining the perceived impartiality of the agency in undertaking enforcement action. Advocating for competition policy would become the responsibility of the new ACCP, if established, but the ACCC would continue to communicate with the public through the media, including explaining enforcement priorities, educating business about compliance, and publishing enforcement outcomes.

The Panel believes the ACCC should establish, publish and report against a Media Code of Conduct in line with the principles laid out in the Dawson Review. This should counter the perception of partiality on the part of the ACCC, especially in enforcement actions.

Recommendation 52 — Media Code of Conduct

The ACCC should establish, publish and report against a Code of Conduct for its dealings with the media with the aim of strengthening the perception of its impartiality in enforcing the law. The Code of Conduct should be developed with reference to the principles outlined in the 2003 *Review of the Competition Provisions of the Trade Practices Act*.

For further detail on ACCC and the media, see Section 26.3.

5 SMALL BUSINESS

Small business makes a vital contribution to Australia's economy. The Panel has been especially mindful of the concerns and interests of small business in the context of the Review.

During the course of consultations, the Panel met in forums with more than 150 small businesses. These meetings supplemented written submissions made to the Review.

The issues raised in forums and submissions were broad-ranging, including: unequal bargaining power in dealing with larger businesses (including concerns about collective bargaining); the compliance burden of regulation; and difficulties in competing with (local) government-run enterprises, particularly where government is also the rule-maker.

This Report contains a number of recommendations that address these and other concerns of small business.

Specifically, the Panel proposes changes to strengthen the 'misuse of market power' provisions of the *Competition and Consumer Act 2010* (CCA) at Recommendation 30, and sets out its views on the unconscionable conduct provisions in Section 19.3. We also consider other issues affecting small business, such as standards (see Recommendation 11), licensing, planning and zoning (see Recommendation 9) and competitive neutrality (see Recommendations 15 - 17) elsewhere in this Report.

In this chapter, we consider access to remedies, collective bargaining and industry codes.

5.1 ACCESS TO REMEDIES

Submissions express concern that, for various reasons including resource priorities, the Australian Competition and Consumer Commission (ACCC) is unable to pursue all small business complaints. They further submit that small businesses either lack the time and financial resources to take action themselves or are concerned about the impact this might have on their ongoing business relationships.

The Panel notes the report of the Productivity Commission's (PC's) review of *Access to Justice Arrangements*, establishment of the Small Business and Family Enterprise Ombudsman, and the current proposal to extend unfair contract terms to small business contracts.

The Panel considers that small businesses need greater assurance that competition complaints can be dealt with. Understandably, the ACCC is not able to take proceedings in respect of all complaints brought to it. However, the ACCC should place some priority on its response to small business complaints concerning the competition law.

If the ACCC determines that it is unable to pursue a particular complaint on behalf of a small business, the ACCC must communicate clearly and promptly its reasons for not acting and direct the complainant to alternative dispute resolution schemes.

Where the ACCC considers a complaint has merit but is not a priority for public enforcement, it should take a more active role in connecting small business with dispute resolution schemes. The ACCC should also test the law on a regular basis to assure small business that the law is being enforced.

The Panel supports submissions' positive comments about the efficacy of the various state and Commonwealth small business commissioners, small business offices and ombudsmen services and does not consider that a separate tribunal is warranted to deal specifically with competition issues.

The Panel also endorses a number of recommendations contained in the PC's *Access to Justice Arrangements* report.

The Panel considers that, as implementation of a number of small business related recommendations do not require legislative change, consultation on these changes could commence following agreement by the Australian Government.

Recommendation 53 — Small business access to remedies

The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement.

Where the ACCC determines it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the business to alternative dispute resolution processes. Where the ACCC pursues a complaint raised by a small business, the ACCC should provide that business with regular updates on the progress of its investigation.

Resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour.

Small business commissioners, small business offices and ombudsmen should work with business stakeholder groups to raise awareness of their advice and dispute resolution services.

The Panel endorses the following recommendations from the Productivity Commission's *Access to Justice Arrangements* report:

- Recommendations 8.2 and 8.4 to ensure that small businesses in each Australian jurisdiction have access to effective and low cost small business advice and dispute resolution services;
- Recommendation 8.3 to ensure that small business commissioners, small business offices or ombudsmen provide a minimum set of services, which are delivered in an efficient and effective manner;
- Recommendation 9.3 to ensure that future reviews of industry codes consider whether dispute resolution services provided pursuant to an industry code, often by industry associations or third parties, are provided instead by the Australian Small Business Commissioner under the framework of that industry code;
- Recommendation 11.1 to broaden the use of the Federal Court's fast track model to facilitate lower cost and more timely access to justice; and
- Recommendation 13.3 to assist in managing the costs of litigation, including through the use of costs budgets for parties engaged in litigation.[27]

For further detail on small business access to remedies, see Chapter 23

27 Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra.

5.2 COLLECTIVE BARGAINING

Submissions broadly support the exemption process for collective bargaining by small business, which is designed to recognise unequal bargaining power between parties to a business transaction. The process of exemption through notification should be capable of addressing a number of the issues raised by small businesses in their dealings with big businesses.

However, the provisions are not being used as frequently as they might. Various improvements could be made, including increasing the flexibility of collective bargaining and improving the framework as it relates to collective boycott activities. For example, one change is to enable the group of businesses covered by a notification to be altered without the need for a fresh notification to be filed.

Raising awareness of these provisions, including but not limited to raising awareness of co-operatives, will promote their use and potentially strengthen the bargaining position of small businesses dealing with large businesses.

Recommendation 54 — Collective bargaining

The CCA should be reformed to introduce greater flexibility into the notification process for collective bargaining by small business.

Reform should include allowing:

- the nomination of members of the bargaining group, such that a notification could be lodged to cover future (unnamed) members;
- the nomination of the counterparties with whom the group seeks to negotiate, such that a notification could be lodged to cover multiple counterparties; and
- different timeframes for different collective bargaining notifications, based on the circumstances of each application.

Additionally, the ACCC should be empowered to impose conditions on notifications involving collective boycott activity, the timeframe for ACCC assessment of notifications for conduct that includes collective boycott activity should be extended from 14 to 60 days to provide more time for the ACCC to consult and assess the proposed conduct, and the ACCC should have a limited 'stop power' to require collective boycott conduct to cease, for use in exceptional circumstances where a collective boycott is causing imminent serious detriment to the public.

The current maximum value thresholds for a party to notify a collective bargaining arrangement should be reviewed in consultation with representatives of small business to ensure that they are high enough to include typical small business transactions.

The ACCC should take steps to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses. The ACCC should also amend its collective bargaining notification guidelines. This should include providing information about the range of factors considered relevant to determining whether a collective boycott may be necessary to achieve the benefits of collective bargaining.

For further detail on collective bargaining, see Section 22.2.

5.3 INDUSTRY CODES

Codes of conduct play an important role under the CCA by providing a flexible regulatory framework to set norms of behaviour. Codes of conduct complement the provisions of the CCA and generally apply to relationships between businesses within a particular industry. Codes also provide a mechanism to implement industry-specific dispute resolution frameworks.

The Panel notes that the CCA was recently amended to give the ACCC additional powers to issue infringement notices for alleged breaches of industry codes. The first code to incorporate the new civil penalties is the new Franchising Code of Conduct, which took effect from 1 January 2015.[28] Experience with administering these new provisions is needed before determining whether they should be applied more broadly.

For further detail on industry codes, see Section 19.4.

5.4 COMPETITIVE NEUTRALITY

For many small businesses, competitive neutrality persists as an area of concern. Governments often have an undue advantage when they compete with small businesses, enabling them to penetrate markets more deeply and charge artificially lower prices than private sector competitors.

The Panel considers that transparency of current competitive neutrality arrangements should be improved and obligations on governments not to breach competitive neutrality principles should be strengthened. The Panel makes three recommendations in this regard (see Recommendations 15-17).

For further detail on competitive neutrality, see Chapter 13.

5.5 REGULATORY RESTRICTIONS

The ability of small businesses to compete will also be enhanced by a number of the Panel's recommendations to remove regulatory restrictions.

In particular, the Panel notes that recommendations concerning planning and zoning and a review of regulatory restrictions will assist small business (see Recommendations 8, 9 and 11).

For further detail on regulatory restrictions, see Chapter 10.

28 Australian Competition and Consumer Commission 2015, *New powers for ACCC will strengthen franchising industry*, media release, 21 January, Sydney.

6 Retail Markets

Competition in retail markets has been an important focus for submissions and the Review. This includes issues relating to how competition is operating in grocery and fuel retailing, regulations on planning, zoning and trading hours, and specific regulations, such as those affecting pharmacy and liquor retailing.

Some of these issues are dealt with elsewhere in this Report, which includes specific recommendations on planning and zoning (see Recommendation 9) and pharmacy (see Recommendation 14). Retail liquor licensing should be reviewed as part of the general process of regulatory review (see Recommendation 8).

6.1 Supermarkets

A large number of submissions raise issues relating to supermarkets. However, on further investigation, most turn out to concern policy and legal issues that apply more broadly than just to supermarkets. Accordingly, many of the Panel's recommendations to deal with these broader issues also apply to supermarkets.

Some small supermarkets allege that the major supermarkets chains misuse their market power, including through 'predatory capacity' and targeting particular retailers. Suppliers also raise concerns about misuse of market power and unconscionable conduct by the major chains.

The Panel cannot adjudicate instances where breaches of the *Competition and Consumer Act 2010* (CCA) are alleged to have occurred but notes that the CCA generally prohibits conduct that harms the competitive process, not individual competitors.

The Panel recommends strengthening the misuse of market power provisions of the CCA at Recommendation 30. The current unconscionable conduct provisions appear to be working as intended to meet their policy goals, but active and ongoing review of these provisions should occur as matters progress before the courts. In this context, the Panel notes that in December 2014 the Federal Court, by consent, made declarations that Coles Supermarkets Australia Pty Ltd engaged in unconscionable conduct in 2011 in its dealings with certain suppliers in the supermarket sector. 29

Introducing a properly designed and effective industry code should also assist in ensuring that suppliers are able to contract fairly and efficiently. The Panel notes that the Australian Government has announced a Food and Grocery Code of Conduct, covering grocery suppliers and binding those retailers and wholesalers that agree to sign on to the Code.[30]

Removing barriers to entry and other regulatory barriers would strengthen competition in the supermarket sector. Planning and zoning restrictions are limiting the growth of new entrants such as ALDI and, as the ACCC has identified, more broadly affect the ability of independent supermarkets to

29 Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 1405 (22 December 2014)

30 Billson, B (Minister for Small Business) 2015, Grocery Code to improve relationships between retailers, wholesalers and suppliers, media release 2 March, Canberra.

compete. The Panel recommends changes to address concerns about planning and zoning rules (see Recommendation 9).

Trading hours restrictions and restrictions preventing supermarkets from selling liquor impede competition. The Panel recommends that restrictions preventing supermarkets from selling liquor be reviewed as part of a new round of regulation reviews (see Recommendation 8) and that retail trading hours be deregulated (see Recommendation 12).

Supermarket operation has undergone a number of structural changes, including: greater vertical integration and use of 'home brands'; an increase in the range and categories of goods sold within supermarkets; and greater participation by supermarket operators in other sectors.

Like all structural changes, these can result in dislocation and other costs that affect the wellbeing of other parties. The move of larger supermarket chains into regional areas can also raise concerns about a loss of amenity and changes to the community.

While the Panel is sensitive to these concerns, they do not of themselves raise issues for competition policy or law.

For further detail on supermarkets, see Section 15.1.

6.2 FUEL RETAILING

The Panel makes no specific recommendations in relation to fuel retailing, although a number of recommendations are relevant to submissions made in that context.

Petrol discount shopper dockets are a source of considerable concern, particularly for small competitors in the context of grocery and fuel markets. These discounts were up to 45 cents per litre[31] but are now limited to 4 cents per litre through undertakings to the ACCC.[32]

The Panel is not persuaded that consumers are made worse off by, rather than benefitting from, the availability of discounts at their current levels. The Panel notes the undertakings accepted by the ACCC. Further, the Panel recommends changes to the misuse of market power provisions of the CCA (see Recommendation 30), which should assist if future competition concerns emerge in this context.

Stakeholders express concerns that prices are higher in certain regional areas. On the information before it, the Panel does not consider that differences in pricing between regions are explained by any clear shortcoming in the competition law or policy. The Panel notes the 17 December 2014 Direction from the Minister for Small Business to the ACCC issued under the prices surveillance provisions of the CCA to monitor 'prices, costs and profits relating to the supply of unleaded petroleum products in the petroleum industry in Australia for three years'.[33] This will provide further information to assist in assessing any competition concerns in the sector, including in regional areas.

The Panel expresses no view as to the effect the Informed Sources pricing information sharing service has on competition. More generally, the Panel recommends that section 45 of the CCA be extended

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31 Sims, R 2013 *Thoughts on market concentration issues* speech to the Australian Food and Grocery Council Industry Leaders Forum, Canberra, 30 October.

32 Australian Competition and Consumer Commission 2013, *Coles and Woolworths undertake to cease supermarket subsidised fuel discounts*, media release 6 December, Canberra.

33 Explanatory Statement, *Competition and Consumer Act 2010* — Monitoring of the Prices, Costs and Profits Relating to the Supply of Unleaded Petroleum Products in the Petroleum Industry in Australia (09/12/2014).

to cover concerted practices which have the purpose, effect or likely effect of substantially lessening competition.

Submissions raise concerns about the New South Wales Government mandate requiring that a certain proportion of petrol sold in that State contain ethanol. The Panel considers that this mandate should be reviewed as part of the proposed new round of regulation review (see Recommendation 8), and repealed 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 policy can only be achieved by restricting competition.

In relation to the regulation of petrol price display boards, the Panel considers that the case for wider regulation to require the undiscounted price (only) to be displayed has not been made. The Panel notes that differences in regulations across jurisdictions create a 'natural experiment', which will provide evidence to assist Ministers in determining whether these regulations have any effect on competition and whether they are in the public interest.

In relation to proposals to introduce a national scheme based on Fuelwatch in Western Australia, the Panel considers that further evidence, both of a problem needing to be addressed and of the benefits and costs of addressing it in this way, would be necessary before making any decision to proceed.

For further detail on fuel retailing, see Section 15.2.

7 IMPLEMENTATION

Reforming Australia's competition policy, laws and institutions represents an ambitious agenda, which will require action by all levels of government. Although some recommendations can be implemented by jurisdictions acting independently, the Panel believes outcomes will be enhanced through co-operation between governments. Competition reform will have economy-wide impacts and therefore merits national action.

To commence consideration of a national competition reform agenda, this Report should be discussed with state and territory governments as soon as practicable. This will allow all governments to make considered responses, including identifying aspects of the agenda where they see value in collaboration.

Recommendation 55 — Implementation

The Australian Government should discuss this Report with the States and Territories as soon as practicable following its receipt.

Recommendation 48 is that the Productivity Commission (PC) be tasked with modelling the revenue effects in each jurisdiction of reforms agreed by governments in the wake of this Review. However, prior to that modelling exercise, the Panel believes that governments would benefit from modelling the economic effects of the recommendations in this Review. This modelling will assist governments in determining the gains from proposals and the prioritisation of reforms.

Recommendation 56 — Economic modelling

The Productivity Commission should be tasked with modelling the recommendations of this Review as a package (in consultation with jurisdictions) to support discussions on policy proposals to pursue.

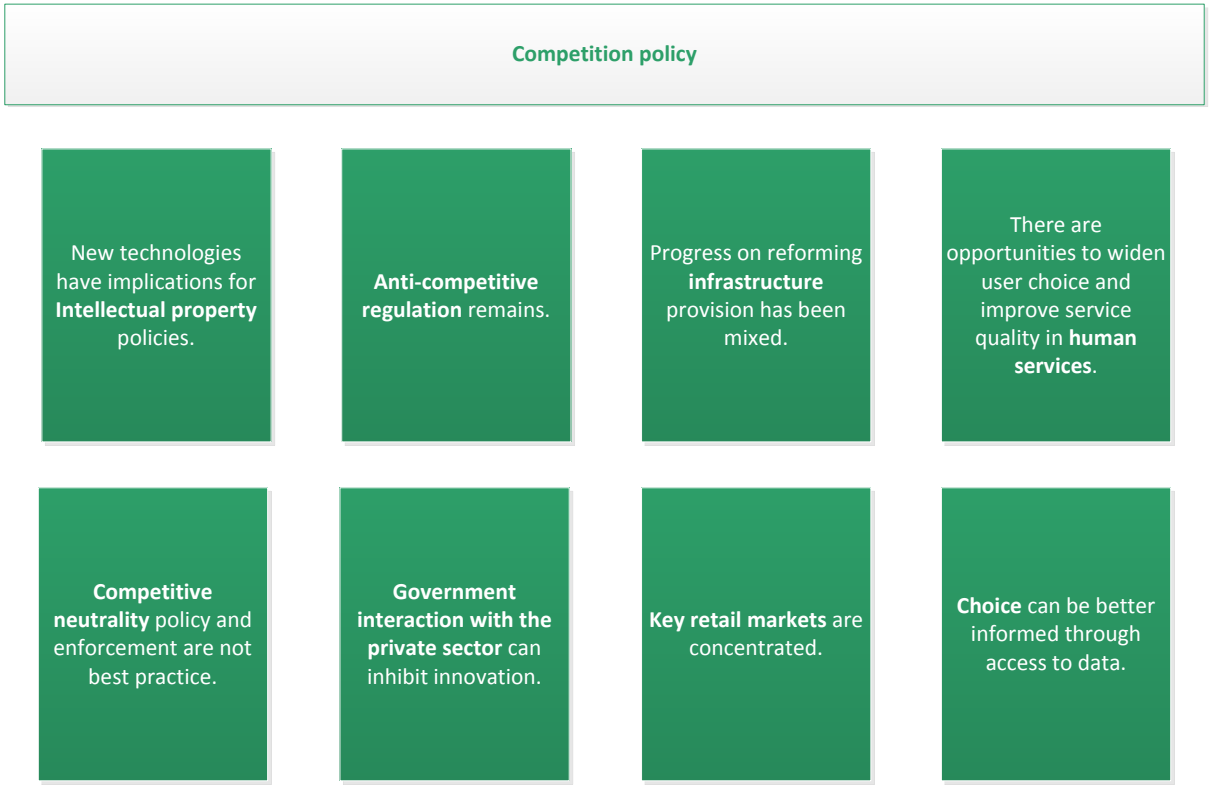
A 'road map' in Section 29.3 illustrates recommendations that can be implemented by different levels of government. For further detail on implementation see Part 6.

PART 3 — COMPETITION POLICY

In this Part we examine the current state of Australia's competition policy and test its fitness for purpose against the criteria identified in Part 1.

We identify areas where existing competition policy may not serve the long-term interests of consumers, especially in light of the forces for change bearing on the Australian economy.

The discussion is structured to reflect eight themes as outlined in the diagram below.



8 COMPETITION PRINCIPLES

The environment that led to the Hilmer Review, and then to all Australian governments agreeing to the National Competition Policy (NCP), is reflected in a Prime Ministerial statement from 1991:

> The Trade Practices Act is our principal legislative weapon to ensure consumers get the best deal from competition.
>
> But there are many areas of the Australian economy today that are **immune from that Act**: some Commonwealth enterprises, State public sector businesses, and significant areas of the private sector, including the professions.
>
> This patchwork coverage reflects historical and constitutional factors, not economic efficiencies; it is another important instance of the way **we operate as six economies**, rather than one.
>
> The benefits for the consumer of expanding the scope of the Trade Practices Act could be immense: potentially lower professional fees, cheaper road and rail fares, cheaper electricity.[34] (emphasis added)

The NCP reflected the challenges Australia faced at that time — more than 20 years ago now. The focus of the NCP reforms was exposing some previously sheltered activities to competition and applying a more national approach to competition issues.

The NCP was set out in three intergovernmental agreements, which are outlined in Box 8.1. They reflected the six elements of competition policy identified in the Hilmer Review:[35]

- limiting anti-competitive conduct of firms;
- reforming regulation which unjustifiably restricts competition;
- reforming the structure of public monopolies to facilitate competition;
- providing third-party access to certain facilities that are essential for competition;
- restraining monopoly pricing behaviour; and
- fostering 'competitive neutrality' between government and private businesses when they compete.

34 Hawke, B (Prime Minister) 1991, *Building a Competitive Australia*, Parliamentary statement, Canberra, 12 March.

35 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page xvii.

Box 8.1: National Competition Policy — intergovernmental agreements

In 1995, Australian governments committed to three intergovernmental agreements: the Competition Principles Agreement (CPA); the Conduct Code Agreement; and the Agreement to Implement the National Competition Policy and Related Reforms.[36] The elements of these agreements were:

- extending the *Trade Practices Act 1974* (TPA) to previously excluded businesses (unincorporated businesses and state, territory and local government businesses);
- establishing independent price oversight of state and territory government businesses;
- corporatising and applying competitive neutrality principles so that government businesses do not enjoy a net competitive advantage as a result of public sector ownership;
- structurally reforming public monopolies to separate out industry regulation and, where possible, further disaggregating potentially competitive parts of the monopoly;
- establishing a third-party access regime for significant bottleneck infrastructure;
- reviewing all legislation restricting competition;
- applying the agreements to local government;
- establishing the National Competition Council (NCC), including funding, appointments and work program;
- imposing conditions on governments seeking to exempt conduct from the competition law; and
- providing financial assistance to the States and Territories, conditional on progress in implementing the NCP.

Although the NCP agreements provided a framework for agreed policies, the States and Territories had flexibility in implementing what was agreed. The Panel considers that flexibility continues to be important, particularly in the context of a federation where responsibility for reform lies with various levels of government. Given the importance of local government in implementing aspects of competition policy is sometimes overlooked, this should be explicitly addressed in the future.

In reviewing the NCP, the Productivity Commission (PC) noted that flexibility provides the opportunity for governments to learn from different approaches to reform:

> … flexibility has in turn harnessed the benefits of 'competitive federalism' to advance the reform process. That is, the NCP framework has provided opportunities for governments to learn from the outcomes of different approaches to reform in other jurisdictions.[37]

That said, flexibility should not compromise the agreed outcomes of particular reforms. Moreover, where different approaches have been adopted by various jurisdictions, best practice approaches to implementing competition reforms should be identified.

Recognising that restrictions on competition can sometimes be desirable, the NCP included a 'public interest' test as a central component.

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36 National Competition Council 1998, *Compendium of National Competition Policy Agreements, Second Edition*, Australian Government Publishing Service, Canberra.

37 Productivity Commission 2005, *Review of National Competition Policy Reforms*, Report no. 33, Canberra, page 130.

As discussed in Part 1, digital technology and increasing globalisation are changing markets and consumers' ability to access markets. Australia also confronts long-term economic challenges, such as an ageing population.

In light of these developments, the Panel believes that the original elements of competition policy should be revisited.

The Crown (whether in right of the Commonwealth, state and territory, or local governments) has the potential to harm competition through its commercial arrangements entered into with market participants. The Panel, therefore, concludes that the anti-competitive conduct provisions of the *Competition and Consumer Act (2010)* (CCA) should reach beyond government businesses to cover all government activities that have a trading or commercial character. This is discussed in more detail in Section 14.2.

Moreover, the Crown's capacity to enhance or harm competition also includes a range of policies and regulations that reach beyond the scope of the CCA. Procurement, which ranges from buying goods and services through to public-private partnerships (PPPs) and privatisations, should be designed with competition principles in mind. This is discussed in more detail in Section 14.1.

The Panel also believes that the focus of competition policy should be widened beyond infrastructure sectors and government businesses to encompass government services more generally.

Competition policy plays an important role in improving government performance in sectors such as human services by promoting user choice and encouraging a diversity of providers. Choice and diversity have the potential to improve outcomes for users, especially but not only by stimulating innovation.

Independent regulation can encourage entry into markets (since it provides a level of certainty about the regulatory environment), while separating the interests of providers from those of funders and regulators encourages accountability, innovation and a level playing field between public and other providers.

The Panel also believes that declaration and third-party access to infrastructure should be mandated only where it promotes the public interest to do so. The onus of proof should lie with those seeking access to demonstrate that it would promote the public interest rather than on infrastructure owners to demonstrate that access would be contrary to the public interest. This is discussed in more detail in Chapter 24.

Competition principles should be based around the central idea that competition policy, laws and institutions should promote the long-term interests of consumers. Responses to the principles, outlined in the Panel's Draft Report, are largely positive. CHOICE notes that a set of principles will 'help sustain momentum in reform processes that may take several years … [and] can play an important role in ensuring there is a consistent approach to reform across multiple sectors' (DR sub, page 8).

CHOICE considers 'competition and consumer choice are means of improving consumer welfare rather than objectives in and of themselves' (DR sub, page 9), while National Seniors Australia 'strongly endorses the Review Panel's call for competition policy to focus on making markets work in the long-term interests of consumers' (DR sub, page 6).

In addition, some submissions comment on the importance of the overriding public interest test.[38] Submissions also highlight the risks in applying the principles to human services.[39]

The Panel agrees that competition and choice need to be seen as a means to improving wellbeing and that caution must be exercised in applying competition principles in the human services sectors. This is discussed in more detail in Chapter 12. In applying competition principles, the Panel endorses a **public interest test** as a central tenet of competition policy. The Panel recommends continuing with the NCP public interest test, namely that legislation or government policy should not restrict competition unless:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation or government policy can only be achieved by restricting competition.

Submissions from Marsden Jacob Associates (DR sub, page 1) and the Pharmacy Guild of Australia (DR sub, page 11) take issue with the public interest test set out in the Draft Report, which reflects that negotiated as part of the 1995 Council of Australian Governments (COAG) Competition Principles Agreement under the NCP.

Marsden Jacob Associates submits that the second limb of the test should not be applied literally, and did not appear in the NCC's 2005 report *Identifying a framework for regulation in packaged liquor*.[40] Instead, the submission suggests the test should be re-worded to substitute the word 'best' for the word 'only' in the second limb. The Pharmacy Guild of Australia similarly proposes that the second limb should be changed so that the words 'most efficient' replace the word 'only'.

The existing public interest test does not put competition above all other considerations, and nor should it. However, it does require that the effect on competition always be carefully considered as part of the overall assessment of the net public interest, and that the costs of anti-competitive regulation should be properly assessed in any cost-benefit analysis.

In its *Identifying a framework for regulation in packaged liquor* report, the NCC notes 'regulation that successfully addresses the public interest but also restricts competition can be justified, so long as the impact on competition is minimised'[41] — illustrating that the test is flexible. The 1995 formulation of the public interest test was also subsequently re-endorsed by COAG in 2007.[42]

The Panel sees no reason for change and recommends that the test continue to be expressed in the same way to ensure that regulatory reviews continue to focus on avoiding any restrictions on competition. The long-standing COAG test enshrines the correct principle — that competition should not be impeded unless it must be, in order to secure the public interest. It also acknowledges the fact that competition is not an end in itself — the test should continue to be applied by assessing the

38 See, for example: Australian Local Government Association, DR sub, pages 3-4; and South Australian Government, DR sub, page 5.

39 See, for example: Australian Education Union, DR sub, page 2; CHOICE, DR sub, page 8; and National Seniors Australia, DR sub, page 7.

40 Marsden Jacob Associates 2005, *Identifying a framework for regulation in packaged liquor retailing*, National Competition Council, Melbourne.

41 Ibid. at Foreword.

42 Council of Australian Governments 2007, *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*, Canberra.

costs and benefits of the regulation overall (including any impact on competition) in order to meet the policy objective.

Further, in the rare circumstances where the benefit to the public would be maximised by a regulation that restricted competition, then the test is flexible enough to allow that option to be chosen.

The Panel's view

The Panel considers that an overarching set of competition principles will provide direction for governments in committing to further competition reform. High-level principles will allow jurisdictions the flexibility to implement policies that reflect local conditions.

These principles should be based around the central idea that competition policy, laws and institutions should promote the long-term interests of consumers.

The Panel reaffirms the principles which underpinned the NCP. However, a new set of competition principles should widen the focus of competition policy, laws and institutions to encompass the many different ways in which the government can affect competition in markets. The Panel's recommendation contains a set of new principles to which governments should commit.

In applying these principles, the Panel endorses the 'public interest test' as a central tenant of competition policy so that legislation or government policy should not restrict competition unless:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation or government policy can only be achieved by restricting competition.

Implementation

Formal agreement by governments to the revised set of competition principles should be pursued as the initial implementation step. Agreeing a set of principles would guide the Australian Government, state and territory and local governments in implementing those aspects of competition policy for which they are responsible.

The principles can be agreed to by each jurisdiction individually and applied through their own processes. Ideally, however, the Australian Government and state and territory governments would jointly agree to the principles. The Australian Government should seek the agreement of the States and Territories within six months of accepting this recommendation.

As with the implementation of the NCP, the agreements should clearly allow each jurisdiction to tailor reforms to meet its own local conditions.

The mechanisms for reaching agreement between the Australian Government and the States and Territories are being considered as part of the Reform of Federation White Paper process. The Panel does not therefore recommend any particular mechanism to reach agreement among the jurisdictions. However, we believe that agreement should be at the level of the Prime Minister, Premiers and Chief Ministers, since the principles apply across the whole of government.

Recommendation 1 — Competition principles

The Australian Government, state and territory and local governments should commit to the following principles:

- Competition policies, laws and institutions should promote the long-term interests of consumers.
- Legislative frameworks and government policies and regulations binding the public or private sectors should not restrict competition.
- Governments should promote consumer choice when funding, procuring or providing goods and services and enable informed choices by consumers.
- The model for government provision or procurement of goods and services should separate the interests of policy (including funding), regulation and service provision, and should encourage a diversity of providers.
- Governments should separate remaining public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities.
- Government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership.
- A right to third-party access to significant bottleneck infrastructure should be granted where it would promote a material increase in competition in dependent markets and would promote the public interest.
- Independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers.

Applying these principles should be subject to a public interest test, such that legislation or government policy should not restrict competition unless:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation or government policy can only be achieved by restricting competition.

9 INTELLECTUAL PROPERTY

As discussed in Part 1, disruptive technologies are changing, and will continue to change, Australia's competitive landscape. Technology is expanding the geographic boundaries of markets, digital delivery of content is becoming more common and connected technologies are increasingly integrated as global communication networks mature.

Disruptive technologies have put intellectual property (IP) rights in the spotlight. Although IP rights can create incentives for innovation and disseminating ideas, they also have the potential to restrict market entry by preventing access to technologies.

In light of technological changes and more general changes to the regulatory environment in which investment in creative effort takes place,[43] Australia's IP arrangements should be re-examined. As the Chairman of the Productivity Commission (PC), Peter Harris, recently argued:

> ... the nature of internet-driven change and related global dependence on software-based systems suggests each nation should consider closely how well it is served by current IP systems, as these trends take hold.[44]

IP rights are a form of intangible property right granted to a creator for something new or original. Like other legal property rights, IP rights exclude others from freely using IP, but the exclusive rights can be traded or licensed to others.

IP rights exist in many forms including:

- patents (inventions and new processes);
- copyright (over literary, musical and artistic works) and registered designs (designs applied to articles such as clothing);
- trademarks (which distinguish the origin of goods and services); and
- plant-breeder rights.

There is no single IP Act. Instead, IP rights are secured by separate, specific statutory regimes; for example, the *Patents Act 1990* for inventions and the *Copyright Act 1968* for literary and artistic creations.[45]

The underlying rationale for IP rights is to promote new ideas and creations. Competitive markets can fail to support an efficient level of innovation because creations and ideas, once known, can be copied at little cost.

Knowledge has 'public good' characteristics. It is difficult to exclude others from using new ideas, and use by one person has little or no effect on the extent to which it is available to others. These public good characteristics of knowledge typically lead to under-investment in research and development — the returns to creators will be insufficient to provide incentives for efficient investment in IP material.

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43 Productivity Commission 2013, *Trade & Assistance Review 2011-12*, Annual Report Series, Canberra, pages 8 -9.

44 Harris, P 2014, *Competition Policy and Deregulation — Challenges and Choices*, Crawford School of Public Policy, ANU, Canberra, page 8.

45 Productivity Commission 2013, *Trade & Assistance Review 2011-12*, Annual Report Series, Canberra, page 66.

IP regulations attempt to address this 'free rider' problem by legally granting exclusive use of the protected right to the creator for a specified period.

IP rights are important for competition and follow-on inventions. They allow firms to derive financial benefit from commercially exploiting their inventions and creations (which provides an incentive to innovate) and allowing other firms and individuals to use disclosed information about new inventions (rather than it remaining secret).

The community benefits from reducing wasteful duplication of research effort and allowing others to build on existing ideas. As the PC notes:

> The issuing of patents may improve efficiency and community welfare by increasing the incentives for firms to innovate, which can in turn lead to new, improved or less expensive products. (sub, page 7)

However, IP rights can be used in a way that deters competition and limits consumer choice. For example, this could manifest in owners of IP rights extracting excessive royalties from IP licences or placing anti-competitive restrictions on knowledge dissemination. This would have adverse knock-on effects for innovation.

As The Australia Institute says:

> While strong IP rights may increase the incentive to put into the [knowledge] pool (thereby generating positive externalities) they hamper the ability to take previously generated knowledge out of the pool (giving rise to negative externalities). The design of the rules is therefore important. (sub, page 20)

The Australian Competition and Consumer Commission (ACCC) claims that, in the vast majority of cases, granting an IP right will not raise significant competition concerns:

> ... rights holders are entitled to legitimately acquire market power by developing a superior product to their rivals, and pursuant to the policy purpose of IP regulation, the temporary market power from an IP right provides the very incentive to invest in the production of new IP. Such innovation is also a key goal of competition law. In this respect, IP and the competition law are for the most part complementary, both being directed towards improving economic welfare. (ACCC sub 1, page 59)

However, conflicts between the two policies can occur 'where IP owners are in a position to exert substantial market power or engage in anti-competitive conduct to seek to extend the scope of the right beyond that intended by the IP statute' (ACCC sub 1, page 59).

The PC submits that the patent system (where not warranted to encourage innovation) can impose costs on the community by impeding competition, including through:

- the accrual of 'patent portfolios' — in some cases, firms that accrue patents conduct no business other than asserting their patents against other firms — effectively 'taxing' other firms' innovations via court cases; and
- 'cumulative innovation', where innovation requires access to multiple patents, there are higher costs to innovate because of the need to purchase those patents. The need to access multiple patents can lead to 'hold out', whereby the owner of a patent holds out for a better deal from a potential innovator, which can also serve to discourage innovation. (sub, page 29)

Therefore, it is a balancing act. As the ACCC says:

> The *extent* of any IP rights should balance: (i) on the one hand, the incentives for innovation in the creation of IP; and (ii) on the other, the incentives that access to IP material provides for efficient use of that IP and for innovation from such use. (sub 1, page 58)

Keeping the balance right in light of technology and market changes is also challenging. For example, the widespread dissemination of material through the internet raises issues around copyright and related rights in the global context. 3D printing — the ability to translate a digital file into a physical object — will also pose challenges.

As noted by the Big Innovation Centre, 3D printing has dramatically lowered the cost and ease of reproducing physical objects. A single 3D printer will be able to copy different products from existing designs that are easily and quickly shared over the internet. This means IP is likely to become the main method through which some manufacturing businesses can fund the research, development and design of physical products. The Big Innovation Centre remarked:

> The disruption caused by 3D printing will put significant strains on government policy. By removing barriers between the internet and the physical world, 3D printing will throw up significant questions for intellectual property laws, for regulators and for competition authorities.[46]

9.1 Is the 'balance' right?

CHOICE, like some other submitters, suggests that Australia has not got the 'balance' right between granting IP rights and promoting competition. CHOICE suggests that the balance currently favours rights holders rather than consumers:

> ... monopolies give rise [to] obvious and well-known problems that ultimately end up impacting consumers. For this reason, limitations and exceptions apply to the monopoly of intellectual property. CHOICE believes that currently, Australia has not achieved the right balance in this regard.
>
> Many companies operating in the entertainment industry (which obviously depends very heavily on copyright) have leveraged the considerable advantage of monopoly rights to insulate themselves against the disruptive effects of technological change, in particular from the internet. The persistence [of] territorial licensing arrangements (limiting the distribution of content based on geographical regions) is testament to the ability of industry to resist change. (sub, page 20)

The Panel considers IP arrangements should be technology-neutral, given the importance of innovation for economic growth. A number of submissions argue that IP arrangements do not support innovation because they are too technology-specific.[47]

Mark Summerfield says:

> The current provisions in the Patents Act and the CCA [Competition and Consumer Act], intended to ensure that patents do not unduly deter competition, or limit consumer

46 The Big Innovation Centre 2012, *Three Dimensional Policy, Why Britain needs a policy framework for 3D printing*, London, page 3.

47 See, for example: Australian Digital Alliance and Australian Libraries Copyright Committee, sub, page 7; and Google Australia, sub, page 18.

> choice, were not drafted with arrangements such as patent pools, or the evolution of global technology standards, in mind. (sub, page 8)

The Australia Institute recommends a critical examination of patents on items such as software and business methods (sub, page 20). The ACCC also notes 'IP regulation can become quickly obsolete as the manner in which IP material is used changes', citing the abandonment of the Optus TV Now service as a casualty of Australia's current copyright laws (sub 1, page 65).

However, determining the appropriate 'extent' of IP protection is complex — and potentially ever changing. If IP rights provide higher rewards than needed to induce an invention, this will reduce the invention's net benefit to the community as a whole and result in a higher share of the benefit going to the IP rights' holder. If there are no substitutes for the idea or invention, the rights' owner could also engage in monopolistic behaviour.

At issue is how closely tests for allocating IP rights are linked to 'public benefits'. Innovation could occur without IP protection. How long is it appropriate to reward the original creators of innovations?

A recent review of the literature undertaken by the PC found limited incentives for innovation from the IP system.[48] For example, Hall and Harhoff's survey of 210 studies found that patents provide clear incentives for innovation in only a few sectors: pharmaceuticals, biotechnology, medical instruments and specialty chemicals.[49]

Hazel Moir argues 'it is neither efficient nor effective if patents are granted for inventions that would be undertaken absent the patent incentive' (DR sub, page 2), with the evidence showing that patents are most needed where copying is fast and relatively cheap and where initial research and development costs are high. Hazel Moir also observes:

> Interestingly, during the period when empirical evidence has mounted showing that patents are generally not needed to support industrial innovation, patents have been made available over a wider subject matter range and for increasingly less inventive 'inventions'. (DR sub, page 2)

It is important that the extent of IP rights provided by IP regulations be reviewed regularly. As the PC said 'because of the pervasiveness of IP law, it is important that the design, operation and review of IP systems be carefully governed'.[50]

The extent of IP protection should be based on what is in the best interest of Australians.

A number of submitters support the Panel's draft recommendation for a review of the extent of intellectual property protection.[51] Electronic Frontiers Australia, for example, says:

> While we also recognise that the underlying rationale for IP rights is the promotion of new ideas and creations, empirically there is little evidence to demonstrate that IP rights actually do this in practice. Furthermore, certain assumptions which underlie the

48 Productivity Commission 2013, *Trade & Assistance Review 2011-12*, Annual Report Series, Canberra, pages 90-91.

49 Hall, B and Harhoff, D 2012, *Recent Research on the Economics of Patents*, NBER Working Paper No 17773, National Bureau of Economic Research, Cambridge.

50 Productivity Commission 2013, *Trade & Assistance Review 2011-12*, Annual Report Series, Canberra, page 2.

51 See, for example: ACM Parts, DR sub, page 2; Australian Information Industry Association, DR sub, page 4; Australian Digital Alliance and Australian Libraries Copyright Committee, DR sub, page 2; Business Council of Australia, DR sub, page 41; CHOICE, DR sub, page 15; and National Seniors Australia, DR sub, page 10.

> neoclassical economics basis of much contemporary IP law and policy have been disproved by real-life events, particularly in the context of free and open source software projects. EFA would thus welcome a consideration of the fundamental principles underpinning Australian IP law and policy, and the extent to which IP law and policy do what they are supposed to, namely stimulate creation and innovation in society. (DR sub, page 2)

Google Australia strongly supports an overarching review of intellectual property and submits:

> … a modern and flexible copyright regime will become an increasingly crucial element of economic policy as Australia transitions to an economy that relies heavily on knowledge, innovation, and creativity. (DR sub, page 2)

However, others question the need for a further review in light of the number of recent inquiries, particularly in the area of copyright law reform (including the Australian Law Reform Commission (ALRC) copyright review and the House of Representatives Standing Committee on Infrastructure and Communications' Inquiry into IT Pricing).[52]

The Australian Copyright Council argues:

> … the rapid rate at which the digital marketplace is evolving suggests that a further review at this time is likely to be premature. … the dynamic state of the market makes it difficult to anticipate the long-term interests of consumers. (DR sub, page 3)

Hazel Moir points to the patent systems as the area most in need of review (DR sub, page 1).

Some submitters also argue that, if there is to be an IP review, it should have a multi-disciplinary approach.[53] For example, the Australian Publishers Association says:

> Intellectual property is a complex and contested area of policy, about which there are many divergent perspectives, all of which should be comprehended within any wholesale review. To provide comprehensive advice to government, any further review would benefit from having from the outset a multi-disciplinary approach, encompassing legal understanding of this complex corpus juris and a broad economic perspective that covers the complex intersection between innovation, entrepreneurship and competition in a digital world. (DR sub, page 5)

The Australian Digital Alliance and the Australian Libraries Copyright Committee, while supporting an overarching review of IP, argue that it would be a perverse result if the ALRC recommendation for introducing a flexible 'fair use' exception to Australian copyright law was delayed by a further review of the IP system (DR sub, page 3).[54]

The Panel acknowledges the recent number of IP reviews but notes that they are partial examinations. We remain concerned that there is no overarching IP policy framework or objective guiding changes to IP protection and therefore see a need for an overarching review of IP.

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52 See, for example: Australasian Performing Rights Association Ltd and Australasian Mechanical Copyright Owners' Society, sub, page 3; Communications Law Centre UTS, DR sub, pages 1-2; and Copyright Agency, DR sub, page 3. Foxtel strongly disagrees that an IP review is warranted, DR sub, page 8.

53 See, for example: Australian Copyright Council, DR sub, page 4; and Australian Motor Industry Federation, DR sub, page 6.

54 Australian Law Reform Commission 2013, *Copyright and the Digital Economy*, Report 122, Sydney.

9.2 THE INTERACTION BETWEEN IP RIGHTS AND COMPETITION LAW

Currently, subsection 51(3) of the *Competition and Consumer Act 2010* (CCA) provides a limited exception from most of the competition law prohibitions for certain types of transactions involving IP. The exception covers certain conditions in licences or assignments of IP rights in patents, registered designs, copyright, trademarks and circuit layouts. The exception does not extend to the prohibitions relating to misuse of market power and resale price maintenance.

A number of submitters, including the PC (sub, page 28) and the ACCC, argue that there is no reason why trading arrangements involving IP rights (licensing and assignments) should be exempt from the competition law prohibitions in the CCA.[55] The ACCC says:

> On the *use* of intellectual property rights, the CCA should apply in the ordinary way. The ACCC recommends that section 51(3) of the CCA should be repealed and that, in general, there is no reason to treat intellectual property any differently to other services in relation to access. (sub 1, page 58)

Similarly, iiNet says:

> Many intellectual property licences and other agreements covered by section 51(3) have significant impacts on competition in a variety of markets and it is iiNet's view that it is therefore appropriate that the use of intellectual property rights be subject to Part IV of the CCA.
>
> iiNet notes that if the exemption is repealed, authorisation will still be available for intellectual property transactions that are caught by the prohibitions in the Part IV but provide a public benefit. (DR sub, page 3)

Australian Industry Group submits that the exemption should be repealed because the ACCC should be allowed to regulate anti-competitive conduct in areas where copyright or patents may be used to engage in such behaviour. Also, the exemption is not needed to ensure that beneficial IP licensing arrangements are lawful (DR sub, page 9).

In a recent submission to the ALRC Inquiry into Copyright and Digital Economy, the ACCC also argued 'it is important that the rights created through IP laws should be subject to competition laws to ensure they are pro-competitive rather than anti-competitive in effect or purpose'.[56]

The ACCC pointed to the digital environment providing new ways of creating, using and distributing copyright materials with commensurate opportunities to improve efficiency and welfare. However, copyright materials are increasingly used as intermediate inputs, which increases the potential for copyright to have anti-competitive effects. Solutions that are capable of addressing new market failures in digital environments (including potentially new forms of collective licensing or copyright exchanges) may also raise competition concerns.[57]

The ACCC also noted 'that in other jurisdictions, such as the United States, IP rights are subject to the same competition laws as all other property rights. [And] … in these jurisdictions, there has been

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55 See, for example: Australian Communications Consumer Action Network, DR sub, page 5; Communications Law Centre, UTS, DR sub, pages 3 and 4; and Australian Digital Alliance and Australian Libraries Copyright Committee, DR sub, page 4.

56 Australian Competition and Consumer Commission 2012, *ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper*, Canberra, page 12.

57 Ibid., page 6.

neither an erosion of IP rights for creators, nor any apparent impact on the incentives for the production of copyright material'.[58]

Associations that represent IP owners, and IP owners themselves, put a contrary view (AIPPI Australia, DR sub, page 1). For example, the Australian Recording Industry Association Ltd says:

> The idea that there is no need for the s 51(3) exemption because IP should be treated like any other form of property is simplistic and misleading. The exemptions under s 51(3) serve partly as a safety net where broadly defined prohibitions under the Competition and Consumer Act would otherwise be too far-reaching. The cartel prohibitions, the prohibition against anticompetitive agreements under s 45 and the prohibition against exclusive dealing under s 47 are all broadly defined and can easily catch conduct that is efficiency enhancing (there is no rule of reason defence in Australia). The exemptions under s 51(3) are important because they avoid liability where IP licensing conditions are efficiency enhancing. (sub, page 4)

AIPPI Australia, the Australian national group of the International Association for the Protection of Intellectual Property, argues that:

> To repeal section 51(3) and expose dealings by intellectual property holders that are within the scope of their monopoly to the full scope of the competition law is inconsistent with the rationale for the existence of intellectual property rights. (DR sub, page 7)

CSIRO points to the value of subsection 51(3):

> … in the context of competition law in Australia, subsection 51(3) is a valuable provision in relation to patent licence transactions and that its repeal (without putting in place some compensating mechanisms) would be potentially counterproductive to technology commercialisation in Australia. (DR sub, page 1)

Others argue that repealing subsection 51(3) will create uncertainty, add a cost burden on businesses and has the potential to give rise to unintended consequences. For example, AIPPI Australia states that, although the ACCC acknowledges the majority of cases do not give rise to competition concerns:

> … without the protection afforded by section 51(3), it would still be necessary to conduct a detailed review of these agreements from a competition perspective to ensure they comply with the relevant laws. It is therefore inefficient to subject dealings to competition laws where the risk of infringement is negligible.
>
> Additional uncertainty and complexity would increase transaction costs and reduce post innovation returns. (DR sub, page 7)

The Australian Copyright Council states:

> While such an amendment may 'tidy up' the CCA … this amendment could create further obstacles and uncertainty for rights holders investing in new business models. In particular, we query whether such an amendment would encourage innovation and establish competition laws and regulations that are clear, predictable and reliable. (DR sub, page 5)

58 Ibid., page 5.

The interaction between IP rights and competition law has been reviewed numerous times, including by the Hilmer Review, the National Competition Council (NCC) and by the Intellectual Property and Competition Review Committee (known as the Ergas Committee). Each of these reviews recommended amendments to the exception for IP licences and assignments (Box 9.1).

The NCC concluded that the original objectives of subsection 51(3) were unclear, although it was most likely included to avoid a perceived conflict between IP laws and competition laws. But 'this objective is no longer relevant because it is clear that these two fields of law are compatible and consistent with each other'.[59] However, the NCC noted that subsection 51(3) may have some continuing objectives in the context of:

- clarifying whether licensing conditions that have the effect of subdividing IP rights may be anti-competitive; and
- providing greater certainty and reduced compliance costs in relation to the licensing and assignment of IP.[60]

The Ergas Committee considered that IP rights were sufficiently different from other property rights and assets to warrant special treatment under the (then) *Trade Practices Act 1974* (TPA). However, the existing IP exceptions under subsection 51(3) were 'seriously flawed, as the extent and breadth of the exemptions are unclear, and may well be over-broad'.[61] The Ergas Committee was of the view that the:

> ... exemptions do not provide an appropriate balance between the needs of the intellectual property system and the wider goals of competition policy.[62]

The then Government accepted the Ergas Committee's recommendation to rewrite subsection 51(3) to allow the competition provisions of the TPA to be applied to IP arrangements that result in a substantial lessening of competition. However, no change has been made to the legislation.[63]

A recent House of Representatives Standing Committee on Infrastructure and Communications report into pricing of information technology recommended repealing subsection 51(3) of the CCA.[64] The ALRC's Copyright and Digital Economy Final Report also stated this repeal should be considered.[65]

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59 National Competition Council 1999, *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974, Final Report*, Melbourne, page 166.

60 Ibid., page 167.

61 Intellectual Property and Competition Review Committee 2000, *Review of intellectual property legislation under the Competition Principles Agreement*, Canberra, page 11.

62 Ibid., page 11.

63 Attorney-General's Department, *Government Response to the Advisory Council on Intellectual Property and Competition Review Recommendations, part 1*, viewed 20 February 2015, http://arts.gov.au/resources-publications/publications/government-response-advisory-council-intellectual-property-rec-0. and Productivity Commission 2005, *Review of National Competition Policy Reforms*, Canberra, page 284.

64 House of Representatives Standing Committee on Infrastructure and Communications 2013, *At What Cost? IT pricing and the Australia Tax*, Canberra, page xiii.

65 Australian Law Reform Commission 2014, *Copyright and the Digital Economy Final Report*, Sydney, pages 74 and 196.

Box 9.1: Reviews of IP and competition law

The Hilmer Review examined the exceptions for IP rights under the then *Trade Practices Act 1974* (TPA). The Hilmer Review stated that it was not apparent that the exception met the relevant policy goal, nor had the Committee been presented with any persuasive arguments as to why IP licensing and assignments should receive protection beyond the authorisation process. The report concluded that it:

> ... saw force in arguments to reform the current arrangements, including the possible removal of the current exemption and allowing all such matters to be scrutinised through the authorisation process. Nevertheless, it was not in a position to make expert recommendations on the matter and recommends that the current exemption be examined by relevant officials, in consultation with interested groups.[66]

In 1999, the NCC reviewed subsection 51(3) of the TPA as part of the Australian Government's review of legislation that restricts competition under the Competition Principles Agreement.[67] The NCC concluded that only in rare cases do IP owners have sufficient market power to enable them to substantially lessen competition in the markets in which they compete. It recommended that:

- the exemption in subsection 51(3) be retained, but amended so that it no longer exempted horizontal arrangements or price and quantity restrictions; and
- the ACCC formulate guidelines on the scope of the exemption, and the application of Part IV to dealings in intellectual property rights.

In 2000, the Ergas Committee also reviewed the interaction between IP rights and competition policy.[68] On subsection 51(3) of the TPA, the Ergas Committee recommended that IP rights continue to be accorded distinctive treatment under the TPA and this should be achieved by:

- amending subparagraph 51(1)(a)(i) of the TPA to *list* all relevant intellectual property statutes, that is any 'Act relating to patents, trademarks, designs, copyright, circuit layouts and plant breeder's rights';
- repealing subsection 51(3) and related provisions of the TPA;
- inserting an amended subsection 51(3) and related provisions into the TPA to ensure that conditions in a contract, arrangement or understanding related to the subject matter of that intellectual property statute did not contravene Part IV or section 4D of the TPA — unless those conditions were likely to result in a substantial lessening of competition; and
- the ACCC issuing guidelines to provide sufficient direction to IP right owners to clarify the types of behaviour likely to result in a breach of the competition law, and mechanisms for parties to seek a written clearance from the ACCC.

The Panel considers it appropriate that commercial transactions involving IP rights, including the assignment and licensing of such rights, be subject to the CCA, in the same manner as transactions involving other property and assets.

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66 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page 151.

67 National Competition Council 1999, *Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974, Final Report*. Melbourne, pages 11 and 12.

68 Intellectual Property and Competition Review Committee 2000, *Review of intellectual property legislation under the Competition Principles Agreement*, *Final Report*, Canberra, page 19.

As many submissions observe, the exemption afforded by subsection 51(3) is confined in two ways:

- In general terms, the exemption is limited to conditions imposed in licences and assignments of IP rights that relate to products created through the application of the IP rights.
- The exemption does not extend to section 46, which remains applicable.

Under the current law, subsection 51(3) does not exempt an IP licence and assignment from competition law; it only exempts certain **conditions** in a licence or assignment.

In most instances, assigning or licensing an IP right to another person will be neutral from a competition perspective. The assignment or licence will involve a bare transfer of the exclusive right from one person to another. However, on occasions, the transfer may result in the other party acquiring substantial control over an area of commerce by reason of the accumulation of IP rights. The transfer of IP rights, whether by licence or assignment, is subject to the potential application of sections 45 and 50 of the CCA and is not protected by subsection 51(3).

Likewise, subsection 51(3) does not exempt the decision by an IP owner to refuse to license IP rights to another person. Refusals to deal may, on occasions, contravene section 46 of the CCA.

In contrast, subsection 51(3) does exempt **conditions** of an IP licence or assignment that relate to products created through application of the IP right from all sections of the CCA apart from section 46.

The Panel acknowledges the original rationale for the exemption in subsection 51(3). The subsection applies where an owner of an IP right licences another person to commercialise that right, but imposes restrictions on the manner in which the commercialisation occurs; for example, quality specifications, quantity restrictions or territorial restrictions. If the IP owner were to commercialise the right, the owner would itself make decisions about quality, quantity and selling territory. The rationale for subsection 51(3) is that the grant of a licence to another person, subject to conditions or restrictions that the owner could have imposed upon itself, should not be regarded as anti-competitive and should be exempted from the competition law.

However, the Panel considers that the rationale for subsection 51(3) is flawed. In the relatively benign example given, the conditional licence would not substantially lessen competition and would not contravene the CCA. Without the licence, the licensee would have been unable to commercialise the IP right; therefore, a conditional licence does not restrict the level of competition that would have existed but for the licence. Accordingly, on the benign example, the exemption is not required.

Conversely, there are other circumstances in which a conditional licence can substantially lessen competition. In fields in which there are multiple and competing IP rights, such as the pharmaceutical or communications industries, cross-licensing arrangements can be entered into to resolve disputes but which impose anti-competitive restrictions on each licensee. Subsection 51(3) can operate to exempt those arrangements from the competition law. The Panel considers that arrangements of this type should be examinable under the competition law.

Most comparable jurisdictions have no equivalent to subsection 51(3). None of the US, Canada or Europe provide an exemption from competition laws for conditions of IP transactions. In those jurisdictions, IP assignments and licences and their conditions are assessed under competition laws in the same manner as all other commercial transactions. The courts in those jurisdictions distinguish between competitively benign and harmful IP transactions, taking account of all relevant circumstances of the transaction and the conditions imposed. There is no evidence that this has diminished the value of IP rights in those countries.

Appendix B summarises the approach to this issue in comparable jurisdictions.

Accordingly, the Panel considers that the IP licensing exception in subsection 51(3) of the CCA should be repealed.

This position is supported by a range of submitters, including: the Australian Digital Alliance and Australian Libraries Copyright Committee (DR sub, page 4); Australian Industry Group (DR sub, page 9); CHOICE (DR sub, page 16); National Seniors Australia (DR sub, page 10); Australian Communications Consumer Action Network (DR sub, page 5); and Electronic Frontiers Australia Inc (DR sub, page 2).

However, as is the case with other vertical supply arrangements, IP licences should be exempt from the per se cartel provisions of the CCA insofar as they impose restrictions on goods or services produced through application of the licensed IP. Such IP licences should only contravene the competition law if they have the purpose, effect or likely effect of substantially lessening competition.

IP licensing or assignment arrangements that are at risk of breaching Part IV of the CCA (which covers anti-competitive practices), but which are likely to produce offsetting public benefits, can be granted an exemption from the CCA through the notification or authorisation processes.[69]

Concerns expressed in submissions about business uncertainty and increased compliance cost likely to arise from repeal of subsection 51(3) do not weigh heavily with the Panel. The competition law, and competition policy generally, are of fundamental importance to the welfare of Australians. All sectors of the economy should be exposed to and disciplined by the competition law, despite the necessary compliance cost that entails. The economic benefits of increased competition almost always outweigh the compliance costs.

Additionally, the block exemption power recommended by the Panel (see Recommendation 39) could be used to specify 'safe harbour' licensing restrictions for IP owners. As the ACCC notes:

> Should a block exemption provision be introduced, it could be used to clarify the scope of permissible conduct relating to the exercise of intellectual property rights, thereby providing additional certainty for businesses. (DR sub, page 22)

The European Commission established a block exemption for categories of technology transfer agreements in 2014.[70]

A number of submitters argue that it is 'premature' to repeal subsection 51(3) given the Panel's proposal to review IP provisions.[71] However, the repeal of subsection 51(3) concerns the use of IP rights; whereas, the proposed overarching review of IP would examine the extent of IP provisions.

Hence, the Panel does not consider that the repeal of subsection 51(3) should be delayed. Regardless of what the proposed review of the scope of IP provisions recommends, IP rights can still be used in an anti-competitive way.

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69 Australian Competition and Consumer Commission 2012, ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper, Canberra, page 5.

70 European Commission, Licensing agreements for the transfer of technology, Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

71 See, for example: Australian Publishers Association, DR sub, page 6; and Richard Hoad, DR sub, page 2.

9.3 IP AND INTERNATIONAL TRADE AGREEMENTS

For individual countries, the optimal design and level of IP rights depends on the extent to which they are net importers or exporters of different forms of IP. Australia is a net importer of IP.[72] With trade and commerce-related aspects of IP crossing national borders, IP has been the subject of international treaties. Frameworks influencing Australian IP law, and trade and commerce in IP both within Australia and internationally, include:

- the Agreement on Trade-Related Aspects of Intellectual Property Rights;
- treaties administered by the World Intellectual Property Organization;
- other dedicated IP agreements falling outside the World Intellectual Property Organization's framework; and
- IP provisions included as part of bilateral and regional trade agreements.[73]

As a net importer of IP, and likely to remain so, Australia's ability to access IP protected by rights granted in other countries will be important to ensure that we reap the benefits of the digital economy. That said, commitments regarding the extent of IP protection in Australia must also serve the best interests of Australians — an issue that should be tested through an independent cost-benefit analysis.

The ACCC (sub 1, page 65), the PC (sub, page 28) and The Australia Institute (sub, page 20) argue that caution should be exercised when entering international treaties or agreements that include IP provisions. As the PC notes, the proposed Trans-Pacific Partnership Agreement between Australia and various other countries, including the US, as well as other proposed international agreements, such as the Transatlantic Trade and Investment Partnership, are specifically considering intellectual property issues (sub, page 28).

AIPPI Australia notes:

> … intellectual property concerns have on several occasions been given much less prominence in negotiations for trade agreements than matters such as agricultural access. This is an issue of increasing concern, as the knowledge economy is growing to form a larger part of the Australian economy. (DR sub, pages 2-3)

The PC suggests that Australia has likely incurred net costs from including some IP provisions in trade agreements. It points to analysis of extensions in the duration of copyright protection required by the Australia-United States Free Trade Agreement, which imposed net costs on Australia through increased royalty payments.[74] As Australia is, and will continue to be, a net importer of IP, these costs are potentially significant.

However, others suggest that the costs and benefits of IP provisions are adequately considered. For example, the Communications Law Centre UTS said:

> … we consider that Australian representatives negotiating trade agreements do so with a guiding policy (but the necessary flexibility) of achieving what is in the overall best interests of Australians. … each agreement represents a negotiated outcome in the

72 Productivity Commission 2013, *Trade & Assistance Review 2011-12*, Canberra, page 77.

73 Ibid., page 78.

74 Productivity Commission 2010, *Bilateral and Regional Trade Agreements*, Canberra.

> particular circumstances of the bilateral or multilateral relationship. Intellectual property is one matter of concern in each complex and particular negotiation. (DR sub, page 3)[75]

Although the Panel acknowledges that trade agreements are necessarily the outcome of a negotiation, trade negotiations must be based on an understanding of the costs and benefits to Australia of proposed IP provisions. This should be undertaken in an independent and transparent way and prior to negotiations being concluded.

A number of submitters support trade negotiations being informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions, including: Australian Digital Alliance and Australian Libraries Copyright Committee (DR sub, page 4); CHOICE (DR sub, page 15); Australian Industry Group (DR sub, page 8); Electronic Frontiers Australia (DR sub, page 4); AIPPI Australia (DR sub, page 2); iiNet (DR sub, page 3); and Spier Consulting Legal (DR sub, page 4).

Further to this, the Panel considers that a separate independent review should assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

The Panel's view

Given the influence that Australia's IP rights can have on facilitating (or inhibiting) innovation, competition and trade, the Panel considers that the IP system should be designed to operate in the best interests of Australians.

Determining the appropriate *extent* of IP protection is complex. Given the complexity of the issues, there is a case for conducting an independent framework-style IP review. The review should have regard to recent reviews of specific aspects of IP, look at competition policy issues, new developments in technology and markets and international trade agreements.

In the majority of cases, granting an IP right is unlikely to raise significant competition concerns. That said, IP rights, like all property rights can be *used* in a manner that harms competition. The use of IP rights should therefore be subject to the CCA.

Independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions in trade negotiations should be undertaken to inform international trade negotiations.

Implementation

The Government should task the PC with undertaking a 12-month, framework-style review of IP in Australia. Because this recommendation does not require consultation with, or agreement by, the state and territory governments, it can be implemented by the Australian Government. The increasing pace of change and importance of technological developments to the Australian economy suggest that the Review be undertaken as soon as possible. The Panel suggests it should commence with 6 months of the Government accepting this recommendation.

Repealing subsection 51(3) of the CCA should not be delayed pending the outcome of the Panel's proposed PC review of IP provisions. Subsection 51(3) concerns the use of IP rights, not the extent of IP provisions, which is the focus of the proposed PC review. It can therefore be repealed at the same time as the other recommended changes to the CCA in this Review.

75 See also Australian Copyright Council, DR sub, page 4.

Recommendation 6 — Intellectual property review

The Australian Government should task the Productivity Commission to undertake an overarching review of intellectual property. The Review should be a 12-month inquiry.

The review should focus on: competition policy issues in intellectual property arising from new developments in technology and markets; and the principles underpinning the inclusion of intellectual property provisions in international trade agreements.

A separate independent review should assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions. Such an analysis should be undertaken and published before negotiations are concluded.

Recommendation 7 — Intellectual property exception

Subsection 51(3) of the CCA should be repealed.

10 Regulatory Restrictions

Following the introduction of the National Competition Policy (NCP) in 1995, governments made a concerted effort to examine and reform regulation that restricted competition where those restrictions were not in the public interest.

Australian laws at the Commonwealth and state and territory level were subject to review for anti-competitive impact as part of the NCP reforms, as set out in Box 10.1 below.

Box 10.1: NCP Legislative Review Program

In 1995, all Australian governments agreed that legislation (including Acts, enactments, ordinances and regulations) should not restrict competition unless it could be demonstrated that the benefits of the restriction to the community as a whole outweighed the costs, and that the objectives of the legislation could only be achieved by restricting competition.[76]

Governments committed to review and, where appropriate, reform all legislation that restricted competition by 2000.

Around 1,800 individual pieces of potentially anti-competitive legislation were identified as part of this process, which was later extended to 2005.

Governments reviewed, and where appropriate reformed, around 85 per cent of their nominated legislation and around 78 per cent of 'priority' legislation.[77]

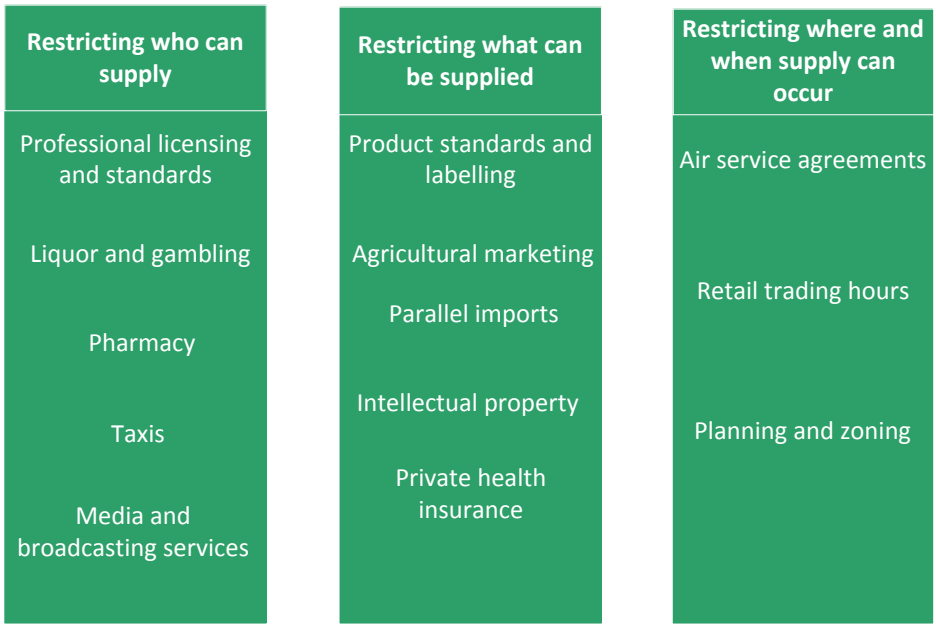
These assessments were linked to the NCP payments from the Australian Government to the States and Territories.

Regulatory restrictions can limit consumers' ability to exercise choice and businesses' ability to respond to consumers. They can determine who participates in the market, what they can produce and even the standard of the product or service they can provide.

Regulatory restrictions can affect: who can supply; what can be supplied; and when and where supply can occur. While it is not practical for the Panel to examine all existing regulatory restrictions on competition, some of the broad categories are detailed below. These are raised in submissions and provide examples of areas requiring a reinvigorated program of regulatory review.

76 See clause 5 of the 1995 Council of Australian Governments inter-governmental Competition Principles Agreement. See also the discussion on the public interest test in Chapter 8.

77 National Competition Council 2005, *Assessment of governments' progress in implementing the National Competition Policy and related reforms*, Melbourne, page xi.



The Panel heard that, although much was achieved through regulatory reform, more remains to be done.

Some restrictions applying to particular industries appear to support only a small number of market participants and may have perverse effects — such as mandated ethanol usage in New South Wales, which may have pushed motorists towards higher-priced premium fuels.[78] Similarly, liquor licensing rules in Queensland that restrict packaged alcohol sales to holders of hotel licences appear to have induced major supermarkets to buy hotel licences, which may have made it harder for smaller independent stores to compete.[79]

Such regulations are generally not contained in competition law,[80] but rather in a multitude of Commonwealth, state and territory and local government laws and legislative instruments. Although generally intended to serve other public policy purposes (for example, health, safety, standards of conduct, consumer protection), regulatory restrictions can nonetheless adversely influence competition. For example, they may create barriers to entry, advantaging some businesses over others, or reducing incentives to compete.[81]

These restrictions can take many forms, including the examples submitted by the Business Council of Australia (BCA) in Box 10.2 below.

78 ACCC sub 1, page 40 and section 15.2.

79 See Deborah Smith, DR sub, page 4 and section 10.4.

80 Subsection 51(1) of the *Competition and Consumer Act 2010* provides that all jurisdictions can exempt specific conduct from competition laws by way of regulations or legislation. The Acts and Regulations that contain these exemptions are listed on the ACCC's website. ACCC 2015, *Exceptions under commonwealth, state & territory legislation*, viewed 5 February 2015, www.accc.gov.au/about-us/australian-competition-consumer-commission/legislation/exceptions-under-commonwealth-state-territory-legislation.

81 OECD 2014, How Can Competition Contribute to the G-20 Commitment to Raise GDP by at Least 2%?, page 2.

Box 10.2: Examples of regulatory restrictions on competition provided by the BCA[82]

'Regulation requiring imported cars to be modified to meet Australian-specific car design standards, as these differ from those of the US and the EU, restricting the scope for parallel imports and importation of second-hand cars.

Restrictions on the parallel importation of commercial quantities of books by booksellers.

Concessional excise treatment of domestically produced ethanol while imported ethanol pays full excise.

The displaying of discounted fuel prices on fuel retailers' price boards is specifically regulated in New South Wales and South Australia.

A restricted number of taxi licences are issued in all states and territories, and competition from hire cars is mostly restricted.

Packaged liquor can be sold by hotels in regional Western Australia on Sunday, but not by specialist packaged liquor stores.

Retail pharmacies can only be owned by pharmacists (whereas no such restrictions exist on medical practices in Australia, nor on pharmacies in the UK, the Netherlands, Norway, Canada and the US).

Restrictions on pharmacists administering vaccinations and re-issuing prescriptions for long-term conditions.

Genetically modified crops cannot be grown in South Australia and Tasmania (but can be grown in all the other mainland States).

The sale of fresh potatoes is restricted in Western Australia (but nowhere else in Australia).

Owner driver and independent contractors are subject to industry-specific regulation in Western Australia, Victoria and New South Wales (but not other states).

Compulsory workers' compensation insurance and third party personal injury transport insurance are only available from government monopoly providers in some States.'

This does not necessarily argue for complete deregulation. The Panel considers the focus should be on *better* regulation. Already, regulation serves the public interest in a range of areas, for example, to protect public safety. The goal is to ensure that regulation does not restrict competition, except to the extent required to meet other overriding policy objectives. Pro-competitive regulation, combined with governments' general deregulation agendas, will provide a more efficient and effective marketplace that offers consumers better value and choice.

The National Competition Council (NCC), which was tasked with assessing the progress of the review process, considers that the NCP legislation review program resulted in a 'material reduction in unwarranted competition restrictions', but that government self-assessment as the basis of reform had been 'limiting'.[83]

82 Business Council of Australia, sub, Main Report, Exhibit 6, page 21.

83 National Competition Council 2005, *National Competition Council Assessment of governments' progress in implementing the National Competition Policy and related reforms: 2005*, Melbourne, page xii.

An independent and transparent process of assessment is more likely to hold all governments to account. Importantly, this assessment must examine the outcomes, not just the processes undertaken, and this requires a more thorough assessment.

The NCP regulatory review process relied upon a generic, but limited, set of factors to assess public interest. The elements to consider in the public interest will necessarily differ on a case-by-case basis and a generic approach is understandable. However, providing governments with industry or regulation-specific guidance can also lead to a narrow approach being taken to assess public interest.

Instead, an independent and transparent process of review can result in a level of public scrutiny that ensures that a thorough examination of the public interest takes place.

The onus of proof in the NCP process was on those wishing to maintain the restriction to demonstrate that it continues to serve the public interest. There is no evidence that this produced poor outcomes.

In addition to national reform agendas such as the NCP, and jurisdiction-specific reviews of pieces of regulation, governments can introduce processes to manage the stock and flow of regulation over time.[84]

Clause 6 of the Competition Principles Agreement (CPA) requires jurisdictions to review legislation that restricts competition, actually or potentially, once every ten years.[85] However, as the Australian Competition and Consumers Commission (ACCC) submission notes, the impetus for review 'slowed considerably' once the competition payments ceased in 2006 (sub 1, page 21).

Although the Australian Government and state and territory governments were signatories to the CPA, local governments also have power to make rules that can affect competition (see Box 10.3).

Box 10.3: Local government and regulatory restrictions

The 2012 Productivity Commission (PC) report on *Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator*[86] discussed local government regulation in some detail.

Local governments often have significant delegated power, which extends beyond formally making local laws. In many instances, local governments develop quasi-regulations — including rules, local government policies, codes, guidelines, conditions on permits, licences, leases or registrations — that can have a similar effect to local laws.

In that report, the PC found 'no state government had provided comprehensive training or guidance on how to administer and enforce regulation.'

84 In its report on National Competition Policy, the Productivity Commission recommended that all Australian governments should ensure that they have in place effective and independent arrangements for monitoring new and amended legislation. (Productivity Commission 2005, *Review of National Competition Policy Arrangements*, Canberra, page XLVII (Recommendation 9.2)).

85 Council of Australian Governments 1995, Competition Principles Agreement, (as amended to 13 April 2007), Council of Australian Governments, viewed 27 February 2015, www.coag.gov.au/node/52.

86 Productivity Commission 2012, *Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator*, Canberra, pages 13, 15 and 16.

Box 10.3: Local government and regulatory restrictions *(continued)*

While exercising its duties, local government may face conflicting roles, which may raise competitive neutrality concerns. The PC notes specific examples, including 'local governments can be the providers of certain facilities, such as waste depots and caravan parks, and regulate similar facilities provided by the private sector.'

The PC notes:

> ...for practical reasons it is frequently difficult to remove such conflicts without significantly affecting the quality of services ... Transparency, conflict resolution and probity requirements are needed to address the potential for these conflicting roles to result in compromised decision-making.

And concludes:

> Since conditions that are applied through approvals and registrations are given less scrutiny than conditions contained in local laws, there is greater scope for these conditions to impose direct or indirect costs on business and for competition to be restricted without being subject to a public interest test.

Since local government rules can affect competition in much the same way as legislation or regulation, they should be made transparently and be subject to the same scrutiny and regulatory impact analysis as Commonwealth, state and territory laws and regulations.

Regulatory impact analysis

All Australian jurisdictions now have in place regulatory impact analysis procedures. Intra-jurisdictional approaches vary in their guidance and application, and there is a specific process for national reforms in the form of the Council of Australian Governments (COAG) best-practice regulation guide.[87] Principle 4 of the COAG Principles of Best Practice Regulation adopts the CPA legislation review principle that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restrictions to the community as a whole outweigh the costs; and
- the objectives of the regulation can only be achieved by restricting competition.

The Panel recognises that regulatory impact analysis is important for managing the flow of regulation. We consider that the impact on competition should be an important element for consideration in any regulation-making process.

87 Council of Australian Governments 2007, *COAG best practice regulation guide*, Canberra.

The Panel's view

Regulatory impact analysis is an important part of policy development for new and amending regulations at the Commonwealth, state and territory and local government levels. The Competition Principles Agreement test for regulatory restrictions on competition (that legislation should not restrict competition unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition) should be retained and promoted as an important part of the process, to ensure that all governments consider competition policy on an ongoing basis.

A NEW ROUND OF REGULATORY REVIEWS

Regulatory restrictions on competition can have a significant negative impact on the economy. This can occur directly, by limiting economic activity in the regulated sector, or indirectly, as many sectors facing regulatory restrictions supply significant inputs to other business activities. While competition principles are enshrined in regulatory impact analysis frameworks for new regulations, the stock of existing regulations is large and needs continual review.

A rigorous, transparent and independent assessment of whether regulations are in the public interest, with the onus on the party wishing to retain anti-competitive regulation, is important to ensure regulation serves the long-term interests of consumers. Although NCP reviews and reforms made substantial progress in eliminating anti-competitive regulations, not everything was considered, and the impact regulations have on competition can change over time.

Now, more than 20 years since the Hilmer Review, and 10 years after the end of the formal regulation review processes that followed, the reform agenda needs reinvigorating. Submissions in response to both the Issues Paper and Draft Report provide a range of examples where review and, where appropriate, reform are needed. Further, jurisdictions have exempted more than 80 pieces of regulation from the operation of the competition law under subsection 51(1) of the *Competition and Consumer Act 2010* (CCA). These should also be reviewed to assess whether they are still needed or can be made to be less anti-competitive.

Submissions generally support the Draft Report's recommendation for a new round of regulation review. While a broad range of submitters (particularly business submitters) support a national regulation review program,[88] some submissions express the view that a national program is not needed and that more targeted reviews would suffice.[89]

While acknowledging that there is likely to be less anti-competitive regulation than at the time of the NCP, the Panel believes it is still an issue requiring national attention. A national approach will provide momentum, impose discipline on all jurisdictions, and foster a nationally-consistent business regulatory environment. Further, reviews of the impact on competition are also distinct from, but complementary to, other 'red tape reduction' processes. The Panel is of the view that the factors to consider in assessing public benefits and costs should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

88 See, for example: Australian Industry Group, DR sub, page 11; Australian National Retailers Association, DR sub, page 6; Coles Group Limited, DR sub, page 3; National Seniors Australia, DR sub, page 11; Plastics and Chemicals Industries Association, DR sub, page 4; Standards Australia, DR sub, page 4; and Suncorp Group DR sub, page 5.

89 See, for example: CHOICE, DR sub, page 19; and South Australian Government, DR sub, page 14.

The Australian Local Government Association notes that state and territory governments will need to 'guide and assist councils in reviewing their regulatory obligations under state and territory laws' (DR sub, page 7).

The Panel also acknowledges submissions that express concern about excessive deregulation.[90] What the Panel believes is needed is *better* regulation, and regulation that does not impede competition, rather than deregulation for its own sake.

The Panel's view

The NCP reforms substantially reduced the amount of anti-competitive regulation. However, the regulation review process begun under the NCP has flagged and should be reinvigorated on a national level.

Regulations should be assessed against the same COAG-agreed public interest test that was used under the NCP reforms from 1995 and later reaffirmed in the 2007 regulatory impact analysis framework *COAG Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies* (see discussion in Chapter 8). Factors to consider in assessing public benefits and costs should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

There will be many instances where some regulation is required, such as for health and safety reasons. The Panel is not suggesting there should be no regulation in those situations, but that regulation should be as pro-competitive as possible, when considered alongside other policy objectives. There is a need for better regulation rather than no regulation at all.

Maintaining a rigorous, transparent and independent assessment of whether regulations serve the public interest, with the onus on the party wishing to retain anti-competitive regulation, is important to ensure that changes in regulation improve the wellbeing of Australians.

The assessment should focus on outcomes achieved and not on processes undertaken.

Implementation

Within six months of accepting the recommendation, all jurisdictions should agree to a process for a renewed round of regulatory reviews to be undertaken by the Australian Government and state and territory governments. State and territory governments would also be responsible for reviewing, or assisting reviews of, local government regulations. Where regulatory reviews are already in place, such as the Australian Government's deregulation agenda, competition principles should be included as part of those reviews.

These regulation reviews must be embraced by all jurisdictions either individually or, preferably, collectively. The national approach taken under NCP was an important reason why regulation review was such a successful reform mechanism. Nationally consistent reforms should be preferred, where practical, to minimise regulatory compliance costs for businesses that operate across state and national borders.

The review process should be transparent, with highest priority areas for review identified in each jurisdiction and results published along with timetables for reform. Priority reviews should be nominated within six months of jurisdictions agreeing to the new round of regulatory reviews.

90 For example, the clear concerns raised in many submissions about any relaxation of restrictions on the sale of alcohol. See Section 10.4.

The Panel acknowledges that, since the legislation review under the NCP, jurisdictions have progressed reform or made pro-competitive changes. This should not dampen the enthusiasm for improvement. The priority areas for review will differ between jurisdictions, with each government responsible for selecting which regulations to review. However, jurisdictions should work collaboratively to learn from the experiences of past reforms.

The review process should be overseen by the proposed Australian Council for Competition Policy (ACCP) (see Recommendation 43) with a focus on the outcomes achieved rather than the process undertaken. The ACCP should publish an annual report on progress of the reviews.

The ACCP will provide the forum for all governments to collaborate and share their experiences. It should report annually on governments' progress on undertaking regulatory reviews and implementing subsequent reform.

Recommendation 8 — Regulation review

All Australian governments should review regulations, including local government regulations, in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Legislation (including Acts, ordinances and regulations) should be subject to a public interest test and 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.

Factors to consider in assessing the public interest should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

Jurisdictional exemptions for conduct that would normally contravene the competition law (by virtue of subsection 51(1) of the CCA) should also be examined as part of this review, to ensure they remain necessary and appropriate in their scope. Any further exemptions should be drafted as narrowly as possible to give effect to their policy intent.

The review process should be transparent, with highest priority areas for review identified in each jurisdiction, and results published along with timetables for reform.

The review process should be overseen by the proposed Australian Council for Competition Policy (see Recommendation 43) with a focus on the outcomes achieved rather than processes undertaken. The Australian Council for Competition Policy should publish an annual report for public scrutiny on the progress of reviews of regulatory restrictions.

PRIORITY AREAS FOR REVIEW

While the regulation reviews should be broad, the Panel considers that planning and zoning rules, the regulation of taxis and mandatory product standards (in particular greater acceptance of international product standards) are priority areas for review and should be commenced immediately.

Governments should subsequently identify other priority areas as part of the national reform and review agenda (see Section 10.4).

10.1 PLANNING AND ZONING

Land can be used for a variety of purposes, including residential, industrial, commercial and conservation, which can include national parks. However, the unfettered market may not deliver an outcome across these various uses that is considered optimal for society as a whole. Hence, governments allocate land to particular uses through planning, zoning and development assessment.

Although submissions note that planning processes are necessary to give the community an opportunity to have input into relevant developments (for example, the Queensland Law Society, sub, page 3), planning systems can create excessive barriers to entry, diversification or expansion, including by limiting the number, size, operating model and mix of businesses. This has the effect of making suppliers less responsive to the needs of consumers.

Planning has been reviewed a number of times, as set out in Box 10.4, with reviews highlighting the need to reform planning and zoning rules across jurisdictions to increase competition and improve productivity.

Box 10.4: Planning reviews

NCP assessments

The NCC's 2003 assessment of governments' progress in implementing the NCP noted that, under NCP, governments are broadly responsible for balancing objectives in developing planning schemes that are in the public interest.[91]

Where legislative restrictions reflect the following principles, the NCC assessed the jurisdiction as having met its CPA obligations:

- Planning processes minimise opportunities for existing businesses to prevent or delay participation by new competitors.
- Jurisdictions considered and, where appropriate, provided for competition between government and private providers in planning approval processes.

91 National Competition Council 2003, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: Volume two — Legislation review and reform*, AusInfo, Canberra, page 10.2.

Box 10.4: Planning reviews *(continued)*

All States and Territories except New South Wales and Western Australia were assessed as having met their obligations in 2003.

By 2005 Western Australia was the only State that had not completed the reform activity.[92]

ACCC grocery inquiry

The 2008 ACCC inquiry into the competitiveness of retail prices for standard groceries found that planning and zoning laws act as a barrier to establishing new supermarkets and that 'little regard is had to competition issues in considering zoning or planning proposals.'[93]

The report noted that independent supermarkets were particularly affected by impediments to new development, given the difficulties they have in obtaining access to existing sites. The ACCC received evidence of incumbent supermarkets using planning consultation and objection processes to 'game' the planning system to delay or prevent potential competitors entering local areas.[94]

PC research report into planning, zoning and development assessments

The PC's 2011 research report into planning, zoning and development assessments[95] found competition restrictions in retail markets evident in all States and Territories, and identified the following changes to planning and zoning systems that could improve competition:

- reducing the prescriptiveness of zones and allowable uses, which would allow a wider range of businesses and developers to bid for the same land;
- facilitating more 'as-of-right' development processes, where no discretionary action is required by the assessment body;
- eliminating the impact on the viability of existing businesses as a consideration for development applications and re-zoning approval;
- considering impacts on the viability of centres only during the metropolitan and strategic planning stages;
- providing clear guidelines on alternative assessment paths to deal with larger scale and/or jurisdictionally significant or sensitive projects (for example, call-in powers of state ministers); and
- accompanying appeal rights with disincentives to discourage their use for anti-competitive purposes.

PC inquiry into the Australian retail industry

The PC's 2011 inquiry report, *Economic Structure and Performance of the Australian Retail Industry*, found that planning and zoning regulations were 'complex, excessively prescriptive and often anti-competitive'.[96]

92 National Competition Council 2005, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: 2005*, Canberra, page 14.39.

93 Australian Competition and Consumer Commission 2008, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, Canberra, page xix.

94 Ibid., pages xix and 194.

95 Productivity Commission 2011, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, Research Report, Canberra, pages 277 and 352-355.

Box 10.4: Planning reviews *(continued)*

The PC's recommendations included:

- State, territory and local governments should (where responsible) broaden business zoning and significantly reduce prescriptive planning requirements to allow the location of all retail formats in existing business zones to ensure that competition is not needlessly restricted. In the longer term, most business types (retail or otherwise) should be able to locate in the one business zone (PC Recommendation 8.1).
- Governments should not consider the viability of existing businesses at any stage of planning, re-zoning or development assessment processes. Impacts of possible future retail locations on existing activity centre viability (but not specific businesses) should only be considered during strategic plan preparation or major review — not for site-specific re-zoning or individual development applications (PC Recommendation 8.2).
- State, territory and local governments should facilitate more as-of-right development processes to reduce business uncertainty and remove the scope for gaming by competitors (PC Recommendation 8.3).

PC study on relative costs of doing business in Australia

The PC's 2014 research report on *Relative Costs of Doing Business in Australia*: *Retail Trade* made two findings in this area:[97]

- The Australian economy would benefit from further simplification of state and territory planning and zoning schemes that expand the supply of retail space by simplifying business zones and removing unnecessary restrictions on the allowable use of land within each zone. Victoria is leading the way in this space, and should serve as a model for other states and territories to follow (PC Finding 6.1).
- The expected net benefits to the economy from state and territory government planning and zoning reforms will only be realised in full if local governments have the resources to effectively implement state and territory government policies consistently and as intended (PC Finding 6.2).

Submissions raise a number of planning and zoning issues. The range of issues is broad and cast in different ways, but there is general dissatisfaction with the current arrangements. Some of this dissatisfaction may reflect individual decisions going against a proponent. However, in other cases, structural issues may be the root cause, as reviews like the PC's research report into planning, zoning and development assessments conclude.

Submissions suggest land use restrictions can pose considerable barriers to effective competition by constraining the supply of urban land, concentrating market power and creating barriers to entry for new businesses.[98]

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96 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, Report no. 56, Canberra, page XIV and these findings were based on the Productivity Commission's assessment from its 2011 Research Report *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*.

97 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, page 28 and Chapter 6.

Inflexible restrictions placed on retailers in relation to land use restrictions and costly approval procedures are also cited as examples of unnecessary barriers to business entry and expansion (Australian Retailers Association, sub, page 9). This issue is particularly relevant for emerging providers in the sharing economy.

In relation to the retail sector, ALDI suggests its expansion has been considerably slower than planned on account of regulatory constraints. The retailer says that rigid and overly-prescriptive land-use planning and zoning rules have produced a chronic shortage of suitably zoned land for small-format supermarkets in many built-up areas. It goes on to state:

> More so than any other country in which it does business, ALDI has found the challenge of securing appropriate property holdings in Australia the single most significant brake on its expansion. (sub, page 4)

Given that planning regulation can restrict the number and use of retail sites, it can confer significant negotiating power on established landlords and restrict commercial opportunities for others. The NSW Business Chamber suggests 'removing unnecessary constraints on planning and zoning regulation would help new development and increase competition in the marketplace' (sub, page 5).

The City of Sydney submits that the city's planning policy framework, which includes planning for centres, acts to protect the broader public interest. It suggests that focusing primary retail development in mixed-use centres — where they are supported by residential populations, complementary businesses and services, and community and transport infrastructure — provides the flexibility for existing centres to grow, while allowing new centres to establish. It also suggests that clustering activity together allows consumers to shop around in one location, compare products and prices, and make more informed decisions, which ultimately drives competition (DR sub, pages 3-4, 10).

The PC, on the other hand, argues that land-use regulation that centralises retail activity can be either competition-enhancing or competition-reducing, depending on how it is designed and implemented by the relevant planning authorities.[99]

To this point, National Seniors Australia suggests:

> Not only can planning and zoning restrictions represent significant barriers to competition in retail markets, including supermarkets, they may also restrict new entrants to other markets of particular relevance to senior Australians, including markets for seniors housing eg retirement villages and aged care accommodation. (DR sub, page 11)

The National Farmers' Federation notes that the planning permit application process can deter a farm from increasing its intensity or efficiency as operational changes may trigger the need to obtain a planning permit. It also notes that local planning zones often provide permit exemptions for a range of agricultural uses and structures (DR sub, page 6). The South Australian government suggests

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98 For example, Urban Development Institute of Australia (sub, page 2) noted the new residential zones currently being introduced in Melbourne as part of the Victorian Government's Metropolitan Planning Strategy will place a mandatory limit of two dwellings per lot for at least 50 per cent of residential areas in Melbourne. Also that this policy has the potential to lock large quantities of valuable urban land into an extremely limited range of uses, and is characteristic of planning systems throughout Australia.

99 Productivity Commission 2014, Relative Costs of Doing Business in Australia: Retail Trade, Research Report, Canberra, page 121.

that consideration of 'fit for purpose' land-use planning regimes may better assist primary industries and regional development (DR sub, page 13).

Submissions also suggest that another issue is the lack of an economic objective in relation to planning. One submission states:

> ...planning is not an area of government activity with clear, simple goals (other than motherhood statements about 'building better communities' and the like), and this leaves it ripe for capture by special interests. (Nick Wills-Johnson, sub, page 1)

The Panel's draft recommendation to include competition principles in the objectives of planning and zoning legislation is supported by a number of submitters.[100] For example, Australian Industry Group notes:

> Planning and zoning restrictions can risk stifling competition when they fix existing land uses — and users over extended periods. Incorporating competition considerations is sensible and will potentially reduce the cost, complexity and time taken to challenge existing regulations. It is a worthy reform. (DR sub, page 10)

Other submissions note that economic objectives already exist in planning and zoning regulations. They raise concerns about the overload of objectives in planning legislation and whether the draft recommendation would just add to complexity.[101]

The Western Australian Local Government Association suggests that local governments would agree that any 'excessive and complex zoning' should be minimised to provide greater clarity for the community. However, it also submits that the planning system has been established to protect and enhance local communities and should not be seen purely as a market-driven consumer tool (DR sub, pages 11-13).

Other local government associations do not support the draft recommendation.[102] They note that 'councils have a legislated responsibility to take into account the broader interests of their municipal residents' (Local Government Association of Tasmania, DR sub, page 6).

Small retailers[103] suggest planning and zoning controls are needed to protect competition and local communities. Others note that planning and zoning restrictions have been maintained in response to concerns that removing restrictions may devastate small business.[104]

Master Grocers Australia/Liquor Retailers Australia (DR sub, page 28) and others[105] recommend that councils have more guidelines on how to take account of competition. They suggest councils should

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100 See, for example: ACCC, DR sub, pages 23-24; ALDI, DR sub, page 2; Australian Industry Group, DR sub, pages 10-11; Australian National Retailers Association, DR sub, page 20; Australian Retailers Association, DR sub, page 4; Coles Group Limited, DR sub, page 5; Large Format Retail Association, DR sub, page 7; Shopping Centre Council of Australia, DR sub, pages 5-6; South Australian Government, DR sub, page 13; and Woolworths Limited, DR sub, page iv.

101 See, for example: Local Government Association of Queensland, DR sub, page 5; National Farmers' Federation, DR sub, page 6; and Peter Phibbs, DR sub, page 3.

102 See, for example: Australian Local Government Association, DR sub, pages 6-7; and the Local Government Association of Queensland, DR sub, page 5.

103 See, for example: Kepnock Residents Action Group, DR sub, page 11; Santos Retail, DR sub, page 2; and a number of IGA supermarkets and individuals.

104 See, for example: Australian Newsagents' Federation, DR sub, page 5; Law Council of Australia — SME Committee, DR sub, page 8; and Spier Consulting Legal, DR sub, page 5.

apply a 'net community benefit test', which would reflect the desire of the local population in determining whether a developer or retail tenant is desirable in a region. Many small retailers say they disagree with 'the principle that more floor space and more entrants in a market equals more competition'.[106]

Some submissions raise concerns about the Draft Report's focus on ensuring arrangements do not explicitly or implicitly favour incumbent operators,[107] with some proposing a neutral formulation to ensure that neither new nor incumbent businesses receive a competitive advantage.[108]

Local governments, police and community organisations express concern that changes to planning and zoning rules could increase the availability of alcohol and the incidence of alcohol-related harm. A significant number of submitters urge the Panel to ensure that competition policy does not interfere with the rights of state and territory governments to impose controls on the sale of alcohol or to limit the trading hours of outlets, the type of outlets (including supermarkets) and the number of outlets in the interests of community safety and wellbeing. [109]

Liquor is addressed specifically in Section 10.4. In addition, the Panel notes that although, as a general policy, competition should be taken into account as an important part of the planning and zoning process, this should not be interpreted as removing any ability for governments to take full account of harm minimisation as an objective.

A number of governments have recognised problems presented by planning rules, with reviews either underway, or recently completed in most jurisdictions. For a number of incoming governments, reform of planning laws has been a priority.

Yet, despite the numerous reviews of planning and zoning, implementing reform has been slow.

That said, while agreeing that progress in implementation has been slow and patchy, the PC notes that Victoria is ahead of other jurisdictions in implementing leading practices for planning and zoning (see Box 10.5).[110]

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105 See, for example: Jean Cowley, DR sub, page 1; Walter Daly, DR sub, page 1; Kepnock Residents Action Group, DR sub, pages 10-11; and Ritchies Stores, DR sub, page 3.

106 See, for example: Santos Retail, DR sub, page 1-2; and a number of IGA supermarkets and individuals.

107 See, for example: Grain Producers of South Australia, DR sub, page 2; and the Shopping Centre Council of Australia, DR sub, page 5.

108 See, for example: Australian National Retailers Association, DR sub, page 20; and Shopping Centre Council of Australia, DR sub, page 5.

109 See, for example: ACT Policing, DR sub, page 9-10; Australasian Professional Society on Alcohol and other Drugs, DR sub, page 2; Australian Health Promotion Association, DR sub, page 1; Brimbank City Council, DR sub, pages 1-2; Cancer Council NSW, DR sub, page 2; City of Port Phillip, DR sub, pages 1-2; Foundation for Alcohol Research and Education, DR sub, pages 13-15; Hobsons Bay Council, DR sub, pages 1-2; Local Government Association of Tasmania, DR sub, pages 6-7; Maribyrnong City Council, DR sub, pages 1-2; McCusker Centre for Action on Alcohol and Youth, DR sub, pages 1-2; Municipal Association of Victoria, DR sub, pages 5-6; National Alliance for Action on Alcohol, DR sub, pages 6-7; National Drug and Alcohol Research Centre, DR sub, pages 2-3; Planning Institute of Australia, DR sub, page 5; and VicHealth, DR sub, page 3.

110 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, pages 124-126.

Box 10.5: Examples of planning reforms in Victoria[111]

1. Broadening business zones

In 2013, Victoria reformed business zones by simplifying requirements and allowing a broader range of activities to be considered. The previous five business zones have been condensed into two broader commercial zones, increasing permissible uses within the zones. The PC expects the benefits of the reform to include: more mixed uses and diversity within employment precincts; making the property sector more responsive to changes in demand for various business types/models; and removing planning barriers to investment.

2. Simpler permit process

In September 2014, Victoria introduced VicSmart, a new development permit process for low-impact development applications costing less than $50,000. Under VicSmart, the waiting time on permit applications has been reduced from 40 to 10 days. Streamlined processes are also being introduced at the Victorian Civil and Administrative Tribunal to reduce the time taken and other cost burdens associated with decision appeals.

3. Metropolitan planning strategy

'Plan Melbourne', which is a strategy document for the future development of the city, was released for public comment in 2013 and adopted as government policy in 2014. Plan Melbourne proposes a less prescriptive approach to planning and zoning through greater use of higher density mixed-use zones and the removal of retail floor space and office caps in activity centres.

The PC notes the need for continuing reform in its 2014 research report, *Relative Costs of Doing Business in Australia: Retail Trade*, but its rationale could equally apply to planning and zoning more broadly:

> Continued action by state, territory and local governments in implementing the leading practices previously identified by the Commission and others…is needed to ensure that the market for retail space is competitive and least-cost, while still achieving the desired outcomes of planners in relation to amenity and other community objectives.[112]

The Planning Institute of Australia advocates adopting a set of planning system principles across the country to provide a framework for the effective operation of planning systems (DR sub, page 4).

Given that reform is already underway around the country,[113] an opportunity exists to make comparisons across jurisdictions to determine 'best practice' as a basis for updating and improving current requirements.

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111 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra Chapter 6, also Victorian Department of Transport, Planning and Local Infrastructure 2014, *Improving the System*, Department of Transport Planning and Local Infrastructure, Melbourne, viewed 28 January 2015, www.dtpli.vic.gov.au/planning/about-planning/improving-the-system and Victorian Metropolitan Planning Authority 2014, *Plan Melbourne*, Plan Melbourne, Melbourne, viewed 28 January 2015, www.planmelbourne.vic.gov.au/Plan-Melbourne.

112 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, page 133.

113 For example, the Western Australian Local Government Association (DR sub, page 12) notes a 2010 review of Western Australia's State Planning Policy relating to Activities Centres which led to the removal of the previous cap on metropolitan floor space.

Box 10.6 sets out an example of how competition can be considered as part of the planning process. The Panel endorses this as a good example of the principles that should be considered as part of reforming planning and zoning rules.

Box 10.6: Example of how competition issues can be considered in the planning context

In 2010, a New South Wales government report[114] recommended ways to ensure the planning process does not unreasonably restrict competition by inadvertently creating barriers to entry, or by discouraging innovative forms of development to emerge.

The report recommended developing a State Environment Planning Policy covering competition policy in planning decisions, including three important clarifications:

- Competition between individual businesses is not in itself a relevant planning consideration (that is, the loss of trade for an existing business is not normally a relevant planning consideration and that a planning authority should not consider the commercial viability of a proposed development).
- Restricting the numbers of a particular type of retail store in any local environmental plan or development control plan is invalid.
- Proximity restrictions on particular types of retail stores contained in local environmental plans or development control plans are invalid.

Some comparison work has already been undertaken, for example:

- An independent advisory forum of government, industry and planning professions, the Development Assessment Forum, set out 10 leading practices for jurisdictions to adopt with a view to a simpler, more effective approach to development assessment in its 2005 'Leading Practice Model for Development Assessment'.[115]
- The Property Council of Australia's 2013 report *Property Interests: Benchmarks for Queensland Planning Schemes* contains details of existing planning scheme codes that it considers workable and effective examples.[116]

114 New South Wales Department of Planning and the New South Wales Better Regulation Office 2010, *Promoting Economic Growth and Competition through the Planning System: Review Report*, Sydney.

115 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, page 123.

116 PSA Consulting Australia 2013, *Property Interests: Benchmarks for Queensland Planning Schemes*, Property Council of Australia, Brisbane, page 23.

The Panel's view

Planning and zoning requirements can restrict competition by creating unnecessary barriers to entry. The regulations should encourage competition and not act to limit entry into a market.

Reform to, or reviews of, planning and zoning are already underway around the country. An opportunity exists to make comparisons across jurisdictions to determine 'best practice' as a basis for updating and improving current requirements. Implementing reform in this area should be advanced more quickly than has been the case to date.

Implementation

Planning and zoning laws and regulations are the responsibility of state and territory and local governments. Within two years, each of these governments should implement reforms to ensure the rules do not unnecessarily restrict competition. As part of this process, collaboration across jurisdictions can assist in developing 'best practice' guidelines that each government can adopt in line with its own local considerations.

The proposed ACCP can provide the forum in which this collaboration can occur — and independently assess progress across the jurisdictions.

Given the numerous reviews of planning and zoning rules in many States and Territories, implementation of reform should be able to proceed as a priority.

Recommendation 9 — Planning and zoning

Further to Recommendation 8, state and territory governments should subject restrictions on competition in planning and zoning rules to the public interest test, such that the rules 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 rules can only be achieved by restricting competition.

The following competition policy considerations should be taken into account:

- Arrangements that explicitly or implicitly favour particular operators are anti-competitive.
- Competition between individual businesses is not in itself a relevant planning consideration.
- Restrictions on the number of a particular type of retail store contained in any local area is not a relevant planning consideration.
- The impact on the viability of existing businesses is not a relevant planning consideration.
- Proximity restrictions on particular types of retail stores are not a relevant planning consideration.
- Business zones should be as broad as possible.
- Development permit processes should be simplified.
- Planning systems should be consistent and transparent to avoid creating incentives for gaming appeals.

An independent body, such as the Australian Council for Competition Policy (see Recommendation 43) should be tasked with reporting on the progress of state and territory governments in assessing planning and zoning rules against the public interest test.

10.2 TAXIS AND RIDE-SHARING

The taxi industry in most States and Territories remains heavily regulated, despite being a priority reform area identified under the NCP regulation review program and most subsequent reviews recommending substantial reform.[117]

Regulations cover minimum quality standards for taxi services, a range of other requirements that amount to community service obligations (CSOs), restrictions preventing other services from competing directly with taxis and restrictions limiting the number of taxis that can operate.

Regulations governing quality cover areas such as the age of vehicles, roadworthiness, driver presentation and knowledge, as well as access to radio dispatch facilities. These regulations are aimed at ensuring minimum standards to promote public confidence that taxis are safe and will provide a minimum standard of service. On the whole, they appear to impose little cost on the taxi industry and their customers because they do not significantly restrict competition between taxi services.

The taxi industry reports that many additional regulations imposed on it create CSOs that competing services do not comply with. For example, Taxi Council Queensland notes that the taxi industry in Queensland is required among other things to:

117 National Competition Council 2005, *Annual Report 2004-2005*, Melbourne, pages 35-36.

- provide a booking service for all communities with more than 10,000 residents;
- provide services on demand, 24 hours per day, for 365 days of the year;
- accept all reasonable requests, meaning that passengers must be served in sequential order, with the exception of wheelchair-accessible taxis, which must give priority to passengers in a wheelchair or on a mobility scooter;
- have taximeters, which are automated for certain tariff times and public holidays, able to apply tolls and access fees, with various restrictions to prevent tampering;
- operate to Minimum Service Levels stipulated in contracts; and
- operate a lost property service (DR sub, page 4).

In addition to regulations covering service standards and obligations, most States and Territories also restrict the quantity of taxis by requiring each taxi to have a licence and limiting the number and types of licences issued.[118] This has the effect of limiting responsiveness to consumer demand. There is no restriction on the number of taxi drivers.

New taxi licences are typically issued on an infrequent and ad hoc basis with different sale methods in the States and Territories resulting in large variations in sale price. Most people wishing to obtain a taxi licence must purchase one from an existing licence holder.

Although laws that regulate safety and minimum service levels are commonplace in the Australian economy, the taxi industry is virtually unique among customer service industries in having absolute limits on the number of service providers.

The Australian Taxi Industry Association considers that:

> … State and Territory Governments cap the supply of taxi licenses (or permits) at levels that aim to balance customer convenience and service (for example measurable in terms of waiting times) with the viability of taxi drivers' and operators' small businesses. This leads to supply caps well in excess of normal demand, although less than the number required to service peak demand without some acceptable diminution in service level. (sub, page 7)

However, the Panel notes that most service industries face variable demand, and that businesses are able to operate without regulation limiting the number of operators.

The scarcity of taxi licences has seen prices paid for licences at $390,000 in New South Wales and $290,000 in Victoria, which indicates that significant economic rents accrue to owners of taxi licences and is at odds with the claim that licence numbers are balanced given market conditions.[119]

IPART estimates that in New South Wales 15 to 20 per cent of the taxi fare arises as a result of restrictions on the number of licences and notes that the passengers who stand to benefit from reform include a significant number of lower-income earners, many of whom have limited transport options on account of their age or disabilities (sub, page 7).

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118 Ibid., pages 35-36.

119 Australian Taxi Industry Association 2013, *Taxi Statistics, State and Territory Statistics as at December 2013.* Australian Taxi Industry Association, Brisbane, viewed 20 February 2015, www.atia.com.au/taxi%1estatistics/.

In each jurisdiction and nationally, the industry has been subject to a series of reviews dating back more than two decades.[120] However, apart from recent reforms in Victoria (see Box 10.7), there has been little reform. The Victorian case demonstrates that change for the benefit of consumers is possible.

Box 10.7: Victorian taxi reforms

In Victoria, dissatisfaction with taxi costs and service levels led the State Government to undertake fundamental reforms, mostly along the lines recommended by the Taxi Industry Inquiry 2012.[121]

These reforms include:

- increased pay and higher standards for drivers under a new mandatory Driver Agreement;
- improvements to the fare structure including peak and off-peak pricing;
- cutting the service fee for card payment from 10 per cent to five per cent;
- regulated fares moving from prescribed fares to maximum fares, providing the ability for customers to be offered discounted rates, such as lower fares to the airport;
- a zoning system — metro, urban (including large regional centres), regional, and country — with separate licence fees applying;
- opening the market, with the Taxi Services Commission issuing new licences as the market demands, with a set annual fee for licences—the fee will be lower in regional and country areas and for wheelchair-accessible vehicles;
- applying a new 'consumer interest test' to regional and country zones to gauge the benefits of new licences for customers;
- enabling taxis and hire cars to compete for contract work to fill the gaps in public transport services; and
- removing the requirement to offer taxi services on a continuous basis, allowing taxi operators to set their own hours.[122]

Technological change is also disrupting the taxi industry, with ride-sharing apps, such as Uber, connecting passengers with private drivers. Traditional booking methods are also being challenged by the emergence of apps such as GoCatch and ingogo.

The advent of ride-sharing services both in Australia and overseas has been particularly controversial, with regulatory agencies questioning their legality and fining drivers,[123] notwithstanding public acceptance of and demand for ride-sharing services.

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120 See, for example: Industry Commission 1994, Urban Transport, Melbourne.

121 Taxi Services Commission Victoria 2012, Final Report — Customers First: Service, Safety, Choice, Victoria.

122 Taxi Services Commission Victoria, *Taxi and Hire Car Reform*, Taxi Services Commission, viewed 30 January 2015 www.taxi.vic.gov.au/taxi-reform/about-taxi-and-hire-car-reforms.

123 Thomson, A, 8 May 2014, *About 50 Uber drivers have been fined $1700 in crackdown by Taxi Services Commission*, Herald Sun, Melbourne viewed 10 February 2015, www.heraldsun.com.au/news/victoria/about-50-uber-drivers-have-been-fined-1700-in-crackdown-by-the-taxi-services-commission/story-fni0fit3-1226910856247; Jackson, E, 16 October 2014, *Uber drivers risk fines, Qld govt warns* Brisbane Times, Brisbane, viewed 10 February 2015, www.brisbanetimes.com.au/queensland/uber-drivers-risk-fines-qld-govt-warns-20141016-1177nf.html and Grubb, B, 8 May 2014, *Victoria government issues $1700 fines to Uber ride-sharing drivers as media gaffe surfaces*, Sydney Morning Herald, 8 May 2014, Sydney, viewed 2 February 2015, www.smh.com.au/digital-life/smartphone-apps/victoria-government-issues-1700-fines-to-uber-ridesharing-drivers-as-media-gaffe-surfaces-20140508-zr6yp.html.

National Seniors Australia notes that new technologies are empowering consumers:

> ... the digital revolution — including the growing use of mobile telephone applications in combination with satellite navigation technologies — is giving rise to opportunities for new entrants to break down existing taxi network monopolies, enabling consumers to exercise greater choice and receive prompter service. It will be important to ensure that these innovations are not stifled by further anti-competitive regulation aimed at protecting incumbents. (sub, pages 14-15)

Taxi Council Queensland considers that taxis and ride-sharing are readily substitutable and should therefore be subject to the same rules and obligations. It considers that ride-sharing platforms are competing unfairly, since they do not comply with the universal service obligation requirements that taxis must comply with:

> These services are illegal de facto taxi services masquerading as a collaborative consumption model. (DR sub, page 10)

and

> … the Henry Tax Review panel believed [universal] service obligations essentially 'tax' low-cost users who subsidise high-cost users. (DR sub, page 5)
>
> A regulatory double standard should not be allowed to persist. One option would be to review the USO [universal service obligation], in line with the Henry Tax Review panel's recommendation. (DR sub, page 5)

Conversely, Uber considers that:

> While ridesharing competes with the taxi industry, ridesharing is not a taxi service ... Notably, ridesharing trips (as with all services facilitated by platforms such as the Uber app) are not anonymous, cannot be hailed on the street, do not use taxi ranks and do not have taximeters. (DR sub, page 1)

A number of state and territory governments have determined that Uber is acting outside current industry regulations and issued fines to Uber drivers.[124] The Panel does not endorse illegal activity, nor encourage new players to ignore or defy relevant laws or regulations. The Panel's primary concern is to ensure that the regulations respond to changes in technology in a way that allows new entrants to meet consumer demand, while continuing to ensure the health and safety of consumers.

Box 1.5 in Part 1 of this Report discusses technological versus regulatory solutions to market failure.

Although taxi reform is not expected to make a major contribution to national productivity, the sector is an important component of metropolitan transport and can be particularly important for the mobility of the elderly and those with a disability. More affordable and convenient taxi services give consumers options. Significantly, reduced barriers to entry could see more services operate at peak times, without needing to operate at off-peak times.

The Panel considers that the longstanding failure to reform taxi regulation has undermined the credibility of governments' commitment to competition policy more broadly, making it harder to argue the case for reform in other areas. The Victorian example demonstrates that change is possible and technological disruption suggests that consumer-driven change is inevitable.

124 Ibid.

The focus of reform in the taxi industry needs to be twofold: to reduce or eliminate restrictions on the supply of taxis that limit choice and increase prices for consumers; and to encourage technological change that can benefit consumers. There is also an opportunity for the taxi industry to consider a reduction in the current level of red tape that applies to their industry.

An important element of reforming regulation should be to separate out CSOs currently embedded in taxi regulation and fund those CSOs explicitly. This would allow the taxi industry and ride-sharing services to compete with each other more effectively.

The ACT Government recently announced a review of its taxi industry regulation to ensure that it adequately protects consumers but is also supportive of new technologies.[125]

The Panel's view

Taxi industry reform in most States and Territories is long overdue. Many restrictions remain that limit competition by creating barriers to entry and preventing innovation.

The regulatory framework for taxi regulation could be enhanced considerably through independent regulators having the power to make determinations (rather than recommendations), including on the number and type of taxi licences to be issued.

Mobile technologies are emerging that compete with traditional taxi booking services and support the emergence of innovative passenger transport services. Any regulation of such services should be consumer-focused, flexible enough to accommodate technical solutions to the problem being regulated and not inhibit innovation or protect existing business models.

Further regulatory review of the industry is necessary to take account of the impact of new technologies.

10.3 GOODS — STANDARDS

Restrictions on the sale of goods can come in a range of forms, including through adopting standards, both Australian and international. Restrictions on the sale of goods reduce businesses' ability to respond to consumer demand.

Adherence to standards can be mandated in law (explicitly or through delegated decision making) or by voluntary adoption by certain industry participants. When compliance with a standard is mandatory, there is a greater likelihood of an anti-competitive effect.

Standards may be in the public interest for many policy reasons, including health, safety and consumer protection. Submissions note that standards can provide efficiencies, address information asymmetries and generate cost savings.[126]

Standards can also promote competition by facilitating interoperability. For example, having no standards for car tyre sizes could limit competition since not all manufacturers would be able to produce tyres to fit all car wheels — reducing the scope for efficiencies of scale as well.

125 Rattenbury, S 2015, Taxi review to increase innovation, choice and value, media release, 28 January, Canberra.

126 See, for example: Australian Industry Group, sub, page 15.

However, on occasion, the way standards are adopted or referenced in law provide unnecessarily high or differential requirements for goods or services, dampening competition or creating barriers to market entry and innovation.

Submissions provide examples where standards mandated by law can impede growth and innovation, including food safety regulation being directed at specific process requirements rather than the outcomes for food safety.[127] Box 10.8 discusses the role of Standards Australia in accrediting standards for goods and services.

Box 10.8: Standards Australia

Standards Australia is a non-government body with a memorandum of understanding with the Australian Government to accredit Australian Standards for goods and services.

There are more than 6,800 Australian Standards, the large majority of which are voluntary. Others are made mandatory through regulation; some are agreed to be mandatory between parties in private contracts.

Standards Australia requires that all Australian Standards, regardless of who develops them, must demonstrate positive net benefit to the community as a whole. One of the required considerations is the impact on competition.[128] This mechanism provides the opportunity for Standards Australia to examine the impact on competition and ultimately the outcomes for purchasers of the goods or services, not just the burden on industry.

In 2012, Standards Australia committed to review, revise, re-confirm, or withdraw all standards published more than 10 years ago. It considers that this initiative helped to ensure the catalogue is current, internationally aligned, and that the standards are not an unnecessary burden on industry (sub, page 4).

Standards Australia has a policy of adopting international standards[129] wherever possible,[130] which should assist in minimising regulatory barriers to import competition.

Given that industry collaboration in relation to standards could be considered anti-competitive, paragraph 51(2)(c) of the CCA provides that agreements relating to the implementation of Australian Standards are exempt from the operation of the competition law.

The Hilmer Review accepted continuation of the exemption recognising that, generally speaking, harmonisation through standards is a good thing, enhancing efficiency, making products more substitutable and facilitating development of service industries for standardised goods. However, the Hilmer Review also noted the risks of standards raising barriers to entry where they are incorporated

127 For example, Australian Food and Grocery Council, sub, page 19 and Attachment 5, provides examples of regulations that impede competition, growth and innovation in the food and grocery sector, including regulation of agricultural and veterinary chemicals residue, industrial chemicals, metrology markings and medicines.

128 Standards Australia, *Net Benefit*, Standards Australia, Sydney, viewed 2 February 2015, www.standards.org.au/StandardsDevelopment/What_is_a_Standard/Pages/Net-Benefit.aspx.

129 International standards include those developed by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC).

130 Standards Australia, *Net Benefit*, Standards Australia, Sydney, viewed 30 January 2015, www.standards.org.au/InternationalEngagement/Pages/default.aspx.

into legislation and mandate particular technologies or systems rather than performance outcomes.[131]

No submission suggests removing the exemption from the competition law for collaboration on Australian Standards in paragraph 51(2)(c) of the CCA. Differing levels of standards can sometimes be required to meet a public policy objective, on account of localised factors such as climatic, geographic or technological issues — a point recognised by the World Trade Organisation.[132]

Standards can also create significant barriers to competition by restricting substitution. If a product or service meets international standards, a strong policy case would be needed for a different standard to apply in Australia (particularly if it is to be mandated); otherwise, it may amount to little more than a barrier to import competition. Examples of standards that were noted in submissions as raising concerns are in Box 10.9 below.

The Panel notes that COAG has recently agreed to 'explore adopting, as a general principle, trusted international standards or risk assessment processes for systems, services and products, unless it can be demonstrated that there is good reason not to'.[133] Further, the Australian Government has announced its adoption of this principle in its *Industry Innovation and Competitiveness Agenda*, citing regulation of medical devices and chemicals as priority areas that the Government will reform in addition to broader consultations.[134] The Panel supports these processes.

Box 10.9: Examples of standards provided in submissions

Issues raised in submissions	Further information
Standards can provide a strong disincentive against new competitors entering an industry, growing their enterprise or diversifying.[135]	Examples include: • a geosynthetic product imported from Germany that meets EU standards still requires re-testing in Australia by VicRoads; • vehicle air conditioning refrigerant has strict controls in Australia, including licensing mechanics that use it, whereas the US has no such restrictions; and • a new conveyor belt lubricant developed in the US but the manufacturer decided against selling it in Australia due to costs and delays in the chemicals approval process (but is available in NZ, where there is stronger recognition of other countries' accreditation).

131 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page 154.

132 World Trade Organisation, *Agreement on Technical Barriers to Trade*, World Trade Organisation, Geneva, viewed 3 February 2015, www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

133 Council of Australian Governments 10 October 2014, COAG communique, COAG, Canberra, page 3, viewed on 3 February 2015, www.coag.gov.au/node/521.

134 Australian Government 2014, Industry Innovation and Competitiveness Agenda Report: An action plan for a stronger Australia, Proposal 1 page 31, Department of Prime Minister and Cabinet, Canberra, viewed 3 February 2015, www.dpmc.gov.au/pmc/publication/industry-innovation-and-competitiveness-agenda-report-action-plan-stronger-australia.

135 Hon. John Lloyd PSM, sub, page 8.

Box 10.9: Examples of standards provided in submissions *(continued)*

Products that do not conform with regulatory, Australian or industry standards (i.e., non-conforming products) can obtain an unfair cost advantage over the majority of businesses that comply with Australian Standards.[136]	Localised standards should not be assumed to be necessary or desirable per se. If a standard is necessary for other policy reasons, such as safety, it should be mandated by governments and effectively enforced.
The costs to the community and car buyers of policing regulation of safety and environmental standards, as well as the risks to purchasers of less certain vehicle history, outweigh the benefits of lower purchase prices.[137]	The PC's inquiry into Australia's automotive manufacturing industry examined import restrictions and standards for used vehicles. It concluded: The progressive relaxation of restrictions on the importation of used passenger and light commercial vehicles, within a regulatory compliance framework that provides appropriate levels of community safety, environmental performance and consumer protection, would have net benefits for the Australian community. These benefits include lower prices and/or improved vehicle features at a particular price point, and greater choice for vehicle buyers.[138]
Lack of specificity in requirements of labelling and country of origin-related laws is leading to poor information to consumers and lower competition.[139]	Submissions propose that additional regulation would improve the competitive process for certain food and beverage products.
Calls for greater equality and consistency in enforcement of food standards, regarding imports versus domestic products.[140]	Submissions are concerned that the more rigorous processes being applied to domestic products are affecting competition.

Submissions to the Draft Report generally support both the existence of standards and the need to review them periodically to ensure that they remain pro-competitive.[141] Standards Australia supports the intent of a standards review but notes that comprehensive reviews require consideration of supporting technical specifications and other referenced documents.[142]

136 See, for example: Australian Industry Group, sub, page 16; and National Electrical and Communications Association, sub, page 4.

137 Federal Chamber of Automotive Industries, sub, page 3.

138 Productivity Commission 2014, *Australia's Automotive Manufacturing Industry*, Inquiry Report No. 70, Canberra, page 129. See also Recommendation 5.4.

139 See, for example: Cider Australia, sub, page 1; and Griffith and District Citrus Growers' Association, sub, page 4.

140 KAGOME Australia, sub, page 11.

141 See, for example: ACCC DR sub, page 24; Australian Industry Group DR, sub, page 15; Law Council of Australia — SME Committee, DR sub, page 9.

142 Standards Australia, DR sub, page 4.

The Law Council of Australia — SME Committee notes concern that large businesses could use the adoption of voluntary Australian Standards to unduly raise compliance costs for small business or may even have the effect of excluding imports from the market altogether.[143]

The Panel's view

Australia has a range of restrictions on the supply of goods. As in the provision of services, many of them are worthwhile for policy reasons, such as health and safety. However, they can also create barriers to entry. Any necessary restrictions on the supply of goods should be implemented in a way that does not unduly restrict competition.

There are also clear examples where different international and domestic standards are dampening or distorting import competition — particularly where the domestic standards are mandated (directly or indirectly) by law. The Panel supports COAG's recent decision to examine whether international standards can be more commonly accepted in Australia and the Australian Government's recent reforms announced in its *Industry Innovation and Competitiveness Agenda*.

Further, the Panel considers that product standards that are directly or indirectly mandated by law should be reviewed as a priority.

The Panel notes that submissions do not support removing the exemption from the competition laws, contained in paragraph 51(2)(c) of the CCA, for agreements relating to the implementation of Australian Standards. However, as all standards (whether mandated by law or not) have the capacity to restrict competition, Standards Australia should periodically review Australian Standards against the same public interest test used to assess the competition impacts of government regulations (see Recommendation 8).

Implementation

Each jurisdiction should review mandatory product standards in its jurisdiction over two years following its acceptance of Recommendation 10. These reviews should be co-ordinated at a whole-of-government level to determine where such standards are restricting competition and whether it is in the public interest to do so.

Within 12 months of accepting Recommendation 10, state and territory governments that have not recently reviewed the regulation of taxis and ride-sharing (including their impact on competition) should commence a comprehensive review to identify whether regulatory restrictions on competition are in the public interest.

Restrictions that are identified as not being in the public interest should be removed or amended as soon as possible.

Within 18 months of accepting Recommendation 11, the Australian Government should re-negotiate its Memorandum of Understanding with Standards Australia to require periodic reviews of non-mandated (i.e., voluntarily adopted) Australian Standards against the public interest test. These reviews should be conducted on a staggered, ongoing basis — with Standards Australia being able to consult the ACCP (see Recommendation 43) or the ACCC for advice, if it identifies a Standard that may be anti-competitive. Where a Standard appears to be anti-competitive, Standards Australia should seek advice on any possible improvements from the ACCP.

143 Law Council of Australia — SME Committee, DR sub, page 9.

Recommendation 10 — Priorities for regulation review

Further to Recommendation 8, and in addition to reviewing planning and zoning rules (Recommendation 9), the following should be priority areas for review:

- **Taxis and ride-sharing**: in particular, regulations that restrict numbers of taxi licences and competition in the taxi industry, including from ride-sharing and other passenger transport services that compete with taxis.
- **Mandatory product standards**: i.e., standards that are directly or indirectly mandated by law, including where international standards can be adopted in Australia.

Recommendation 11 — Standards review

Given the unique position of Australian Standards under paragraph 51(2)(c) of the CCA, Australian Standards that are not mandated by government should be subject to periodic review against the public interest test (see Recommendation 8) by Standards Australia.

10.4 Other potential areas for review

In addition to the priority areas of planning and zoning, taxis and ride-sharing and mandatory product standards that the Panel has identified for review, other regulations should be considered as part of a national regulation review agenda. Six broad areas that were raised in submissions are set out below, noting that this is not an exhaustive list — potential regulatory restrictions on competition could arise throughout the economy.

Services — professional and occupational licensing

Professional and occupational licensing can promote important public policy aims, such as quality, safety and consumer protection. For example, regulations governing the accreditation of health professionals are a means of assuring that service quality does not fall below minimum acceptable standards. Competition considerations should not override these objectives — but neither should they be ignored.

Licensing that restricts who can provide services in the marketplace can prevent new and innovative businesses from entering the market. It can also limit the scope of existing businesses to evolve and innovate. As a result, service providers can become less responsive to consumer demand. This imposes a cost on consumers without necessarily improving consumer protection. Quantitative limits on the number of providers most obviously restrict competition. Examples raised in submissions are set out in Box 10.10 below.

Box 10.10: Examples of standards restrictions

Industry	Issues raised in submissions
Medical profession	Admission requirements of medical colleges and the accreditation body's unwillingness to accredit new specialties.[144] If medical specialist colleges unduly restrict entry to their professions, this has the effect of lessening competition.[145] Using nurse practitioners to perform a range of functions formerly restricted to medical practitioners has enabled the delivery of some health services at lower cost without increased risk to patients.[146]
Building trade	While supporting the need for a degree of licensing, the industry[147] notes that this constrains the market's ability to provide services. It should only be used where the benefits outweigh the costs and where the objectives of regulation can only be achieved by restricting competition.
Legal profession	Competition is limited by aspects of the self-regulatory regime. Examples include: restrictions on the ability of law schools to offer curricula that do not include 11 core subjects; and state law societies both setting requirements for, and providing, training and professional development.[148] Submissions also raise concerns regarding transparency, pricing and self-regulation. They suggest that either self-regulation by Law Societies and Legal Services Commissioners should be abolished and moved to a completely independent authority, or a new super-regulatory function should be assumed by an existing ombudsman. To encourage the legal profession to become more competitive and affordable, a co-ordinated link is needed between governments, independent regulators, the business community and consumers .[149]
Dental practitioners	Inconsistencies and anomalies can result from professional restrictions; for example, registered dental practitioners are required to observe advertising guidelines, but private health insurers, where they are the owner/operators of dental clinics, are not bound by the same requirements.[150]

IPART's submission draws the Panel's attention to its new licensing framework[151] as outlined in Box 10.11.

144 Spier Consulting, sub 1, pages 1-2.

145 National Seniors Australia, sub, page 20.

146 See, for example: National Seniors Australia, sub, page 20; UnitingCare Queensland, DR sub, page 2.

147 Housing Industry Association, sub, pages 12-13.

148 Lynden Griggs and Jane Nielsen, sub, pages 1-2.

149 Eqalex Underwriting Pty Ltd, sub, page 6.

150 Australian Dental Association Inc., sub, page 18.

151 PwC 2012, *A best practice approach to designing and reviewing licensing schemes,* Independent Pricing and Regulatory Tribunal, Sydney.

Box 10.11 IPART's Licensing Framework

IPART has examined New South Wales licences and identified those where reform would produce the greatest reduction in regulatory burden for business and the community. As part of this review, IPART engaged PwC to develop a conceptual framework for licence design.

Applying the licensing framework can ensure that licensing regimes do not restrict competition unless it can be demonstrated that they are the best means of achieving policy objectives.

Where a licence is necessary, the framework also requires an assessment of whether the licence is well-designed, i.e., whether the various aspects of the licensing regime that may restrict competition are the minimum necessary.

The framework requires a regulator to take into account how the objectives of a licence relate to its coverage, duration, reporting requirements, fees and charges, and conduct rules.

IPART has suggested this framework could be used by other New South Wales regulators and in other jurisdictions to limit barriers to competition arising from licensing.

The IPART guidance indicates that, after following the framework:

- the need for licensing will have been established (Stage 1);
- the various aspects of the licensing scheme that may restrict competition will be the minimum necessary (Stage 2);
- the licensing scheme will be efficiently administered (Stage 3); and
- licensing will be the best response to achieve objectives (Stage 4).

Industry bodies often put professional and occupational licensing in place to promote the ethical and quality practices of their professions. This can lead to better consumer outcomes but can also dampen competition and raise barriers to entry into those markets.

During the NCP regulation review process, the NCC stated:

> It is totally unfounded to assume that a professional, simply by virtue of his/her qualification, is somehow above the profit motive and therefore should not be subject to market competition like all other service providers in our economy.[152]

Some progress has been made in eliminating unnecessary restrictions on competition, including removing: medical practice ownership restrictions; restrictions preventing lawyers from advertising; and lawyers' monopoly on conveyancing services. Removing conveyancing restrictions is a case in point. Previously, regulations prevented non-lawyers from carrying out conveyancing services, even though this is largely an administrative service.

152 National Competition Council 2000, *Public Interest or Self Interest?*, media release 14 August, Canberra.

The Panel's view

Services will continue to make a growing contribution to economic activity in Australia. It is therefore important to remove unnecessary restrictions on service provision — particularly barriers to entry and expansion that impede competition.

Licensing requirements can raise barriers to entry in markets and impose more costs than benefits on the community. In a range of areas, the competitive impacts of licensing are not adequately considered, either in frameworks or during decision making.

Professional and occupational licensing has a range of potential restrictions on competition — both regulatory and non-regulatory. Although some restrictions are clearly necessary for health, safety or consumer protection, others can unduly impede competition, particularly where they limit the number of providers.

Media and broadcasting services

The media market is highly integrated, incorporating media content delivery platforms, such as television broadcasting — which will increasingly include new technologies, such as multicasting via the internet — and content delivered via media platforms.

Ownership and content issues are intertwined and essential elements in the commercial strategies adopted by media companies and telecommunications partners.

Competition and the diversity of competitors in the media market are affected both by explicit regulatory interventions and by market developments, particularly in relation to content, which require close monitoring to ensure that competition concerns do not emerge.

Regulatory interventions regarding ownership and content exist to achieve other policy objectives, including media ownership diversity and, in the case of broadcasting rules that impose Australian and local content requirements, media content that reflects a sense of Australian identity, character and cultural diversity.

These media diversity objectives, which underpin many of the ownership and control rules, are given force by the *Broadcasting Services Act 1992* and administered by the Australian Communications and Media Authority. The rules within the Broadcasting Services Act are relatively simple, quantitative constraints, which are generally quite clear to existing and potential market participants.

That said, as hard and fast legislative provisions are built around existing market structures and participants at the time legislation is passed, they almost by definition lag developments in a rapidly evolving marketplace. The explicit rules also only cover the most influential media services, such as those delivered by commercial television broadcasters, commercial radio and associated print newspapers.

A large number of competition issues in the media sector have been slated for review this year, as part of the Australian Government's deregulation agenda. Many media broadcasting issues, such as those relating to media control and ownership, are canvassed in a policy background paper released by the Department of Communications in June 2014.[153]

153 For further discussion see Australian Government Department of Communications 2014, Media Control and Ownership — Background Policy Paper, Canberra.

In addition, the Department of Communications is also conducting a review of current spectrum policy arrangements to ease the compliance burden on users and improve accessibility of new technologies.[154] Spectrum use and access arrangements underpin, among other things, existing television and radio broadcasting markets, as well as other uses for the spectrum, such as tablets and smartphones, and importantly, essential public and community services.

These two reviews will likely raise many issues relevant to the competitive environment for media and broadcasting services. Both the spectrum review and the consideration of further reforms to media ownership will be progressed by the Minister for Communications in 2015.

Other related media sector issues, such as the anti-siphoning rules, which prevent pay television broadcasters from buying the rights to events on the anti-siphoning list before free-to-air broadcasters have the opportunity to purchase the rights, are identified as issues for consideration by the Australian Government as part of the roadmap for deregulation in the Communications portfolio.[155]

A number of media content issues may raise competition concerns over time, particularly in relation to competition in upstream markets for the provision of content. As technology evolves, and partnerships between media platform owners, content producers and telecommunication providers strengthen, the capacity to restrict consumer choice or access becomes an issue that competition regulators need to monitor closely.

In Australia, concerns around preferential treatment of content by media owners and telecommunications partners appear less pronounced than in some other jurisdictions. However, the capacity for dominant players in one market to leverage market power into another market, such as media content, is an issue in need of constant monitoring.

Submissions on the Draft Report argue for more detailed recommendations on media and broadcasting to support the existing processes underway by the Minister and the Department of Communications. While the Panel welcomes this feedback and support, the Panel considers that its view as outlined below represents a sound statement of principles and directions that can support further reform in these areas, once the more detailed expert analysis has been undertaken as part of the roadmap for deregulation in the Communications portfolio.

154 Turnbull, M (Minister for Communications) 2014, Spectrum Reform to Drive Future Innovation and Productivity, media release 23 May, Canberra.

155 Australian Government, Department of Communications 2014, Communications portfolio: Deregulation Roadmap 2014, Department of Communications, Canberra, viewed 3 February 2015, www.communications.gov.au/deregulation/communications_portfolio_deregulation_roadmap_2014.

The Panel's view

Regulatory restrictions on media ownership and broadcasting rules are designed to achieve other public policy objectives, such as media diversity and support for Australian and local content. In a rapidly evolving technology landscape, inflexible regulatory provisions are unlikely to be sustainable or remain relevant over time.

The Australian Government reviews as part of the broader deregulation roadmap planned for the Communications portfolio should consider the current impact of the regulatory interventions on ownership and control of media and broadcasting services, as well as the impact of rapidly evolving communication technologies on competition over time.

Liquor and gambling

Liquor retailing and gambling are two heavily regulated sectors of the economy. The risk of harm to individuals, families and communities from problem drinking and gambling provides a clear justification for regulation. This is reflected in a number of submissions expressing concern that changes to the regulation of alcohol sales could increase social harm.

> Regulating access to alcohol with the objective of minimising harm can only be achieved by restricting the economic and physical availability of alcohol. This justifies the controls that may otherwise be seen as anti-competitive. (National Alliance for Alcohol, sub, page 1)[156]

However, such regulations also restrict competition and reduce consumer choice.

The Review received a large number of submissions in relation to liquor[157] and several addressing gambling. Some submissions support removing anti-competitive elements of liquor licensing regimes. However, most oppose any change that would restrict the ability of governments to set trading hours or planning and zoning rules in order to address the risk of harm from alcohol. A number of submitters consider that regulations relating to alcohol should be entirely exempt from any review of regulations against competition principles.

For example, the National Alliance for Action on Alcohol states:

> The NAAA reiterates the importance of not only maintaining existing restrictions but also explicitly preserving the ability of Governments to impose further restrictions on liquor in the public interest as and when they consider appropriate. (DR sub, page 7)

Although the recommendations on trading hours (see Recommendation 12), planning and zoning (see Recommendation 9), and regulatory review (see Recommendation 8) are addressed in detail elsewhere in this Report, they have each been raised in the context of liquor retailing. Accordingly, the Panel wishes to clarify how it intends these recommendations to apply in the context of liquor licensing.

In particular, given the Panel's view that the risk of harm from liquor provides a clear justification for liquor regulation, any review of liquor licensing regulations against competition principles must take proper account of the public interest in minimising this potential harm. The Panel agrees with the

156 This submission is endorsed by the Foundation for Alcohol Research and Education, and the McCusker Centre for Action on Alcohol and Youth.

157 Approximately 40 such submissions were received, many of which referenced or endorsed one or both of the submissions from the Foundation for Alcohol Research and Education and the National Alliance for Action on Alcohol.

many submitters who note that 'Alcohol, because of its potential to cause harms, is not like other products. It is not the same as cornflakes, nor is it similar to washing powder or orange juice' (Foundation for Alcohol Research and Education, DR sub, page 6).

Accordingly, the Panel does not propose that the recommendation to deregulate trading hours for sellers of 'ordinary' goods and services (see Recommendation 12) should prevent policymakers from regulating trading times for alcohol retailing (or gambling) in order to achieve the public policy objective of harm minimisation. Similarly, the recommendation that competition be taken into account as an important part of the planning and zoning process (see Recommendation 9) should not be interpreted as removing any ability for governments, in dealing with planning and zoning, to take full account of harm minimisation as an objective.

Rather, these recommendations mean that restrictions on opening hours, or planning and zoning rules, or liquor licensing regimes, or gaming licensing, should not be designed to benefit particular competitors or classes of competitors, but only to achieve the stated public policy benefits.

As noted Chapter 8, submissions in various contexts take issue with the public interest test used in NCP and adopted in the Draft Report, namely, that competition should not be restricted unless:

- the benefits of the restrictions to the community as a whole outweigh the costs; and
- the objectives of the regulation can only be achieved by restricting competition.

In the context of liquor, Marsden Jacob Associates submits that the Draft Report fails to recognise that the second limb of the NCP test should not be (and for at least the last (2004-05) assessment was not) applied literally (DR sub, page 1).

The Panel does not support a change to the public interest test, and the 2005 review of packaged alcohol cited by Marsden Jacob Associates is an example of how the test can be pragmatically applied to a sensitive area of regulation.

Some restrictions on the sale of alcohol (and on gambling) appear to favour certain classes of competitors to the detriment of consumers. All regulations must be assessed to determine whether there are other ways to achieve the desired policy objective that do not restrict competition. However, it is certainly not the Panel's view that the promotion of competition should always trump other legitimate public policy considerations.

Under the previous NCP review, a number of pre-existing barriers to competition in the sale of alcohol were removed, but the extent of reform varied by state and the NCC withheld payments from several jurisdictions due to lack of progress in this area.[158] There were also changes to gambling regulation, but some stakeholders submit that existing regulations continue to unduly restrict competition in both sectors.

For example, in relation to gambling, the Australian Wagering Council calls for a review of the *Interactive Gambling Act 2001*, which prohibits Australian licensed and regulated online wagering operators from offering in-play sports wagering, arguing that it is failing to meet its original objective of harm minimisation, since technological advances mean that it is now readily bypassed by gamblers using offshore websites.

158 National Competition Council 2005, *Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms: 2005*, Melbourne, pages xxvii, xxx, xxxiii, xxxvi.

> This regulation is … obsolete given the rapid technological changes and increased internet-usage … (DR sub, page 3)
>
> … [this regulation] only impacts the legally licensed and regulated Australian industry giving a clear advantage to unregulated and/or illegal overseas operators who will continue to offer their services to Australians in a manner that provides little by way of consumer protection and harm minimisation … (DR sub, page 3)

The Australasian Association of Convenience Stores submits that regulation preventing its members from obtaining liquor licences is not slowing the growth of the alcohol industry but does inhibit its members' ability to meet customers' demands and to compete with Coles and Woolworths (sub, page 7).

Ice Box Liquor, which operates 20 stores in regional New South Wales, submits that because 'liquor license applications are made in respect of specific premises and therefore the applicant must "control" or have tenure of the property during the full application process … [this] clearly favours the larger business (Coles and Woolworths) who can much more readily afford the cost [of] making applications, more so of unsuccessful applications' (DR sub, page 2).

Three other examples of liquor licensing and gambling regulation restricting competition are provided at Boxes 10.12, 10.13 and 10.14 below. It is not obvious to the Panel that these restrictions serve the public interest rather than serving the interests of incumbent retailers. This illustrates the importance of ensuring that any restrictions are designed to achieve clearly defined policy objectives, and then tested to ensure that they are doing so and that they do not have unintended consequences that can harm competition.

Box 10.12: Queensland takeaway packaged liquor licensing regulations

Several submissions, including from Master Grocers Australia/Liquor Retailers Australia, AURL FoodWorks, and small supermarket operators cite the example of Queensland's liquor licensing regime, under which only premises with a hotel licence may operate detached bottle-shops, as an impediment to their ability to respond to consumers and compete with Coles and Woolworths.

Deborah Smith, a Toowoomba retailer, submits:

> Coles and Woolworths — along with their subsidiary liquor brands — can provide the consumer with the "whole meal" solution, offering licenced bottle shops attached to their hotel licences within their shopping centres. The Queensland Liquor Act is a real barrier to entry for independent supermarket operators, as we are prohibited from offering this same service. This market inequality ensures a non-competitive retail liquor industry in Queensland. (DR sub, page 4)

Even those strongly concerned about changes that would increase alcohol availability, including the Foundation for Alcohol Research and Education (FARE) and the National Drug and Alcohol Research Centre, draw attention to problems with Queensland's liquor laws. As FARE notes:

> [Queensland's restrictions] prompted Coles and Woolworths to undertake, as IBISWorld describes it "… a pub buying frenzy during the last decade in an effort to circumvent this legislation. These companies now own … 49 per cent of detached bottle shops [in Queensland]." (DR sub, page 20)

The National Drug and Alcohol Research Centre recommends ensuring public health is given a critical place in any assessment of liquor retailing regulations to ensure that alcohol-related harm is not increased, but notes:

> The inconsistencies across jurisdictions in who can sell alcohol, and particularly the Queensland regulations that require anyone operating packaged liquor outlets also requires a pub licence are worthy of review. (DR sub, page 4)

Box 10.13: Costco application for liquor licence in South Australia

On 16 October 2014, the Licensing Court of South Australia declined to grant Costco a licence to sell alcohol in its new Adelaide store.[159] Costco had applied for a 'Special Circumstances Licence', since its model for liquor retailing, as used in other Australian and overseas stores, and which involves a limited range of premium products stocked within its warehouse together with other goods sold only to fee-paying members of Costco, would not meet the requirements of a standard licence.

A competitor, Woolworths, and an industry association, the Australian Hotels Association, challenged the application and went to court to object. The Court stated:

> I accept the undoubted attractiveness of the Costco's proposal. The evidence establishes that Costco stores are very popular and no doubt the addition of a facility within the store enabling the purchase of first class liquor at competitive prices is something that the public can be presumed to want. [paragraph 75]

However, ultimately the Court considered that Costco's model for liquor retailing was not compatible with South Australia's licensing requirements and to grant a licence would risk setting 'an undesirable precedent' [paragraph 72].

Box 10.14: New South Wales restrictions on sale of lottery products

Under the terms of a 40-year lease of New South Wales lotteries to the Tatts Group from 2010, as a transitional measure a five year moratorium was imposed, such that only newsagents and convenience stores were permitted to sell lotteries products. [160]

The Panel notes recent proposals to extend this moratorium rather than allow it to expire in 2015. The justification advanced for doing so makes no reference to minimising harm to consumers from problem gambling, only protecting newsagents from competition.[161]

The PC found 'The risks of problem gambling are low for people who only play lotteries and scratchies, but rise steeply with the frequency of gambling on table games, wagering and, especially, gaming machines.'[162]

Many submissions cite empirical evidence of the harm caused by alcohol and suggest that further applying competition policy to the regulation of alcohol retailing would exacerbate this harm.[163] Other parties disagree and submit that various measures of alcohol-related harm have decreased over the period since NCP was introduced.[164]

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159 *Costco Wholesale Australia Pty Ltd* [2014] SALC 55.

160 Nicholls, S 2015, 'Treasury warns Labor newsagents plan could cost NSW $760 million', *Sydney Morning Herald*, Sydney.

161 Constance, A (NSW Treasurer) and Barilaro, J (Minister for Small Business) 2015, *Cleaning up Labor's Lotteries Mess: Newsagent Protections Extended in Landmark Deal with Tatts Group*, media release 30 January, Sydney, and NSW Labor 2015, *A Labor Government Will Enact Laws to Protect Local Newsagents*, 20 January 2015, lukefoley.com.au viewed 3 February 2015, www.lukefoley.com.au/a_labor_government_will.

162 Productivity Commission 2010, *Gambling*, Report no. 50, Canberra, page 2.

163 See, for example: Foundation for Alcohol Research and Education, sub; and National Alliance for Action on Alcohol, DR sub.

164 See, for example: Australian Liquor Stores Association, DR sub.

The Panel has neither the expertise nor the resources to assess this evidence, nor to analyse the costs of harm compared to the costs of reduced competition. Such an investigation is beyond the scope of this Review.

However, the Panel does note that the PC's 2010 *Gambling* report suggests there is no simple relationship between restricting competition and mitigating harm.[165] In fact, the PC noted that the anti-competitive effects of current regulations are an important source of consumer detriment.

Considerable time has elapsed since the NCP reviews of regulation in these areas. Those reviews noted the desirability of revisiting these regulations in future to assess their impact and to compare outcomes in jurisdictions that have implemented competition reforms with those that have not.

The Panel's view

Liquor retailing and gambling are two heavily regulated sectors of the economy. The risk of harm to individuals, families and communities from problem drinking and gambling is a clear justification for regulation.

As with other regulations, liquor and gambling regulations should be included in a new round of regulation reviews (see Recommendation 8) to ensure that they are meeting their stated objectives at least cost to consumers and are not unduly restricting competition.

Reviews of these regulations should draw on evidence, including comparing competition and harm reduction outcomes from the different approaches adopted across jurisdictions. The public interest in minimising harm from problem drinking and gambling should be given proper weight as part of any such review.

The impact of regulatory restrictions on the ability of small businesses to compete should be considered as part of such reviews.

Private health insurance

Around 47 per cent of the Australian population is covered by private health insurance with hospital benefits.[166] The Australian Government subsidises the cost of insurance through the private health insurance rebate, and a levy is imposed on higher-income earners who are not privately insured. However, Medibank Private states that private health insurance is among the most heavily regulated industries in Australia, with the regulatory framework bearing on the scope of services covered, product design, pricing, discounts and capital requirements (sub, page 12).

Private health premiums are regulated by the Australian Government Minister for Health, who has discretion as to whether to allow insurers to increase their premiums. Funds may only apply to increase premiums if their cost structures have increased.

The recent National Commission of Audit examined these pricing arrangements, finding that they remove the incentive for firms to become more efficient, and suggested current arrangements be replaced with a system of price monitoring. It also suggested that insurers be allowed to offer a

165 Productivity Commission 2010, *Gambling*, Report no. 50, Canberra, pages 19-20.

166 As at 31 December 2013. Private Health Insurance Administration Council 2014, *Privately Insured People with Hospital Treatment Cover*, Canberra, page 5.

wider scope of products to consumers, in particular, to cover care in out-of-hospital (primary care) settings to assist members managing chronic conditions.[167]

The prices of some inputs purchased by private health insurers are also regulated. The price of prostheses (medical devices such as cardiac pacemakers and artificial hips) are regulated under the *Private Health Insurance Act 2007*. Applied Medical states:

> As a result of regulatory policy settings which restrict optimal competitive outcomes, products listed on the Prostheses List are being sold at prices that are in some cases multiple times more expensive than the prices at which they are sold in the public health system and in other jurisdictions. Given that the value of total expenditure by private health insurers on prostheses was $1.6 billion in 2012, there is scope for very substantial efficiencies to be created through the introduction and extension of principles of competition to the regulatory structure that underpins the Prostheses List. (sub, page 1)

Preferred provider arrangements involve customers having lower or no out-of-pocket expenses if they consult one of the preferred providers recommended by their insurer. Some submissions suggest these types of arrangements can be anti-competitive.[168] However, the Panel notes that the ACCC has examined preferred provider arrangements, in sectors including health and motor vehicle smash repair, and finds that they generally raise no competition concerns.[169]

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167 Australian Government 2014, *Towards Responsible Government - The Report of the National Commission of Audit Phase One*, Canberra, pages 101-102.

168 See, for example: Australian Dental Association Inc., sub, pages 7-8; Australian Physiotherapy Association, sub, pages 3-7; and Optometry Australia, sub, pages 1-2.

169 For example, the ACCC found in its 2010-11 Private health insurance report that consumers were, on the whole, satisfied with preferred provider schemes, and the arrangements were unlikely to contravene the third-line forcing provisions of the CCA (page 33). The ACCC has also found that preferred provider schemes for smash repairs have resulted in a number of consumer benefits, including lower insurance premiums, lifetime guarantees and repair work performed to a high standard: ACCC 2003 *Smash repairers/insurance issues paper published*, media release 19 September, Canberra.

The Panel's view

It is important that consumers have access to products that meet their needs, including in the area of private health insurance.

The National Commission of Audit report suggests there may be scope for 'lighter touch' regulation of the private health insurance sector, which could encourage innovation and wider product availability for consumers. In particular, price regulation of premiums could be replaced with a price monitoring scheme and health funds could be allowed to expand their coverage to primary care settings.

The Panel believes that prices should be fully deregulated when competition is deemed to be effective. This assessment of effectiveness should be undertaken by the proposed ACCP (see Recommendation 43).

The regulation of prostheses should be examined to see if pricing and supply can be made more competitive, while maintaining the policy aims of the current prostheses arrangements. This examination should also be led by the ACCP.

Agricultural marketing

Agricultural marketing arrangements can create barriers to entry through licensing restrictions and weaken incentives for growers to differentiate their products and to innovate.

The PC's 2005 *Review of National Competition Policy Reforms* (see Box 10.15) noted that domestic pricing arrangements and import tariffs needed to support the activities of statutory marketing authorities provide assistance to producers and are effectively paid for by household and business users. Such controls were found often to reduce the scope and incentives for innovation, to the detriment of both consumers and producers.[170]

170 Productivity Commission, 2005, *Review of National Competition Policy Reforms*, Report no. 33, Canberra, page 81.

Box 10.15: National Competition Policy reforms to agricultural marketing arrangements

Under the NCP, the NCC identified the following priority legislation review areas in primary industries: barley/coarse grains; dairy; poultry meat; rice; sugar; wheat; fishing; forestry; mining; food regulation; agricultural and veterinary chemicals; quarantine and bulk handling.[171]

Under the NCP, price and supply restrictions in the agricultural marketing arrangements were progressively removed. The Australian Bureau of Agricultural and Resource Sciences recently noted that these reforms have resulted in Australian agriculture being strongly market-oriented, with farmers now exposed to competition in domestic and world markets and governments having largely removed production and trade-distorting support.[172]

However, restrictions still apply in relation to rice in New South Wales and potatoes in Western Australia.

The New South Wales Rice Marketing Board, initially established in 1928 under the *Marketing of Primary Products Act 1927*,[173] retains powers to vest, process and market all rice produced in New South Wales — around 99 per cent of Australian rice.[174] Although a party wanting to participate in the domestic rice market must apply to the Board to become an Authorised Buyer, no price or supply restrictions apply to rice marketing in New South Wales. [175] The New South Wales Rice Marketing Board has appointed Ricegrowers Limited (trading as SunRice) as the sole and exclusive export licence holder.[176]

The marketing arrangements for rice are subject to regular review and, under the terms of the New South Wales *Subordinate Legislation Act 1989*, a public benefit case must be made for renewal to continue. The Act requires public consultation and an assessment of the costs and benefits, with legislation not restricting competition unless the benefits of the restrictions to the community as a whole outweigh the costs; and the objectives of the regulation can only be achieved by restricting competition.

The most recent review, in 2012, recommended that vesting be renewed until 30 June 2017, with further extension subject to a review to determine that export price premiums relative to other international competitors on export markets continue to be achieved. [177]

In Western Australia, licences to grow ware potatoes (i.e., fresh potatoes for human consumption), as well as the price, quantity and varieties grown, are all regulated by the Potato Marketing

171 National Competition Council 2003, Assessment of governments' progress in implementing the National Competition Policy and related reforms: Volume one — Overview of the National Competition Policy and related reforms, AusInfo, Canberra, page 4.6.

172 Gray, EM, Oss-Emer, M and Sheng, Y 2014, *Australian Agricultural Productivity Growth: Past Reforms and Future Opportunities*, ABARES research report 14.2, Canberra, page 14.

173 Rice Marketing Board of NSW, 2015, About the RMB, Rice Marketing Board, Sydney, viewed 28 January 2015 www.rmbnsw.org.au/about-the-rmb.

174 Gray, EM, Oss-Emer, M and Sheng, Y 2014, *Australian Agricultural Productivity Growth: Past Reforms and Future Opportunities*, ABARES research report 14.2, Canberra, page 15.

175 National Farmers' Federation, DR sub, pages 6-7.

176 Rice Marketing Board of NSW, 2015, About the RMB, viewed on 12 February 2015 www.rmbnsw.org.au/about-the-rmb.

177 NSW Government Trade & Investment Strategic Policy & Economics Division 2012, Review of Rice Vesting by the Rice Marketing Board under the NSW Rice Marketing Act 1983, Sydney, page 14.

Corporation, which is established under the Western Australian *Marketing of Potatoes Act 1946*, and is a statutory marketing organisation of the government of Western Australia.[178]

The Potato Marketing Corporation, not consumers and producers, determines the quantities, kinds and qualities of potatoes offered to consumers in Western Australia. In fact, it is illegal to sell ware potatoes grown in Western Australia without a licence from the Potato Marketing Corporation.

The Economic Regulation Authority of Western Australia's *Inquiry into Microeconomic Reform in Western Australia*, released in July 2014, recommended removing the existing restrictions. Overall, it estimates that the restrictions on the Western Australian ware potato market have a net cost of $3.8 million per annum, equating to a present value of $33.23 million over a 15-year period.[179]

Recent media coverage highlights the extent of potato regulation in Western Australia and has prompted calls for its removal.[180]

Submissions also call for deregulation of Western Australia's potato industry, with the Chamber of Commerce and Industry (WA) highlighting how the regulation, which dates from Australia's national security regulations imposed during the Second World War 'has impeded competition in the WA potato market, leading to higher prices and lower choice for consumers' (sub, page 16). The Business Council of Australia recommends Western Australia's potato marketing regulation should be considered as part of a legislative review program (sub, page 21).

The Panel's view

Most price and supply restrictions in agricultural marketing have been removed. However, some unfinished business remains. For example, restrictions still apply in relation to the export of rice in New South Wales and the price, quantity and type of potatoes sold in Western Australia. These restrictions raise barriers to entry and impede consumer choice. Governments should resist calls for past reforms to be unwound.

Air service restrictions

International air services to and from Australia are regulated by air service agreements. These follow the processes set out under the 1944 Chicago Convention on International Civil Aviation, restricting airlines to operating within agreements developed by countries on a bilateral basis.[181]

178 Government of Western Australia 2014, Potato Marketing Corporation of Western Australia website, viewed on 28 January 2015, www.pmc.wa.gov.au/index.cfm.

179 Western Australian Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia: Final report*, Perth, page 317.

180 For example: Thompson, B 2015, 'Spud price tensions boil over' *The West Australian*, 7 January, Perth; Tinney, M 2015, 'Potato price war', *Sunrise*, 8 January; Burrell, A 2015, 'Spud war: rules give grower the chips', *The Australian*, 13 January, Perth; APP 2015, 'A vegetable producer will give away 200 tonnes of spuds after breaching WA's potato laws by growing too much, and says the industry must be deregulated' SBS, 13 January; Sprague, J 2015 'WA potato rules ignite hot debate', *Australian Financial* Review, 14 January; Orr, A 2015 'Potato board's advertisement proves a hot potato political issue' *WA Today*, 16 January, Perth; Burrell, A 2015, 'Spud missiles fly over $5m marketing board', *The* Australian, 16 January; and Fitzgerald, B 2015, 'Free potato giveaway drives a wedge between growers' *ABC Rural*, 28 January.

181 See Department of Infrastructure and Regional Development website, *The Bilateral System — how international air services work,* viewed 3 February 2015, www.infrastructure.gov.au/aviation/international/bilateral_system.aspx.

Air service agreements amount to an agreement with another country regarding which airlines can service a particular route. They have the effect of constraining how responsive providers can be to consumer demand.

Complexity is added given other countries' need to negotiate 'beyond rights'. For example, for Qantas to fly to London via Dubai, Australia needs the United Arab Emirates to negotiate 'beyond rights' on behalf of Qantas with the UK. Australia therefore uses air service agreements, as do other countries, as a negotiating chip to obtain 'beyond rights' for Australian flagged carriers in exchange for access to the Australian market.

An Australian carrier granted an allocation of capacity must be designated by Australia before it is able to operate an international air service. As a result, air service agreements act to regulate capacity and who can service particular international air routes. This has been thought to raise prices on some routes. As a consequence, some air service agreements may protect Australian carriers from competition or act as barriers to new carriers entering particular markets.

Other parts of the world have moved to a less regulated approach. For example, within Europe international air services effectively operate under an 'open skies policy'.[182]

Australia also has a policy of seeking 'open skies' on a bilateral basis, for example, the agreement with New Zealand.[183]

Unilaterally allowing open skies to Australia would severely disadvantage Australian airlines, so long as the bilateral system remains entrenched in the rest of the world.[184] The Australian & International Pilots Association notes, 'Australia already has one of the most liberalised air service policies in the world' (DR sub, page 2).

However, other submissions raise concerns that, while Australia may have a relatively liberalised aviation market, air service restrictions are still impeding competition.

For example, Sydney Airport Corporation considers that air service agreements may act as a restriction on competition from foreign carriers in the air services market with broader economic implications:

> Delays in bilateral capacity negotiations, which are running behind demand in many key growth markets, restrict the level of competition in the market from foreign carriers, preventing travellers from accessing Australia in the most efficient and cost effective manner. These delays also risk economic and tourism growth, which is highly reliant on inbound international visitation. (sub, page 5)

Similarly, Melbourne Airport considers:

> At a time when the Australian Government is seeking more liberal market access arrangements with our key trading partners through bilateral and multilateral trade agreements, air services agreements that impose the equivalent of quotas on passengers and freight are anachronistic. They impose arbitrary constraints on the ability of airlines to respond to market demand for additional or new services. (DR sub, page 1)

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182 Productivity Commission 1998, *International Air Services Inquiry Report*, Report No. 2, Canberra, page 59.

183 See Department of Infrastructure and Regional Development website, *The Bilateral System — how international air services work,* viewed 3 February 2015, www.infrastructure.gov.au/aviation/international/bilateral_system.aspx.

184 Productivity Commission 1998, *International Air Services Inquiry Report*, Report No. 2, Canberra, page 220.

In respect of domestic restrictions, state governments sometimes provide exclusive rights for regional airlines to operate on particular routes. Ostensibly, exclusivity is provided to guarantee service, as it gives the operator confidence that it can run the route profitably. Regional routes are often very lightly patronised, supporting only one operator, i.e., they are natural monopolies. While it might be reasonable in these circumstances to restrict competition to guarantee a stable service, exclusive rights create the potential for monopoly pricing.

Virgin Australia notes:

> ... the Queensland Government has determined that the Brisbane-Roma route will remain regulated and free from competition until at least 2020, notwithstanding that passenger numbers grew from just under 40,000 in 2008-09 to over 240,000 in 2013-14. This decision cannot be justified from either an economic or public policy perspective. The costs of restricting competition on this route will be borne by passengers, in the form of higher airfares and fewer travelling options, as well as the economy more broadly, including by limiting opportunities for growth in tourism. (DR sub, page 19)

The Panel's view

The Panel considers that air service agreements should not be used to protect Australian carriers. The Australia Government should take a proactive approach on air service agreements to ensure sufficient capacity on all routes to allow for demand growth, including by pursuing bilateral open skies policies with other countries. This will ensure that agreements do not act as barriers to entry in the provision of services to and from Australia.

Where air service agreements act to restrict capacity, the costs will be borne by travellers through higher prices and fewer options, and by the economy more broadly, for example, though lower tourism growth.

Governments should only create exclusive rights for regional services where it is clear that the air route will only support a single operator. Where exclusive rights are created, they should be subject to competitive tender.

AREAS FOR IMMEDIATE REFORM

Although other areas require detailed reviews to determine whether reform is needed, the Panel considers that, in the three areas of retail trading hours, parallel imports and pharmacy location and ownership rules, the need for reform is well established and long-standing. Those areas, which were identified as problematic under the NCP process, still remain today in some jurisdictions. Of course, they still require careful and consultative reform processes to minimise the risk of unintended consequences.

The Panel emphasises that it is not proposing total and unfettered deregulation of these areas, any more than it is in other areas. Each will have its own particular public interest considerations that need to be contemplated carefully along the way. Nevertheless, where there continues to be a need for regulation, governments should thoroughly analyse alternative, less anti-competitive ways to achieve public policy objectives.

10.5 RETAIL TRADING HOURS

Restrictions on retail trading hours impede suppliers' ability to meet consumer demand. They can discriminate among retailers on the basis of factors such as products sold, or retailer size or location.

They can also impose costs on consumers by creating inconvenience and congestion. The rules can be complex and confusing and create compliance costs for businesses.

As the PC noted in its 2014 report *Relative Costs of Doing Business in Australia: Retail Trade*:

> Restrictions on trading hours lead to reduced consumer convenience and increased travel costs, higher capital costs to deal with artificial peaks in shopping activity, greater product wastage, lost sales with a likely disproportionate negative impact on the visitor economy, and a restricted ability to compete with online retailers. They add complexity to business operations that are not necessary nor in the interest of consumers or the state economies.[185]

Australian governments agreed to review retail trading hours as part of their NCP commitment to review legislative restrictions on competition, as outlined in Box 10.16. The outcomes of more recent reviews of trading hours are outlined in Box 10.17.

Box 10.16: Review of retail trading hours under NCP

Since the mid-1990s, shop trading hours have been deregulated progressively across Australia; however, experience varies across the country. The Australian Capital Territory, Victoria, Tasmania and the Northern Territory have deregulated trading hours and New South Wales has done so to a large extent. In contrast, three States retain significant restrictions: Western Australia, Queensland and South Australia.

The NCC's 2005 assessment of governments' progress in implementing the NCP[186] noted that all governments, except for Western Australia, had substantially liberalised retail trading hours. Western Australia was the only jurisdiction to restrict weekday trading hours and to prohibit large retailers (outside of tourist precincts) from opening on Sundays.

As a consequence, the Australian Government deducted 10 per cent of Western Australia's 2003-04 competition payments and 10 per cent of its 2004-05 competition payments.

Since then, retail trading hours in Western Australia have been partially deregulated, and Sunday trading was introduced for all shops in the Perth metropolitan area on 26 August 2012.[187] This brought retail trading hours in Western Australia closer to those in Queensland and South Australia.

185 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, page 8.

186 National Competition Council 2005, *Assessment of governments' progress in implementing the National Competition Policy and related reforms*, Melbourne, page xxix.

187 Government of Western Australia Department of Commerce 2012, Sunday Trading, Government of Western Australia Department of Commerce, Perth, viewed 30 January 2015, www.commerce.wa.gov.au/sites/default/files/atoms/files/sundaytradingfactsheet.pdf.

Box 10.17: Recent reviews of retail trading hours.

A number of recent reviews have recommended further deregulating retail trading hours.

In 2011, the PC found that restrictions on trading hours applied with varying levels of intensity, with Queensland, Western Australia and South Australia having the most restrictive regulations. The PC recommended that retail trading hours should be fully deregulated in all States, and allow trading on public holidays.[188]

In its 2014 research report, *Relative Costs of Doing Business in Australia: Retail Trade*, the PC found that trading hours' restrictions are increasingly out of step with changing patterns of work, leisure and shopping.[189] They impose costs on retailers and reduce consumer welfare. The arbitrary boundaries and exemptions found in Queensland, Western Australia and South Australia lead to unintended consequences and anomalies, which can disadvantage businesses of all sizes.

The PC considers that deregulation would: increase economic activity and lower retailers' cost of doing business; increase choice and convenience for consumers; and enhance employment opportunities, particularly for younger and older workers and those working part-time or on a casual basis.

In 2013, the Queensland Competition Authority recommended full deregulation of retail trading hours. It found that the net potential benefit to Queensland of removing the current restrictions was as much as $200 million per annum, and noted that the 'potential benefits of the reform include an increase in retail productivity, more shopping convenience for the broader community and lower prices'.[190]

In its 2014 report, *Inquiry into Microeconomic Reform in Western Australia,* the Western Australian Economic Regulation Authority found no market failure to justify the current restriction on competition. 'As such, consumer choice, rather than government regulation, should determine which shops open and when. Retailers will respond to consumer demand by opening when it is profitable for them to do so and remaining closed when it is not.' The Economic Regulation Authority recommended deregulating retail trading hours in Western Australia, with the exception of Christmas Day, Good Friday and the morning of ANZAC Day.[191]

However, a 2007 review of South Australia's retail trading hours by Alan Moss recommended that the current shopping hours be retained, with consideration given to the possibility of a later Sunday closing time. Moss found that the existing rules strike a satisfactory balance between the competing interests of the various sectors of the retail industry and the larger interests of the community, 'At the end of the day there are more important human activities than shopping.'[192]

Retail trading hours are governed by state regulations that vary significantly between and within States. Box 10.18 provides examples of some of the existing regulations around the country.

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188 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry Inquiry*, Report no. 56, Canberra, Recommendation 10.1, pages XLII and 275.

189 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, Finding 5.1, page 111.

190 Queensland Competition Authority Office of Best Practice Regulation 2013, *Measuring and Reducing the Burden of Regulation*, Brisbane, pages 33 and 39.

191 Western Australian Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia Final Report*, Perth, pages 292-293 and recommendation 29.

192 Moss, A 2007, *Report of the 2006–07 Review of the Shop Trading Hours Act 1977*, National Competition Council, Canberra, page 26.

Box 10.18: Examples of current retail trading hours' restrictions

Retail trading hours regulations vary considerably across States and Territories.

The **Western Australian** *Retail Trading Hours Act 1987* specifies the hours that a shop can operate, based upon the goods it sells, its location and size.

- Sunday trading in the Perth metropolitan area was introduced in 2012, with 'general retail shops'[193] now able to open between 11am and 5pm on Sundays.
- 'Special retail shops', which include souvenir shops, pharmacies, domestic development shops, video shops, duty-free shops, motor vehicle spare parts shops, sports venue shops and newsagencies may open from 6 am to 11:30 pm every day of the year but may only sell goods prescribed in the regulations. For example, a domestic development shop can sell light bulbs but not light fittings, and kitchen sinks but not dishwashers (Woolworths, DR sub, page 17).
- 'Small retail shops'[194], for example, greengrocers, butchers, corner stores and many small supermarkets, have no restrictions on their trading hours.
- Petrol stations have unrestricted operating hours but may only sell goods prescribed in the regulations. For example, before 8am on Mondays, they can sell cigarettes but not nicotine patches (Woolworths, sub, page 62).

The Western Australian Retail Trading Hours Act does not apply to restaurants, cafes, takeaway food shops, veterinary clinics or retail shops located in public transport areas.

The Western Australian government introduced special trading rules for the 2014 Christmas period, with all 'general retail stores' in the Perth metropolitan area able to trade every day but Christmas Day from 7am (8am on Sundays, Boxing Day and New Year's Day) until 9pm weeknights (and 6pm weekends, Boxing Day and New Year's Day).[195]

The Western Australian Premier has announced that during 2015 his government would continue to address anomalies in the regulation of trading hours.[196] However, this will be limited to removing a discrepancy that relates to hardware stores, and the Premier has again ruled out extending the current opening time of 11am on Sundays.[197]

In regional Western Australia, different rules apply. Retailers are unable to trade on Sundays, except where location-specific exemptions apply.

In addition, north of the 26th parallel, which runs from the Northern Territory and South Australian border to Shark Bay on the west coast, the Western Australian Retail Trading Hours Act does not apply, so retail trading hours are not regulated.

193 General retail shops are defined in subsection 10(2) of the Western Australian *Retail Trading Hours Act 1987* as any retail shop that is not a small retail shop, a special retail shop or a filling station.

194 Small retail shops are defined in subsection 10(3) of the Western Australian *Retail Trading Hours Act 1987* as shops owned by up to six people who operate no more than four retail shops, in which up to 25 people work at any one time.

195 Government of Western Australia, *Retail Trading Hours*, Department of Commerce, Perth, viewed 28 January 2015, www.commerce.wa.gov.au/consumer-protection/retail-trading-hours.

196 Barnett, C 2015, Western Australian Premier's Statement to Parliament.

197 Strutt, J 2015, 'Sunday trading hours anomalies to be addressed by WA Government', ABC, 19 February 2015.

Box 10.18: Examples of current retail trading hours' restrictions *(continued)*

New South Wales[198] currently only has four and a half days where trading is restricted: Good Friday; Easter Sunday; ANZAC day prior to 1pm; Christmas Day; and Boxing Day. The restrictions do not apply to some retailers, typically small businesses, that are still able to trade on these public holidays.

Trading hours are almost fully deregulated in **Victoria** and **Tasmania**, with the only restricted trading days being Good Friday, Christmas Day and the morning of ANZAC Day. On these days, only exempt stores are permitted to trade.

In the **Northern Territory** and the **Australian Capital Territory**, trading hours are almost completely deregulated, but many retailers choose not to trade on Good Friday, Christmas Day and the morning of ANZAC Day.[199]

A number of submissions call for further deregulating trading hours so that in all Australian States and Territories only Christmas Day, Good Friday and ANZAC Day morning are restricted trading days.[200] Submissions also draw comparisons between 'bricks and mortar' retailers and online retailers, which are not inhibited by restrictions on trading hours.[201] Restrictions on retail trading hours are seen to handicap physical retailers from competing with online retailing, which can be conducted at any time of the day or night, and on any day.[202]

For instance, a December 2014 Western Australian survey indicated that 64 per cent of consumers intended to shop locally online for Christmas, an increase of 16 per cent over the 2013 figure.[203]

Submissions suggest deregulated retail trading hours would enable businesses to compete on a level playing field.[204]

However, submissions responding to the recommendation in the Draft Report to deregulate remaining restrictions on trading hours are divided. The existing rules are described as 'retail apartheid' by the Shopping Centre Council of Australia (DR sub, page 8). In contrast, during consultation meetings, small supermarkets describe trading hours as a 'weapon' that can be used by those with market power.

198 New South Wales Government, *Retail trading in NSW*, Industrial Relations, Sydney, viewed on 28 January 2015, www.industrialrelations.nsw.gov.au/oirwww/Industries_and_Awards/Retail_industry.page?.

199 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry Inquiry*, Report no. 56, Canberra, page 282.

200 See, for example: Australasian Association of Convenience Stores, DR sub, page 5; Australian Chamber of Commerce and Industry, DR sub, page 18; Australian National Retailers Association, DR sub, page 16; Business Council of Australia, DR sub, page 57; Business SA, DR sub, page 8; Coles Group Limited, DR sub, pages 4-5; Kim Greeve, DR sub, page 1; Daryl Guppy, DR sub, page 10; Large Format Retail Association, DR sub, page 9; Myer Holdings Limited, DR sub, page 1; Queensland Competition Authority, DR sub, page 1; Shopping Centre Council of Australia, DR sub, page 7; and Woolworths, DR sub, page 14.

201 See, for example: Business Council of Australia, sub, page 28.

202 See, for example: Shopping Centre Council of Australia, sub, page 7.

203 Curtin Business School and Chamber of Commerce and Industry WA, December 2014, *Curtin Business School — CCI Survey of Consumer Confidence*, page 4, Chamber of Commerce and Industry WA, Perth, viewed on 28 January 2015, http://cciwa.com/docs/default-source/economics/consumer-confidence-results.pdf?sfvrsn=2.

204 See, for example: Chamber of Commerce and Industry WA, DR sub, page 14; and Shopping Centre Council of Australia, sub, pages 7-8.

Retail workers, unions and religious groups express concerns about deregulation, including that employees could lose family time, and days of religious or cultural significance to the community as well as being subjected to unwelcome pressure to work on public holidays.[205]

Submissions from individuals and small businesses raise concerns that removing restrictions on retail trading hours will require retailers to open, particularly on public holidays. Submissions also raise concerns about removing penalty rates and that some tenancy agreements may oblige stores within shopping centres to open whenever the centre is open.

> Within a major mall, no retailer should feel 'forced' into opening beyond the core trading hours if that retailer believes it may be unprofitable to open. With penalty rates of two and a half times on public holidays, retailers often feel pressure to open when in fact because of the high wages costs, that retailer may lose money by opening their store. (Australian Retailers Association, DR sub, p5)

The Panel emphasises that removing restrictions would not require retailers to trade 24 hours a day, seven days a week or to adopt identical trading hours. Rather, deregulation allows retailers to decide for themselves when to open for trade, as is currently the case in those jurisdictions where retail trading hours are already deregulated. In making this decision, retailers will take into account customer demand as well as other factors, such as labour costs and requirements of tenancy agreements. In jurisdictions where deregulation of trading hours has already occurred, shops are not routinely trading 24 hours a day, seven days a week.

A New South Wales review of retail trading hours in 2012 noted that, in both the Australian Capital Territory and the Northern Territory where retail trading is almost completely deregulated, most large retailers choose not to open on Good Friday, Christmas Day or the morning of ANZAC Day.[206]

The PC also found that, despite concerns that removing trading hours' restrictions would create extremes in trading hours, it instead provides retailers with greater flexibility, allowing them to more closely align opening hours with consumer demand: '…retailers are able to open when they consider it is in their commercial interests and opening hours reflect consumers' shopping patterns.'[207]

As was the case in relation to the Planning and Zoning reforms (see Section 10.1), a significant number of submitters urge the Panel to ensure that competition policy does not interfere with the rights of state and territory governments to impose controls on the sale of alcohol, to limit the trading hours of outlets, the type of outlets and the number of outlets in the interests of community safety and wellbeing.

Liquor is addressed specifically in Section 10.4. In addition, the Panel notes that a general policy of deregulating retail trading hours should not prevent jurisdictions from imposing specific restrictions on trading times for alcohol retailing, or indeed for gambling services, to achieve the policy objective of harm minimisation. A time restriction on alcohol retailing may satisfy the public interest test when

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205 See, for example: Anglican Church Diocese of Sydney, DR sub, pages 1-3; Anglicare Sydney, DR sub, pages 1-3; Partnering for Transportation, DR sub, pages 1-3; Shop, Distributive and Allied Employees' Association, DR sub, pages 2-3; Sydney Alliance for Community Building, DR sub, page 1; Unions NSW, DR sub, pages 3-9; and a number of individuals.

206 New South Wales Department of Finance and Services 2012, *Report of the Review of the Retail Trading Act 2008*, Sydney, page 12.

207 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, page 103.

a review is conducted (see Recommendation 8), even though general retail trading hours' restrictions do not.

Concerns have been raised about employees being forced to work on public holidays, for example, Boxing Day in New South Wales. However, retailer Myer notes:

> In our experience there is no shortage of volunteers among team members for work on this day due to the attractive penalty rates. We know from our experience that many casual workers such as students look forward to the extra income from Boxing Day employment. (DR sub, page 4)

Submissions to the Draft Report from small businesses, particularly small supermarkets in Western Australia, South Australia and Queensland, do not support removing restrictions on retail trading hours, with some noting that the current restrictions provide them with a degree of protection from competition, as they are free to open when other retailers are not.

> My business will lose that last opportunity to impress customers that come in because we are open earlier than the majors and the flow on effects are immeasurable. (IGA Walloon, DR sub, page 1)

> Though we have busy times similar to the chains, we tend to do better when they are closed, either early in the morning or later at night. If the chains have deregulated hours then this will decrease our sales dramatically. (Nicks Supa IGA, DR sub, page 1)

However, the relevant policy question is whether the restrictions are in the public interest, not whether they are in the interest of particular competitors. No compelling evidence has been presented to the Panel that, in the States and Territories with deregulated retail trading hours, the benefits to the community are outweighed by the costs.

Indeed, many have claimed that the restrictions inhibit retailers' ability to meet consumers' needs.[208] The Panel's view is that the needs of consumers, not of retailers, drive the structure and diversity of the retail sector.

The South Australian Chamber of Commerce and Industry notes that, in its 2013 pre-state election survey, 73 per cent of respondents supported a move to fully deregulated shop trading hours (DR sub, page 8).

The Panel heard from independent supermarkets that compete by offering a tailored range of products or emphasising customer service. The Panel notes that some retailers already choose to open on Christmas Day to provide an option for last-minute purchases.

The Panel also notes that, where restrictions apply to a particular sector or type of business, this can result in consumers having less flexibility and choice. The PC found that the evidence does not support the claim that deregulating trading hours has a material effect on the structure of the retail sector and the viability of small retailers.

> Restrictions on bricks and mortar retailers' trading hours are increasingly out of step with consumer expectations and the rapid growth of online retailing. While these restrictions aim to protect smaller retailers, removing trading hours restrictions does not appear to have a material impact of the structure of the retail sector. Retaining restrictions also ignores the potential for more than offsetting gains for retailers through lowering costs

208 See, for example Myer, DR sub, page 2.

> and increasing their ability to compete with online retailers, and greater choice and convenience for consumers.[209]

The take-up of online shopping clearly demonstrates that consumers are demanding more diversity in how and when they shop. In recent years, online retail sales have grown more quickly than spending at traditional bricks and mortar retailers. In National Australia Bank's December 2014 Online Retail Sales Index, online retail sales were estimated to represent around 6.8 per cent of spending at bricks and mortar retailers, up from 4.9 per cent in 2011.[210]

When consumers can switch to online suppliers outside regulated trading hours, restrictions on retail trading hours merely serve to disadvantage bricks and mortar retailers relative to their online competitors. In any event, many bricks and mortar retailers are also taking up the opportunity to have an online option, which enables them to serve their customers when their stores are closed.

National Australia Bank estimates that Australians spent $16.4 billion on online retail in the 12 months to November 2014.[211] Customers are already deciding when and how they wish to make their purchases. Retailers should be given freedom to respond by deciding for themselves when to open and close their bricks and mortar stores, referring after-hours customers to their online portals.

Submissions raise concerns that removing restrictions will reduce employment in small supermarkets. However, the PC found that deregulating trading hours in some jurisdictions increased employment opportunities in particular segments of the retail sector.

> The sector is a significant employer and further deregulation of trading hours is likely to benefit particularly the youngest and oldest age cohorts, first time job-seekers, and those with a preference for part-time or casual work.[212]

Box 10.19 relates Tasmania's experience of deregulating retail trading hours.

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209 Productivity Commission 2014, Retailing and dairy manufacturing input costs and policy implications, media release 10 October, Canberra.

210 National Australia Bank 2012, *NAB Online Retail Sales Index In-depth report, January 2010 — January 2012*, National Australia Bank, viewed 30 January 2015 http://business.nab.com.au/wp-content/uploads/2014/06/norsi-jan-2010.pdf and National Australia Bank 2014, NAB Online Retail Sales Index — November 2014, National Australia Bank, viewed 30 January 2015 http://business.nab.com.au/wp-content/uploads/2014/12/Online-Retail-Sales-Index-monthly-update-–-November-2014-PDF-57KB.pdf.

211 National Australia Bank 2014, NAB Online Retail Sales Index — November 2014, National Australia Bank, viewed 30 January 2015, http://business.nab.com.au/wp-content/uploads/2014/12/Online-Retail-Sales-Index-monthly-update-–-November-2014-PDF-57KB.pdf.

212 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, page 6.

Box 10.19: Experience of deregulation in Tasmania

Prior to 1 December 2002, major retailers and businesses employing more than 250 people were prohibited from trading on Sundays, public holidays and after 6pm on Mondays to Wednesdays.

A review in 2000 found the restrictions could not be justified as being in the public interest. The private benefits to selected stakeholders, principally the independent grocery retailers, were assessed as being less than the costs imposed on the Tasmanian community as a whole, particularly consumers, the restricted supermarket chains and the total retail sector.[213]

Tasmanian retail trading hours were deregulated in December 2002, and now all retailers can open at any time except Christmas day, Good Friday and the morning of ANZAC day.

Following deregulation, from January 2003 until June 2006, Tasmania experienced 25 per cent growth in retail sales compared with an Australia-wide growth rate of 16 per cent.[214]

Despite concerns that deregulation could lead to a loss of employment because of a decline in the number of smaller retailers, this was not the case:

- Australian Bureau of Statistics (ABS) data show that employment in retail trade in Tasmania increased significantly, from 23,500 total jobs in November 2002 to 25,500 total jobs in November 2003. This represented 8.3 per cent retail jobs growth over the year, which was greater than the 4.3 per cent average jobs growth across all Tasmanian industries.[215]
- Coles added 280 jobs in Tasmania following deregulation in 2002.[216]
- The retail sector remains a significant employer in Tasmania, accounting for 11 per cent of all employees.[217]

The PC[218] noted that recent experience (not limited to Tasmania) shows that relaxing retail trading restrictions capitalises on latent consumer demand and allows consumers to shop according to their preferences as determined by their work, leisure and family commitments. It also increases the scope for businesses to achieve scale economies and reduces red tape.

The legislation that removed restrictions on trading hours, the *Shop Trading Hours Amendment Act 2002,* allows councils to request, at any time, the Chief Electoral Officer to conduct a plebiscite on the question of reimposing shop trading restrictions in their municipality. Shop trading restrictions on Sundays and public holidays could be reimposed in a municipality should the community support them.

To date no request for a plebiscite has arisen from any local council in Tasmania.

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213 Workplace Standards Tasmania 2000, Shop Trading Hours Act 1984, Regulatory Impact Statement, page 10.

214 ACIL Tasman 2006, Review of Retail Trading Hours in South Australia, page 2, Shopping Council Centre of Australia, Sydney, viewed 30 January 2015 www.scca.org.au/Pdf%20links/2006PDFlinks/Subs06/Full%20Subn%20Review%20of%20Trading%20Hours%20Sept%2006.pdf.

215 ABS Cat No. 6291.0.55.003 Labour force, Australia.

216 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Retail Trade*, Research Report, Canberra, page 109.

217 Ibid., page 111-112.

218 Ibid., page 103

The Panel's view

Shop trading hours have been progressively deregulated across Australia. However, trading hours in Queensland, South Australia and Western Australia remain regulated to a greater degree than other States and Territories.

The remaining restrictions create a regulatory impediment to competition by raising barriers to expansion and distorting market signals. The Panel believes that consumer preferences are the best driver of business offerings, including in relation to trading hours.

The growing use of the internet for retail purchases is undermining the intent of restrictions on retail trading hours, while disadvantaging 'bricks and mortar' retailers. This provides strong grounds for abandoning remaining limits on trading hours.

The Panel appreciates the concern of some independent retailers about their ability to compete in a deregulated environment. However, the Panel notes that independent and small businesses are able to differentiate their offerings to fulfil consumer demands and compete in the face of deregulated trading hours. The Panel also notes that, where restrictions apply to a particular sector or type of business, this can result in consumers having less flexibility and choice.

A general policy of deregulation of retail trading hours should not prevent jurisdictions from imposing specific restrictions on trading times for alcohol retailing or for gambling services to achieve the policy objective of harm minimisation. A time restriction on alcohol retailing may be found to satisfy the public interest test when a review is undertaken, even though general retail trading hours' restrictions do not.

Implementation

Laws and regulations dictating retail trading hours are the responsibility of state and territory governments. The Panel considers that deregulating trading hours should be a priority for those States where the tightest restrictions on retail trading hours apply, because there lies the greatest potential gain. To this end, Western Australia, Queensland and South Australia should aim to complete the reforms within two years.

Experience in those States and Territories that have already deregulated trading hours provides 'best practice' for guidance. The proposed Australian Council for Competition Policy (see Recommendation 43) could provide an independent assessment of progress across the jurisdictions.

Recommendation 12 — Retail trading hours

Remaining restrictions on retail trading hours should be removed. To the extent that jurisdictions choose to retain restrictions, these should be strictly limited to Christmas Day, Good Friday and the morning of ANZAC Day, and should be applied broadly to avoid discriminating among different types of retailers. Deregulating trading hours should not prevent jurisdictions from imposing specific restrictions on trading times for alcohol retailing or gambling services in order to achieve the policy objective of harm minimisation.

10.6 PARALLEL IMPORTS

An overseas manufacturer can supply goods to different distributors in different countries, license the manufacture of goods to different manufacturers in different countries, or both. These supply or licensing arrangements may mean that the goods, all of which are genuine, are available for purchase in different countries (including Australia) at different prices.

Parallel imports refer to genuine goods that are imported into Australia by someone other than the licensed or authorised distributor or manufacturer in Australia.[219] The Advisory Council on Intellectual Property says:

> A concise and exhaustive definition of parallel imports (sometimes referred to as 'grey' imports) is somewhat elusive. The basic problem is that while trade may be global, and brands may be global*, trade marks* are national and may be owned or used by different people in different countries. (DR sub, page 2)

Parallel imports provide an alternative source of supply, which promotes competition and can provide consumers with products at lower prices. Woolworths says that in some instances it:

> … uses parallel import arrangements to deliver lower price products to consumers or to negotiate more efficient local sourcing options. (DR sub, page 20)

CHOICE says:

> Parallel imports play an important role in addressing international price discrimination. They create situations whereby over-priced Australian products compete with identical cheaper products from overseas. Companies essentially compete with themselves, driving prices lower. (sub, page 15)

Parallel import restrictions are similar to other import restrictions (such as tariffs) in that they benefit local suppliers by shielding them from international competition.

Parallel imports of goods that are protected by certain forms of intellectual property rights are currently restricted by legislation. For example, parallel importation of some copyright products is restricted under the *Copyright Act 1968*.[220]

The Copyright Act originally prohibited parallel imports except for personal use.[221] In 1991, the Copyright Act was amended to allow limited parallel importation of books.[222] General prohibitions regarding parallel imports were removed for sound recordings in 1998 and computer software in 2003. The general prohibition against parallel imports continues to apply to literary works (other than books), dramatic, musical and artistic works, broadcasts and cinematographic films.[223]

Because parallel import restrictions shield suppliers from international competition, they can be to the detriment of Australian consumers. As the ACCC notes:

> Such restrictions effectively provide an import monopoly to the domestic distributor and protect owners of the local IP rights from competition. The restrictions may also enable copyright owners to practice international price discrimination to the detriment of Australian consumers. (sub 1, page 60)

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219 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, Report no. 56, Canberra, page 160.

220 The Copyright Act grants copyright holders the right to restrict parallel imports, extending copyright protection into the sphere of distribution.

221 Fels, A 1999, Parallel Importing, speech to the Victorian Employers' Chamber of Commerce and Industry, International Trade Committee, Melbourne, 21 June.

222 The reproduction and first sale of books in Australia is governed by the *Copyright Act 1968*. In 1991, a '30 day release rule' and a '90 day resupply rule' were introduced to improve the timeliness and availability of titles on the Australian market.

223 ACCC sub 1, page 62.

The ACCC also notes that, under the *Trade Marks Act 1995*, it appears that trade mark owners are able to prevent parallel imports of trade-marked goods into Australia by limiting trade mark licences to specific territories.[224]

Australia's parallel import restrictions have been reviewed many times over the past few decades (Box 10.20).[225] Most reviews recommend that parallel import restrictions be removed on the basis that removing the restrictions would provide net benefits to the community. For example:

- A PC report on parallel import restrictions on books found that the restrictions impose a private implicit tax on Australian consumers, which is used largely to subsidise foreign copyright holders (Box 10.20).
- A PC report on automotive manufacturing concluded that, in the long term, the progressive relaxation of restrictions on the wide-scale importation of second-hand vehicles would have net benefits for the community as a whole (Box 10.21).

Studies assessing the impact of removal of restrictions on parallel imports in New Zealand in 1998 have also found that the reforms resulted in lower prices for consumers and improved supply.[226] A recent report commissioned by the New Zealand Ministry of Economic Development on the costs and benefits of preventing parallel imports concluded that:

> … the available evidence suggests that removing parallel import restrictions tends to reduce consumer prices, with few negative consequences for domestic creative effort. This suggests that the benefits of removing parallel import restrictions tend to outweigh the costs.[227]

Box 10.20: Reviews of Australia's parallel import restrictions

In 2000, the Intellectual Property and Competition Review Committee (the Ergas Committee) looked at parallel import restrictions as part of the Legislative Review Program.[228] The Ergas Committee concluded that the costs of removing the parallel import restrictions were likely to be small relative to the gains to Australia. It also considered that the net income leakage to foreign copyright holders flowing from the parallel import restrictions was potentially significant.

A 2009 PC research report on provisions of the Copyright Act that restrict the parallel importation of books found that the restrictions provide territorial protection for the publication of many books in Australia, preventing booksellers from sourcing cheaper or better value-for-money editions of those titles from world markets. [229]

224 ACCC sub 1, page 61, provides details on two recent cases: *Sporte Leisure Pty Ltd v Paul's Warehouse International Pty Ltd* and *Paul's Retail Pty Ltd v Lonsdale Australia Ltd*.

225 See also Prices Surveillance Authority 1995, *Inquiry into Book Prices and Parallel Imports*, Report no. 61, Sydney, and The Copyright Law Review Committee 1988, *The Importation provisions of the Copyright Act 1968*, Canberra.

226 See also Moore, D, Volkerling, M and van der Scheer, B 2007, *MED Parallel Importing Review: impact upon creative industries*, LECG, Auckland.

227 Deloitte Access Economics 2012, *The Costs and Benefits of Preventing Parallel Imports into New Zealand*, New Zealand Ministry of Economic Development, Wellington, page 46.

228 Intellectual Property and Competition Review Committee 2000, *Review of intellectual property legislation under the Competition Principles Agreement*, Canberra.

229 Productivity Commission 2009, *Restrictions on the Parallel Importation of Books, Research Report*, Canberra, page XXI.

Box 10.20: Reviews of Australia's parallel import restrictions *(continued)*

Price comparisons found that, in 2007-08, a selection of around 350 trade books sold in Australia were on average 35 per cent more expensive than editions sold in the US (after accounting for the effects of GST). In many cases, the price difference was greater than 50 per cent. While noting the limitations of price comparisons, the PC said 'these results … make it clear that, but for the PIRs [parallel import restrictions], Australian booksellers could have obtained and shipped many trade titles to Australia for significantly less than they are currently charged by Australian publishers'.[230]

The PC also found that parallel import restrictions poorly target cultural externalities and much of the assistance the restrictions provide does not promote Australian-authored work. PC estimates suggest that the additional income flowing overseas is around 1.5 times that retained by local copyright holders.

The PC recommended that Australia's parallel import restrictions on books be repealed and (because of the significant adjustment costs for book producers) that the repeal take effect three years after the policy change is announced.

A PC inquiry into the Australian retail industry found that international price discrimination is being practised against some Australian retailers, to the detriment of Australian consumers. The PC stated that some Australian retailers have the option of altering their supply arrangements — either by putting pressure on existing international suppliers and distributors or changing their supply channels. The PC recommended a review of the parallel import restrictions in the Copyright Act that prevent retailers from importing and selling clothing or other goods that embody decorative graphic images sold with the copyright owner's permission in another market.[231]

The House of Representatives Standing Committee on Infrastructure and Communications inquiry into IT pricing recommended lifting the parallel import restrictions still found in the Copyright Act, and reviewing and broadening the parallel importation defence in the Trade Marks Act to ensure it is effective in allowing the importation of genuine goods.[232]

A number of submitters question why parallel import restrictions continue to be in force. The International Bar Association says:

> The dramatic changes to Australian consumers' retail shopping practices over the past few years, especially through their on-line purchases, has called into question, among other things, existing parallel trade policies, both with respect to copyright and trade mark legal regimes. (sub, page 10)

The Australian National Retailers Association argues that the restrictions are another example of 'outdated regulations that distort competition amongst retailers' (sub, page 18), particularly the remaining restrictions on books and some clothing items that feature images. Also:

230 Ibid., page XVIII.

231 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, Canberra, page 163 and page 167.

232 House of Representatives Standing Committee on Infrastructure and Communications, *At what cost? IT pricing and the Australia tax,* Canberra, pages xii-xiii.

> Like trading hours, this restriction is becoming increasingly anti-competitive as technology tilts the competitive edge in favour of retailers with overseas stores or warehouses which can circumvent these restrictions at the expense of local-based retailers. (sub, page 18)

The Co-Op also describes parallel import restrictions as 'effectively an anachronism of a pre digital age' (sub, page 2).

The ACCC, commenting on parallel import restrictions in the Copyright Act, states that it has:

> … consistently held the view that parallel importation restrictions (via legislation) extend rights to copyright owners beyond what is necessary to address 'free riding' on the creation of IP (the economic rationale for establishing copyright in the first instance). The ACCC considers that there is no further economic reason to justify a blanket legislative restriction on parallel imports. Rather, any arrangements that seek to address a 'free rider' problem in distribution are not unique to IP, and should be subject to the general competition provisions, under which authorisation is available if the arrangements can be shown to be in the public interest. (sub 1, page 62)

In the context of restrictions on imports of second-hand passenger vehicles, Auto Services Group questions the rationale for retaining such restrictions, claiming that they:

> … avoid placing undue competitive pressure on local manufacturers. As of 2017, manufacturing of passenger vehicles will cease in Australia, which will, in turn, mean that all new vehicles sold in Australia will be imported from overseas. The original purpose for the restriction of parallel importing of passenger vehicles will no longer apply. (DR sub, page 1)

Submissions also support moving to the New Zealand position, where all restrictions on parallel imports caused by statute have been abolished (Professor Allan Fels, sub, page 14).

Box 10.21: Restrictions on the importation of second-hand vehicles[233]

The *Motor Vehicles Standards Act 1989* sets out national motor vehicle standards and regulates the supply of new and second-hand vehicles being imported into Australia. Under the Motor Vehicles Standards Act, applications for approval to place a used import plate (or to sell a used imported vehicle without such a plate) can only be made in respect of a single vehicle. The *Motor Vehicle Standards Regulations 1989* (as amended up to 2012) also prohibits automotive workshops from importing more than 100 used vehicles in each vehicle category in a 12-month period.

The PC's report on *Australia's Automotive Manufacturing Industry* concluded that progressively relaxing restrictions on the wide-scale importation of second-hand passenger and light commercial vehicles would have net benefits for the community as a whole. However, it noted that this relaxation of the restrictions would need to occur within a regulatory framework that provides for appropriate standards of quality and information, if it is to meet community expectations and the economy-wide benefits are to exceed the costs.

233 Productivity Commission 2014, *Australia's Automotive Manufacturing Industry, Inquiry Report,* Canberra, pages 32 and 154.

Box 10.21: Restrictions on the importation of second-hand vehicles *(continued)*

The PC stated that second-hand vehicles should be limited to source countries where vehicle design standards are consistent with those recognised by Australia.

The PC recommended that the new regulatory arrangements for imported second-hand vehicles should be developed in accordance with the outcomes of the Australian Government's review of the Motor Vehicles Standards Act and should:

- not commence before 2018, and ensure that reasonable advance notice is given to affected individuals and businesses, such as vehicle leasing companies;
- be preceded by a regulatory compliance framework that includes measures to provide appropriate levels of community safety, environmental performance and consumer protection;
- initially be limited to vehicles manufactured no earlier than five years prior to the date of application for importation; and
- be limited to second-hand vehicles imported from countries that have vehicle design standards which are consistent with those recognised by Australia.

The PC also recommended that the Australian Government remove the $12,000 specific duty on imported second-hand vehicles from the Customs Tariff as soon as practicable.[234]

However, some submitters do not support removing the remaining restrictions on parallel imports. Some argue that there are few remaining restrictions on parallel importation in Australian copyright law. For example, the Australian Copyright Council says:

> Consumers already can and do use the Internet to price compare and purchase goods from other jurisdictions. The parallel importation laws do not prohibit this. They only apply to commercial entities wanting to import stock from other jurisdictions. (DR sub, page 5)

Penguin Random House Australia also claims that the restrictions are not inconsistent with competition policy as they 'relate only to commercial quantities of books' and the '*Speed to Market Initiative*, voluntarily entered into by publishers and retailers in 2012, ensures speed of supply of commercial quantities of titles into the Australian market' (DR sub, page 2).

However, the Panel considers that, even where personal use exceptions currently exist, there are potential benefits from removing remaining restrictions. As the ACCC says:

> … own-use exemptions benefit Australian consumers but may create an uneven playing field for Australian businesses (including small businesses) that are not able to parallel import on a commercial scale. (sub 1, page 62)

The report commissioned by the New Zealand Ministry of Economic Development by Deloitte Access Economics has also argued:

> … even in markets where internet commerce is widespread, individual consumers who are purchasing for individual use from foreign parallel import suppliers are likely to face higher transaction costs (such as search costs, transport and delivery costs, delays and so

234 The Australian Government response to the PC's Automotive Manufacturing Industry report was that the importation of second-hand vehicles will be thoroughly considered in the 2014 Review of the Motor Vehicle Standards Act 1989.

> on), than domestic retailers, who have a comparative advantage in search, transportation and delivery and arbitrage activities. In other words, even where personal use exceptions mitigate some of the adverse welfare effects of parallel import restrictions, prices would be lower still if the restrictions were removed completely.[235]

Others argue that, where restrictions remain, they serve sound policy objectives. For example, the Australian Screen Association says:

> Importantly, the restriction on parallel importation of copyright material exists to serve the geographical licensing arrangements that must exist in order to enforce exclusive rights of copyright holders. (DR sub, page 4)

In the context of parallel import restrictions on books, it is argued that the restrictions must be kept in place to maintain a viable local book and publishing industry.[236]

In 2012, Deloitte Access Economics also noted that removing parallel import restrictions on books in New Zealand in 1998 'had little impact on overall creative effort in the New Zealand book industry' — the number of new New Zealand book titles published annually remained fairly steady between 2005 and 2008, and that the share of authors in overall employment increased following the changes.[237]

The PC report, *Restrictions on the Parallel Importation of Books,* also concluded:

> … while removal of the PIRs [parallel import restrictions] should see an increase in imported books where these represent better value, it is probable that most Australian publishers, including the major publishing houses, would generally adapt to the new regime, that Australian stories and content will continue to be demanded and that talented and marketable Australian authors would continue to be widely published.[238]

Some submitters argue that removing parallel import restrictions will not result in lower prices for consumers. The Federal Chamber of Automotive Industries states that Australia has one of the most competitive new car markets in the world and removing parallel import restrictions on second-hand vehicles would not lower prices for motor vehicles (DR sub, pages 1 and 11).[239] Queensland Writers Centre also claims, 'it is not certain that removing parallel importation restrictions would result in cheaper books' (DR sub, page 3).

Reviews consistently conclude that removing the parallel import restrictions will result in lower prices for consumers (see Box 10.20). For example, the PC's report on parallel imports of books concluded that parallel import restrictions place upward pressure on book prices in Australia and reform of the current arrangements is necessary to place downward pressure on book prices.[240]

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235 Deloitte Access Economics 2012, *The Costs and Benefits of Preventing Parallel Imports into New Zealand*, New Zealand Ministry of Economic Development, Wellington, page 14.

236 See, for example: Hachette Australia, DR sub, page 4; Harlequin Enterprises (Australia) Pty Ltd, DR sub, page 3; HarperCollins Publishers Australia, DR sub, page 6; Anthony Holden, DR sub, page 1; Law Council of Australia — SME Committee, DR sub, page 8; Queensland Writers Centre, DR sub, page 3; Spinifex Press, DR sub, page 3; and Text Publishing Company, DR sub, page 26.

237 Deloitte Access Economics 2012, *The Costs and Benefits of Preventing Parallel Imports into New Zealand*, New Zealand Ministry of Economic Development, Wellington, pages 24-25 and page 6.

238 Productivity Commission 2009*, Restrictions on the Parallel Importation of Books*, Research Report, Canberra, page XXIII.

239 See also Ford Australia, DR sub, page 10.

240 Productivity Commission 2009*, Restrictions on the Parallel Importation of Books*, Research Report, Canberra, page XIV.

The ACCC also reports that, although the effects of parallel import competition on the price of sound recordings and computer software (following the removal of the restrictions) have not been formally reviewed, periodic price surveys conducted by the ACCC up to the early 2000s suggest that the difference between Australian and overseas prices of sound recordings narrowed considerably after the importation provisions were repealed.[241]

Some submitters raise concerns about removing parallel import restrictions on second-hand passenger vehicles into Australia on the grounds of health and safety. They also suggest that an increased supply of second-hand vehicles would have a detrimental impact on the environment. For example, Ford Australia argues that Australia should continue to focus on encouraging new vehicle ownership as:

> … modern vehicles are demonstrably safer and more environmentally friendly. This is in stark contrast to allowing greater market access to the importation of questionable, secondhand 'Grey' vehicles that have been cast off by other advanced economies. (DR sub, page 7)

The Federal Chamber of Automotive Industries states, 'the importation of second hand vehicles is inconsistent with government policy objectives in other areas such as road safety and the environment' (sub, page 3).

However, the PC report on automotive manufacturing concluded that, provided the relaxation of restrictions on second-hand vehicle importation was designed to favour the increased supply of late-model used vehicles, it could lower average vehicle fleet age and improve average vehicle fleet safety and emission standards. The PC also considered that average vehicle standards could improve in the new vehicle market if the additional source of competition encouraged vehicle manufacturers and importers to improve their product specifications.[242]

Some submitters argue that the concerns about health and safety and environmental impacts could be addressed through regulatory and compliance frameworks. For example, the Australian Imported Motor Vehicle Industry Association considers that:

> All concerns (such as health & safety, and impact to the environment) relating to the relaxing of these laws can be easily addressed through regulatory and compliance framework and consumer education campaigns *(these have been proven and tested for the past 25 years in countries such as NZ)*. (DR sub, page 3)

RAWS Association supports the removal of parallel import restrictions but with:

> … the use of standards to protect the consumer and ensure the quality of imported vehicles, new and used. The Association generally supports harmonisation with international standards and in the interim would recommend the recognition of International Vehicle Safety and Environmental Standards from jurisdictions that equal or exceed the current domestic requirements. (DR sub, page 2)

The Federal Chamber of Automotive Industries argues that, when considering removing parallel import restrictions on second-hand cars it is important to be aware that Australia's climatic and environmental conditions are significantly different to other substantial right-hand drive markets,

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241 Australian Competition and Consumer Commission 2009, ACCC submission to the Productivity Commission's study into Copyright Restrictions on the Parallel Importation of Books, Canberra, page viii.

242 Productivity Commission 2014, *Australia's Automotive Manufacturing Industry, Inquiry Report,* Canberra, pages 160-161.

such as the United Kingdom and Japan, and such differences 'necessitate substantial engineering changes to motor vehicles imported into Australia to enable those motor vehicles to perform as intended' (DR sub, page 4).

The Federal Chamber of Automotive Industries also says it has:

> … serious reservations about the government's resourcing capacity to adequately police, at the time of importation and subsequently, the safety of used vehicles including compliance with the standards that applied when the vehicle was built and the continued compliance with such standards following any modifications or repair. (sub, page 3)

In line with these concerns, the restrictions on importing second-hand vehicles have largely been justified on the basis of consumer protection and road safety, as a way of ensuring that all vehicles meet minimum safety standards. However, they have also restricted the importation of used vehicles into Australia. As the PC's report on automotive manufacturing concluded, the benefits of relaxing import restrictions on second-hand vehicles are conditional on having an appropriate regulatory and compliance framework in place:

> Provided relaxing the import restrictions were undertaken within an appropriate regulatory standards and compliance framework, net benefits would arise through lower prices and/or improved product specification (vehicle features) as well as increased product choice and availability for vehicle buyers, including consumers, businesses and government fleet buyers.[243]

In New Zealand, to be registered for road use, second-hand vehicles entering the country for the first time must pass:

- border inspection (checks for vehicle and importer identity, odometer reading, and any obvious defects or damage);[244]
- biosecurity and Customs clearance (vehicles are denied entry if they have missing or fraudulent odometers); and
- entry certification (to demonstrate compliance with applicable New Zealand standards). [245]

The Department of Infrastructure and Regional Development is currently reviewing the *Motor Vehicle Standards Act 1989*. The review is looking for ways to reduce regulatory burdens imposed by the Act and improve its safety and environmental provisions.[246] Commenting on the Motor Vehicle Standards Act, the Department of Infrastructure and Regional Development states that it:

> … sets uniform minimum safety and environmental standards for all road vehicles entering the Australian market, including those that are imported. The Act restricts parallel or other imports of vehicles which are unable to meet these standards. (DR sub, page 7)

243 Ibid., page 160.

244 NZ Transport Agency, The border inspection process, NZ Transport Authority, Wellington, viewed 9 February 2015 http://vehicleinspection.nzta.govt.nz/virms/border-inspection/introduction/the-border-inspection-process#heading3-for-tab1.

245 Productivity Commission 2014, *Australia's Automotive Manufacturing Industry,* Canberra, page 158.

246 Department of Infrastructure and Regional Development, 2014 Review of the *Motor Vehicle Standards Act 1989*, Canberra.

On recommending the progressive relaxation of restrictions on the importation of second-hand vehicles, the PC said that the new regulatory arrangements should be:

- developed in accordance with the outcomes of the review of the Motor Vehicle Standards Act; and
- preceded by a regulatory compliance framework that includes measures to provide appropriate levels of community safety, environmental performance and consumer protection.[247]

The PC also recommended that relaxing restrictions on importing second-hand vehicles should begin with vehicles under five years old (since the date of manufacture). It considered that the relatively newer second-hand vehicles would be least likely to pose safety, environmental and consumer protection concerns. The PC states that second-hand imports should also be limited to vehicles manufactured in countries with vehicle design standards that are consistent with those recognised by Australia. In addition, the PC recommended accelerated harmonisation of Australian Design Rules with relevant standards applying internationally (see Box 10.21).

Other concerns relating to parallel imports include:

- counterfeits being mixed with parallel imports;
- consumer protection concerns where the packaging of the local and imported goods are similar, but there is a difference in quality or performance; and
- impacts on local distributors (such as warranty issues and recalled products). For example, consumers of parallel imports may seek a repair or replacement under warranty from the licensed distributor in Australia.[248]

Australian Food and Grocery Council provides some examples:

> … chewing gum and confectionery products from global brands that have been parallel imported require very close label scrutiny to identify that the product is not that of the Australian brand owner, and yet it is the Australian brand owner that must carry the costs of call centre contacts and product replacement (with Australian brand product) to protect brand reputation. There is also little practical recourse to global funding arrangements to recompense these costs because the exporting brand owner is often either unaware or not the direct seller of the parallel imported product. (DR sub, page 9)

Australian Industry Group also notes:

> The authorised distributor is responsible for marketing and warranty expenses, while the parallel importer does not need to cover these costs and so can undercut on price. On occasion, parallel importers can get caught out as they can end up buying counterfeit product. (DR sub, page 9)

Parallel imports may be confused with counterfeit goods — an issue most likely to occur in easily replicable goods, such as clothing. However, issues around counterfeiting can be addressed directly

247 Productivity Commission 2014, *Australia's Automotive Manufacturing Industry*, Canberra, page 32.

248 See also: Australian Chamber of Commerce and Industry, sub, page 20; Australian Food and Grocery Council, sub, page 22; Australia Industry Group, DR sub, page 9; Brewers Association of Australia and New Zealand Inc, sub, pages 4-5; and Federal Chamber of Automotive Industries, DR sub, page 8 and attached report, Pegasus Economics 2014, *Implications of Parallel Imports of Passenger Motor Vehicles*.

by regulation rather than by restricting parallel imports and shielding local suppliers from international competition.

eBay notes that it currently has measures in place to remove counterfeit products so as to safeguard consumers. Also, eBay states that it works with law enforcement agencies to ensure appropriate safeguards are monitored, reported and enacted (DR sub, page 12).

Some submitters note that they service or repair products they did not sell because they do not want to risk compromising the reputation of their product or brand. Ford Australia says:

> … there exists the potential for significant reputation damage to brands and dealers operating legitimately in Australia from consumers who personally import new vehicles not sold in Australia but expect them to service and repair these vehicles. A lack of replacement parts, suitable diagnostic equipment, specialised tools and trained technicians may lead to significant dissatisfaction when consumers have the expectation that their vehicle will be maintained and supported by the dealers and brand of their vehicle operating in Australia. (DR sub, pages 10-11)[249]

Consumer education and information disclosure (together with appropriate regulatory and compliance frameworks) are important in ensuring that consumers are aware of the product they are buying, their warranty rights and their ability to seek a refund when purchasing products from overseas traders. The Australian Automotive Aftermarket Association argues:

> Many of the concerns regarding consumer safety, counterfeit products and inadequate enforcement can be addressed through regulation and consumer information. Discussion on this matter [parallel imports] is often misinformed and fuelled by exaggerated claims of the consequences. (DR sub, page 3)

The Federal Chamber of Automotive Industries has another view:

> Consumer education campaigns are far from pragmatic for a complex technical unit such as a motor vehicle as many of the necessary attributes are not identifiable from simple, or even complex, observations. Consumer expectations are built from the observation in the current Australian market which is supported by the authorised OEM [original equipment manufacturer] distributor. To suggest that the changing of the rules to allow parallel imports … would see the market respond and brands left undamaged, is fanciful. (DR sub, page 11)

In New Zealand, used vehicles for sale must display a Consumer Information Notice to assist buyers in making informed purchasing decisions. Imported used vehicles must display the year of first registration overseas, country of last registration before import and whether the vehicle was recorded 'damaged' at the time of importation.[250]

The Panel considers that many of the concerns raised in submissions around relaxing parallel import restrictions, including concerns about consumer safety, counterfeit products and inadequate enforcement, could be addressed directly through regulation and information.

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249 The Federal Chamber of Automotive Industries also argues that 'free riding' occurs, DR sub, page 8 and attached report, Pegasus Economics 2014, *Implications of Parallel Imports of Passenger Motor Vehicles*.

250 Consumer Affairs New Zealand, Consumer Information Notice, Consumer Affairs, Wellington, viewed 9 February 2015, www.consumeraffairs.govt.nz/for-business/compliance/selling-cars-motor-vehicles/mvt-consumer-information-notice.pdf/view. See also Productivity Commission 2014, *Australia's Automotive Manufacturing Industry*, Canberra, page 159.

Relaxing parallel import restrictions should deliver net benefits to the community, provided appropriate regulatory and compliance frameworks and consumer education programs are in place.

If consumers buy goods without realising that they are parallel imports, there is a concern that consumers could be misled and/or brands damaged. By way of illustration, Box 10.22 describes a dispute between ALDI and Nestlé Australia relating to parallel imports. The Panel expects that the market will respond to these concerns arising from removing restrictions on parallel imports, including through making consumers aware of what products they are buying. The threat of consumers becoming dissatisfied with particular products and/or brands is also likely to motivate international suppliers to rethink their regional arrangements.

Box 10.22: ALDI's imports of Nescafé coffee

In a 2005 notification to the ACCC, Nestlé Australia raised the issue of ALDI selling Nescafé branded instant coffee in its stores sourced from overseas suppliers.[251] ALDI had previously supplied the locally sourced Nescafé 'Blend 43', which was its highest selling instant coffee, but submitted that it resorted to import-sourcing as a result of uncompetitive local prices and supply difficulties.

The imported coffee did not have the same formulation and taste as instant coffee supplied by Nestlé Australia. Nestlé Australia submitted that consumers may be misled and/or may form negative views about Nestlé Australia's products as a result of drinking the imported coffee.

ALDI had taken steps, including in-store posters, shelf labels, and stickers on the coffee jars, to alert customers to the fact that the imported Nestlé 'Matinal' or 'Classic' blends were different to the locally sourced Nescafé 'Blend 43' product. ALDI also provided a satisfaction guarantee.

However, Nestlé Australia submitted that this disclosure was inadequate to address its concerns. It proposed to cease supply of all of its products to ALDI, unless ALDI made further disclosures as prescribed by Nestlé Australia and published corrective advertisements.

The ACCC concluded that ALDI's disclosure was adequate, noting that ALDI was selling genuine Nescafé products manufactured by a Nestlé subsidiary.

Having regard to internal Nestlé Australia documents it obtained, the ACCC concluded that a substantial purpose of Nestlé Australia's conduct was to lessen competition generated by ALDI's supply of imported Nescafé products, and lessen the likelihood of other supermarkets importing Nescafé products, both of which would place downward pressure on prices.

A number of submissions consider the remaining restrictions on parallel imports should be reviewed:

- The Law Council of Australia — IP Committee submits that, in light of several significant decisions by the courts, it has become difficult to advise clients on what is, or is not, a legitimate parallel import. It argues that the parallel importation of trade-marked goods should be comprehensively examined to determine the costs and benefits of permitting (or not permitting) parallel imports into Australia (sub, page 2).
- The Advisory Council on Intellectual Property also argues, 'if policy favours parallel importation, serious thought needs to be given to exactly how to make that policy work' in the context of trade marks. It suggests considering the approach found in New Zealand's Trade Marks Act (DR sub, pages 1 and 6).

251 Nestlé Australia Limited — ACCC Notification — N31488, 2 December 2005.

- The Australian Chamber of Commerce and Industry recommends reviewing the enforcement requirements associated with parallel imports (sub, pages 20-21).[252]

The Panel's view

Parallel import restrictions are similar to other import restrictions (such as tariffs) in that they benefit local producers by shielding them from international competition. They are effectively an implicit tax on Australian consumers and businesses. The Panel notes that the impact of changing technology means that these restrictions are more easily circumvented.

Removing parallel import restrictions would promote competition and potentially lower prices of many consumer goods, while concerns raised about parallel imports (such as consumer safety, counterfeit products and inadequate enforcement) could be addressed directly through regulatory and compliance frameworks and consumer education campaigns.

Implementation

Enforcing restrictions on parallel imports is the responsibility of the Australian Government.

On the basis that the PC has already reviewed parallel import restrictions on books and second-hand vehicles and concluded that removing such restrictions would be in the public interest, the Australian Government should, within six months of accepting the recommendation, announce that:

- parallel import restrictions on books will be repealed; and
- parallel import restrictions on second-hand passenger and light commercial vehicles will be progressively relaxed.

Transitional arrangements are important to ensure that affected individuals and businesses are given adequate notice before parallel import restrictions are removed. As the PC concluded, the immediate abolition of parallel import restrictions could impose significant adjustment costs on book producers.

Timeframes for removing parallel import restrictions on books and second-hand cars should be set based on the transitional arrangements recommended by the PC. These include that:

- repealing the parallel import restrictions on books takes effect three years after the policy change is announced; and
- progressively relaxing restrictions on the importation of second-hand vehicles commences no earlier than 2018, having been preceded by the introduction of a regulatory compliance framework that includes measures to ensure appropriate levels of community safety, environmental performance and consumer protection.

The Australian Government should also announce an independent review of all remaining provisions of the Copyright Act that restrict parallel imports, and of the parallel importation defence under the Trade Marks Act, to commence within six months of accepting the recommendation.

252 See also the Business Council of Australia, sub, Main Report, page 21.

Recommendation 13 — Parallel imports

Restrictions on parallel imports should be removed unless it can be shown that:

- the benefits of the restrictions to the community as a whole outweigh the costs ; and
- the objectives of the restrictions can only be achieved by restricting competition.

Consistent with the recommendations of recent Productivity Commission reviews, parallel import restrictions on books and second-hand cars should be removed, subject to transitional arrangements as recommended by the Productivity Commission.

Remaining provisions of the *Copyright Act 1968* that restrict parallel imports, and the parallel importation defence under the *Trade Marks Act 1995,* should be reviewed by an independent body, such as the Productivity Commission.

10.7 PHARMACY

Pharmacy[253] regulation has been the subject of numerous reports and reviews over the past 20 years, including the 2000 Wilkinson National Competition Policy Review of Pharmacy (required under NCP). It has also been examined by the PC[254] and, most recently, by the National Commission of Audit, which recommended 'opening up the pharmacy sector to competition, including through the deregulation of ownership and location rules'.[255] The effectiveness and efficiency of the pharmacy location rules was also reviewed in 2010 by Urbis Consultancy in its *Review of the Pharmacy Location Rules under the Fourth Community Pharmacy Agreement.*[256]

The Draft Report recommends, 'the pharmacy ownership and location rules should be removed in the long-term interests of consumers. They should be replaced with regulations to ensure access and quality of advice on pharmaceuticals that do not unduly restrict competition.'

The Review received some submissions supporting this recommendation and others opposing it. Some submissions also addressed the question of how governments should determine whether the current restrictions are justified.

The Panel recognises that some pharmacy regulation is justified to: uphold patient and community safety; ensure pharmacists provide consumers with appropriate information and advice about their medication; provide equitable access to medication, regardless of the patient's wealth or location; ensure accountability for appropriate standards and behaviour by pharmacists; and manage costs to patients and governments.

The policy objectives of the pharmacy ownership and location rules are outlined separately below, followed by a discussion drawing on stakeholder arguments about how they have applied in practice. The concluding section covers recent developments and recommendations, including transitional arrangements.

253 In this Report, 'pharmacy' refers to community pharmacy and does not include hospital pharmacy.

254 Productivity Commission 2005, Review of National Competition Policy Reforms, Report no. 33, Canberra.

255 Australian Government 2014, *Towards Responsible Government - The Report of the National Commission of Audit Phase One*, Canberra, page xlii.

256 Urbis Pty Limited 2010, *Review of the Pharmacy Location Rules under the Fourth Community Pharmacy Agreement*, Sydney.

Pharmacy ownership rules

State and territory legislation limits ownership of community pharmacies to pharmacists, with limited exceptions, such as for friendly societies with historical ownership of pharmacies. There are also limits in each State (but not the Territories) on how many pharmacies each pharmacist can own. These limits vary by State. The ownership rules do not prevent pharmacies owned by different pharmacists from operating under a common name and brand, such as Amcal or Terry White.

As the PC submission to the National Pharmacy Review noted, rationales given in support of the ownership restrictions include to:

- maintain ethical and professional standards in the provision of pharmacy services;
- provide a greater capacity to enforce professional standards; and
- promote equitable access to pharmacy services. [257]

Sitting alongside the ownership rules are state and territory regulations governing the licensing of pharmacists and pharmacy premises, and the advertising of medicines and poisons. The Panel makes no recommendations in relation to these other regulations, but nor does it suggest that they should be exempt from consideration as part of the new round of regulation reviews proposed at Recommendation 8. Arguably, these licensing requirements, together with measures such as codes of ethics enforced by Pharmacy Boards, undergird consumer confidence in pharmacy services meeting minimum quality and safety standards.

The Pharmacy Guild of Australia submits that pharmacies should be seen as agents providing services to consumers on behalf of government and that:

> … ownership rules encourage efficiency in the provision of community pharmacy services while ensuring that these services are provided to an appropriate quality standard. By contracting with independent owner-pharmacists, the Government preserves the strong efficiency incentives that exist in franchise relationships. Furthermore, by placing the pharmacist and his or her professional reputation at the centre of the distribution relationship, a position that the pharmacist stands to lose if quality standards are not met, the Government effectively 'raises the stakes' for poor quality performance. Owner-pharmacists therefore have an enhanced incentive to conduct themselves and their pharmacies ethically and professionally, and not risk loss of registration and, therefore, loss of value in the pharmacy.
>
> Additionally and importantly, the ownership rules limit concentration in the supply of dispensing services. (DR sub, page ix)

The Pharmaceutical Society of Australia also supports the pharmacy ownership rules:

> … limiting the controlling interest in the ownership of pharmacy businesses to pharmacists promotes patient safety and competent provision of high quality pharmacy services and helps maintain public confidence in those services; and limiting the number of pharmacy businesses that may be owned by a person or entity helps protect the public from market dominance or inappropriate market conduct. (sub, page 7)

257 Productivity Commission 1999, *Submission to the National Review of Pharmacy*, Canberra, page 31.

On the other hand, Chemist Warehouse and Ramsay Health Care submit that the ownership rules are redundant and ineffective:

> The societal engagement and relationship is with the dispensing and counselling pharmacist. The Australian public forges a bond of trust and respect with the chemist whom assists their pharmaceutical needs who in many cases (if not most) is not the store proprietor.
>
> We estimate Guild membership today is around 2000 with about 5400 pharmacies in the country. There are about 28,000 pharmacists practising in the country, which suggests a very high proportion of customer interactions are with pharmacists working for someone else. (Chemist Warehouse, DR sub, pages 2-3)
>
> …for many years enterprising pharmacists, families of pharmacists (i.e. spouses and children), and pharmacist business partners have formed operating alliances that combine their personal holdings under State laws, creating loose conglomerates in which each member exercises nominal supervision over their personal pharmacy holdings (and therefore everyone remains within the legislative boundaries).
>
> In effect, supposedly professional practices are operating as commercial businesses, using the rules to maximise returns and profits rather than give consumers the best possible professional service.
>
> In our view, if these restrictions are so easily got around by entrepreneurial pharmacists acting more like business tycoons they are pointless, make a mockery of ownership rules excluding non-pharmacists, and should be removed. (Ramsay Health Care, DR sub, page 6)

No analogous ownership rules apply to GP practices, and the Panel is unaware of any evidence that this absence of regulation compromises high professional standards of care and accountability in the provision of primary medical services.

The Panel also notes that, in every State and the Northern Territory, certain companies, viz., Friendly Society Pharmacy companies, have historically been allowed to own pharmacies and continue to do so. The Panel sees no reason to believe, nor does any submitter suggest, that these companies provide pharmacy services less ethically or professionally than do owner-pharmacists.

Pharmacy location rules

The Australian Government's National Medicines Policy establishes objectives against which medicines are provided and regulations set. This is a co-operative endeavour to bring about better health outcomes for all Australians, focusing especially on access to and quality use of medicines.[258]

The National Medicines Policy has the following central objectives:

- timely access to medicines that Australians need, at a cost individuals and the community can afford;
- medicines meeting appropriate standards of quality, safety and efficacy;
- quality use of medicines; and
- maintaining a responsible and viable medicines industry.[259]

258 Australian Government Department of Health 2014, *Post–implementation Review — Amendments to the National Health Act 1953 to extend the Pharmacy Location Rules to 30 June 2015,* Canberra, page 5.

Since 1990, the remuneration pharmacists receive for dispensing Pharmaceutical Benefits Scheme (PBS) medicines on behalf of government, and regulations governing the location of pharmacies, have been negotiated in a series of Australian Community Pharmacy Agreements between the Australian Government and the Pharmacy Guild of Australia. These Agreements also govern remuneration for in-pharmacy programs and services as well as community service obligation (CSO) arrangements with pharmacy wholesalers.

The pharmacy location rules specified in the current Australian Community Pharmacy Agreement require a pharmacist to obtain approval from the Australian Government to open a new pharmacy or to move or expand an existing pharmacy.[260] Box 10.23 provides a brief history of the location rules.

Box 10.23: Australian Community Pharmacy Agreements and location rules — a brief history[261]

The first Australian Community Pharmacy Agreement was signed in 1990. Since then, there have been five agreements, each lasting five years. At the time of the first Agreement (1990-1995), there was concern that there were too many pharmacies on a population basis and that they were unevenly distributed, with clustering in some urban areas but a significantly lower pharmacy-to-population ratio in rural and remote areas.

The first Agreement set out a new remuneration framework and rules to address these concerns. The rules primarily focused on relocating, closing and amalgamating existing pharmacies. It also specified requirements to be met before additional pharmacies would be approved, including that the proposed relocated pharmacy be at least 5km from the nearest approved pharmacy and satisfy an assessment of community need.

The second Agreement (1995-2000) maintained pharmacy location restrictions, both in respect of assessing community need before establishing a new pharmacy and satisfying primarily distance-based criteria for relocated pharmacies.

The third Agreement (2000-2005) relaxed the location requirements for both new and relocated pharmacy approvals, particularly in rural and remote areas. It also introduced financial incentives to establish new pharmacies in rural locations.

New rules under the fourth Agreement (2006-2010) facilitated pharmacy relocation into some medical and shopping centres as well as into single pharmacy towns and high-growth, single-pharmacy urban areas.

259 Australian Government Department of Health 2014, *Post–implementation Review — Amendments to the National Health Act 1953 to extend the Pharmacy Location Rules to 30 June 2015,* Canberra, page 5.

260 Australian Government Department of Health 2014, *Pharmacy Locations Rules Applicant's Handbook,* Canberra.

261 Australian Government Department of Health 2014, *Post–implementation Review — Amendments to the National Health Act 1953 to extend the Pharmacy Location Rules to 30 June 2015,* Canberra, pages 7 — 8.

Box 10.23: Australian Community Pharmacy Agreements and location rules — a brief history *(continued)*

The fifth Agreement (2010-2015) retained the location rules from the fourth Agreement, pending the outcome of an independent review of the Rules (the Urbis Review).[262]

The fifth Agreement is due to expire on 1 July 2015 and to be replaced by a sixth Agreement, the terms of which are currently subject to negotiation.

The complexity of the pharmacy location rules has led the Australian Government Department of Health to prepare a 56-page Handbook, which the Department issues to applicants to convey the full requirements of the location rules.[263]

The Pharmacy Location Rules include provisions for establishing a new pharmacy or relocating an existing pharmacy. These include four rules for existing pharmacists wishing to expand or contract an existing pharmacy, relocate a pharmacy up to 1km by straight line, or within the same facility (as defined by the location rules) or within the same town, and seven rules for pharmacists wishing to open a new pharmacy. Generally, a new pharmacy may not open within a certain distance of an existing pharmacy (usually either 1.5 or 10 kilometres depending on the location), with some exceptions, including for pharmacies located within shopping centres, large medical centres or private hospitals.

These rules apply differently depending on the distance to the nearest existing pharmacy, the number of supermarkets in a town, and/or the number of medical practitioners in the area.

A pharmacy must also not be located within, or directly accessible from, a supermarket, where a supermarket is defined as 'a retail store or market, the primary business of which is the sale of a range of food, beverages, groceries and other domestic goods'. This referenced range of goods means that it is the type of store in which a person could do their weekly shopping from fresh food (for example, dairy, meat, bread), pantry items, cleaning products, personal care items and other household staples (for example, laundry pegs, plastic food wrap).

This definition prevents pharmacists from opening stores within or adjoining a supermarket where there is direct access to the pharmacy from within the supermarket, but it does not prevent pharmacists from expanding their ranges to include many of the products sold by supermarkets. Barbara Packer submits that her Pharmacy in Stafford, Brisbane is also an IGA X-press store that seeks '… to give our customers the convenience they need of buying pharmaceutical products, prescriptions and convenience groceries before the other larger supermarkets are open' (DR sub, page 1). In this example, customers are able to access the professional assistance of a qualified pharmacist and to have medicines dispensed by a qualified pharmacist while these functions are co-located with a grocery retailer. Commenting on this example, the Pharmacy Guild said, 'We don't support pharmacies in supermarkets but this is different because the supermarket is owned by a pharmacist not a corporate entity…We don't think that is double standards'.[264]

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262 Urbis Pty Limited 2010, *Review of the Pharmacy Location Rules under the Fourth Community Pharmacy Agreement*, Sydney.

263 Australian Government Department of Health 2014, *Pharmacy Locations Rules Applicant's Handbook,* Canberra.

264 Dunlevy, S 5 February 2015, A chemist can own a supermarket, but supermarkets can't own a pharmacy, news.com.au, viewed 19 February 2015 www.news.com.au/finance/business/a-chemist-can-own-a-supermarket-but-supermarkets-cant-own-a-pharmacy/story-fnkgdftz-1227216267630.

The location rules and their rationale

Submissions from the Pharmacy Guild, Symbion, Australian Friendly Societies Pharmacies Association and the Pharmaceutical Society of Australia, as well as a number of individual pharmacists and small business representatives, support the current arrangements. They argue that the pharmacy location rules are achieving better outcomes than could be achieved under a different regulatory regime. For example, the Pharmaceutical Society of Australia submits:

> The location provisions facilitate access to pharmacies by all segments of the population. (sub, page 4)

The website for the current (fifth) Community Pharmacy Agreement states, 'To ensure that all Australians have access to PBS medicines, particularly in rural and remote areas, Pharmacy Location Rules (the Rules) have been a feature of all five Community Pharmacy Agreements [since 1990].'[265]

The Pharmacy Guild also commissioned a consultancy report, which it says:

> ... demonstrates that community pharmacy provides an enviably high level of access not only to metropolitan consumers but also to consumers in regional areas, to older consumers and to consumers in areas of socio-economic disadvantage. (DR sub, page iv)

However, Chemist Warehouse submits that, far from ensuring access to pharmacy services, the location rules reduce the ubiquity of pharmacies by preventing Chemist Warehouse members and other pharmacists from opening new outlets wherever they choose (DR sub, page 2). Chemist Warehouse also submits that evidence from European countries, where similar pharmacy location rules have been reformed, shows that pharmacies, particularly those in regional locations, are unlikely to close if regulation is relaxed to allow competitive entry of new pharmacies (DR sub, page 4).

Pharmacy location rules restrict competition in pharmacy services. The Panel received several submissions complaining that the location rules were responsible, at least in part, for a proposed medical practice at Ingham in Queensland not proceeding.[266] These submitters say that the inclusion of a pharmacy was integral to the proposal's commercial viability but that, due to an incumbent pharmacist relocating one of two existing pharmacies within 500 metres of the proposed medical practice, the application to open a new pharmacy as part of the medical practice was denied.

The Panel cannot adjudicate the facts of this particular case but accepts that the location rules limit the options available to those wishing to open a new pharmacy, or to move an existing pharmacy, and thereby restrict competition.

There are no analogous location rules for GP practices. The Pharmacy Guild submits:

> The absence of regulations for GPs has clearly not enabled equitable access to health care services for all Australians, while the lack of success of different incentive programs in encouraging medical professionals to move to regional, rural and remote Australia suggests that devising effective mechanisms to achieve this objective is problematic. (DR sub, page 22)

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265 5th Community Pharmacy Agreement website 2015, Department of Health and Pharmacy Guild of Australia, viewed 9 February 2015, http://5cpa.com.au/about-5cpa/.

266 See, for example: Sue Tack, DR sub; Ingham Family Medical Practice, DR sub; and Madonna Simmons, DR sub.

Although there are challenges in ensuring access to GP services in rural Australia, possible alternative means of addressing those challenges exist that do not restrict competition. The Panel sets out some possible alternatives below.

Recent developments relevant to pharmacy ownership and location rules

The Pharmacy Guild submits that pharmacy ownership and location regulations were reviewed in 2000 under NCP and that any further review is therefore unnecessary (sub, page 6). However, the Panel notes that considerable time has elapsed since then, and there have been a number of significant developments in the meantime.

For example, the introduction, and subsequent expansion, of Price Disclosure arrangements for PBS medicines has lowered the prices the Australian Government pays for key medicines closer to those actually paid by community pharmacies, with a significant downward impact on the incomes of community pharmacies. Changes were also made to the location rules as part of the fifth Australian Community Pharmacy Agreement (2010-2015) following the Urbis Review.[267]

In 2011, the location rules were amended and, through a targeted easing of existing regulations, simplified. Relocating an existing pharmacy was no longer required in order to establish a pharmacy in shopping centres, large medical centres, private hospitals and one-pharmacy towns. This made it easier and cheaper to establish a pharmacy in such circumstances and provided greater flexibility to respond to community need.[268]

In October 2014, the Australian Government Department of Health completed a post-implementation review of the 2010 decision to renew the pharmacy location rules, since a Regulation Impact Statement was not prepared at the decision-making stage (see Box 10.24).[269]

Box 10.24: Post-implementation review of the 2010 pharmacy location rules

In October 2014, the Australian Government Department of Health completed a Post-implementation review of the 2010 decision to renew the pharmacy location rules.[270]

The post-implementation review notes that the basis of the decision to extend the location rules 'was to ensure Australia continues to maintain a viable and sustainable network of community pharmacies approved to supply PBS medicines and pharmacy health services funded under the Fifth Agreement' (page 4).

The Review concluded that the policy objectives of the location rules are consistent with the broad objectives of national health policy, in particular, the National Medicines Policy, which has timely access to medicines as one of its four key pillars.

267 Urbis Pty Limited 2010, *Review of the Pharmacy Location Rules under the Fourth Community Pharmacy Agreement.*

268 Australian Government Department of Health 2014, *Post–implementation Review — Amendments to the National Health Act 1953 to extend the Pharmacy Location Rules to 30 June 2015,* Canberra, page 11.

269 Australian Government Department of Health 2014, *Post–implementation Review — Amendments to the National Health Act 1953 to extend the Pharmacy Location Rules to 30 June 2015,* Canberra.

270 Ibid.

Box 10.24: Post-implementation review of the 2010 pharmacy location rules *(continued)*

The Review examined three possible alternative approaches that might be adopted in place of the location rules. These were:

- targeted easing of the existing rules;
- remuneration-based incentives and disincentives; and
- complete deregulation of pharmacy location decisions.

The Review listed a fourth alternative approach but did not examine it in detail, viz., the Australian Government directly tendering for the delivery of PBS medicines and pharmacy services.

Taking into account the costs and benefits of the alternatives considered, the Review concluded that:

> ... while there remains a net benefit to consumers and pharmacy owners from the retention of the Rules from the Fourth Agreement, additional benefits can be achieved. These benefits, particularly in relation to consumers and in the government administration of the Rules, could be realised through the targeted easing of the Rules … (page 30)
>
> Under this option, the restrictions of the Rules would be further relaxed to provide greater opportunity to establish new pharmacies. Such amendments would address emerging or ongoing issues and provide greater flexibility to respond to community need for access to PBS medicines. They would also take into account the changing business environment and health care policy priorities ... (page 22)

In addition to these developments, different business models have emerged in the pharmacy sector since 2000, including specialist and online pharmacy models and discount groups that operate on a larger scale, such as Chemist Warehouse.

Increasingly, pharmacy business models involve selling a much wider range of products, extending beyond health and personal care-related products to include gifts and home consumables. The rationale for pharmacy location rules relates only to their role in dispensing prescription (particularly PBS) medications. There are no location rules governing the sale of non-prescription medications, let alone gifts and home consumables.

There is also a clearer understanding of how well other primary healthcare providers operate without anti-competitive location and ownership restrictions. For example, ownership of medical practices is not limited to GPs, nor are GP practices prevented from locating in close proximity to one another.

Stakeholders also point to the experience of partial deregulation in other jurisdictions as providing new evidence about the merits of location and ownership rules.

Chemist Warehouse cites an Organisation for Economic Co-operation and Development (OECD) review that assessed the impacts on competition of pharmacy sector deregulation in several European countries. Chemist Warehouse submits that the OECD review[271] found:

271 Vogler, S 2014, *Competition Issues in the Distribution of Pharmaceuticals*, OECD, Paris, 2014, pages 7, 9.

> - Accessibility of medicines to consumers increased due to the establishment of new pharmacies and the extension of opening hours.
> - Price decreases were observed in many countries — including a dramatic 42 per cent decrease in retail pharmacy prices in Denmark. No country reported increases. (sub, page 6)

However, the Pharmacy Guild submits that this summary seriously misrepresents the conclusions of the OECD Review (sub, pages 19-20).

The Panel considers that evidence of the outcomes of partial deregulation in overseas jurisdictions provides useful guidance for policymakers about the gains that may be available.

Alternatives to current ownership and location rules

The current ownership and location regulations impose costs on consumers directly and indirectly by erecting barriers to entry to the market for dispensing PBS medicines. The Post-implementation Review also noted the following 'cost impacts' arising from the location rules:

- possibly reduced geographical access to pharmacies in urban areas;
- the potential for higher cost non-PBS medicines, reflected in higher profits to existing pharmacists; and
- an administrative impost for pharmacists who want to relocate or expand.[272]

In their submissions to the Draft Report, the Consumers Health Forum, National Seniors Australia, Chemist Warehouse, and Professional Pharmacists Australia call for changes to the ownership and location rules:

> The end result of limiting competition and guaranteeing income has been to create a significant problem in community pharmacy that is leading to poor health outcomes, a stifling of innovation and the taxpayer not receiving value for money. (Professional Pharmacists Australia)[273]

The Northern Territory Government also supports removing the pharmacy ownership and location rules (DR sub, page 5).

A range of other options are available to governments seeking to secure the access, community service and other objectives of the present ownership and location rules.

The Panel notes that supply of medicines in remote areas is already partly conducted through channels other than retail pharmacies. For example, under the Remote Area Aboriginal Health Services Programme, clients of approved remote area Aboriginal Health Services receive PBS medicines directly from the Aboriginal Health Services at the point of consultation, without the need for a normal prescription form — and without charge.[274]

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272 Australian Government Department of Health 2014, *Post–implementation Review — Amendments to the National Health Act 1953 to extend the Pharmacy Location Rules to 30 June 2015,* Canberra, page 29.

273 Professional Pharmacists Australia provided a confidential submission to the Review but gave permission for this extract to be quoted in this Report.

274 Australian Government Department of Health, Aboriginal Health Services and the Pharmaceutical Benefits Scheme (PBS), Canberra, Department of Health, viewed 3 February 2015 www.health.gov.au/internet/main/publishing.nsf/Content/health-pbs-indigenous.

It is also open to government to secure its policy objectives by imposing obligations directly on pharmacies as a condition of their licensing and/or remuneration, noting that the Australian Community Pharmacy Agreement already imposes certain obligations for services that pharmacists provide.

Another alternative model is funding a CSO to achieve specific policy objectives. Such a mechanism currently operates in pharmaceutical wholesaling (see Box 10.25). The Australian Government uses the CSO Funding Pool to directly target its policy outcome of timely access to the full range of medicines for all Australians. Notably, it does so without imposing ownership or location restrictions on pharmaceutical wholesalers. Further, the Australian Community Pharmacy Agreement also includes provisions to fund 'Specific Programs' including for medication management, rural support, Aboriginal and Torres Strait Islander access, and research and development.[275]

Box 10.25: CSO Funding Pool for pharmaceutical wholesalers[276]

The aim of the CSO Funding Pool is to ensure that all Australians have access to the full range of PBS medicines, via their community pharmacy, regardless of where they live and usually within 24 hours.

The CSO Funding Pool financially supports pharmaceutical wholesalers to supply the full range of PBS medicines to pharmacies across Australia, regardless of pharmacy location and the relative cost of supply.

Under these arrangements, payments are provided directly to eligible wholesalers (known as CSO Distributors) who supply the full range of PBS medicines to any pharmacy, usually within 24 hours, and that meet compliance requirements and service standards. These payments are over and above those made directly to pharmacists to cover the cost of supply from the wholesaler.

Community service objectives in the *retailing* of pharmaceuticals could be recognised and funded via a CSO pool in a similar way, particularly for dispensing PBS medicines and providing other in-pharmacy services in remote and rural locations. This could also occur through a tender arrangement.

As in other contexts, the use of trials and/or a staged approach to easing and replacing the existing rules would be beneficial in pharmacy regulation. This gives existing providers time to adjust their business models and to trial and test for unintended outcomes (both positive and negative).

The Government's own Post-implementation Review recommends a targeted easing of the location rules. The Panel agrees that this would increase competition to the benefit of consumers, while relaxing the rules gradually would address any concerns about their removal at a single stroke.

Chemist Warehouse proposes possible measures to address the perceived risks of removing the location and ownership rules. These include: imposing a 'fit and proper person test' for pharmacy ownership; establishing a licence fee to address concerns about the risk of predatory entry to 'clear the market'; and retaining a 1-2 kilometre limit on moving an existing pharmacy to address concerns that pharmacies would move away from rural areas to cities (DR sub, page 7).

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275 Fifth Community Pharmacy Agreement, pages 20-21 (PDF accessible from Australian Community Pharmacy Agreement website).

276 Department of Health 2014, *Community Service Obligation for Pharmaceutical Wholesalers*, Commonwealth of Australia, Canberra, viewed 9 February 2015, www.health.gov.au/internet/main/publishing.nsf/Content/community-service-obligation-funding-pool.

Ramsay Health Care proposes that, to reassure the Australian public that dispensing medicines and providing other professional pharmacy services is motivated first and foremost by the best healthcare interests of Australians (rather than commercial or other objectives), Wilkinson's complementary recommendation 4 be adopted. This recommendation proposed establishing a statutory offence, with appropriate and substantial penalties for individuals and corporations, of improper and inappropriate interference with a pharmacist in the course of his or her practice (DR sub, page 9).

The Panel's view

The Panel accepts that, given the key role of pharmacy in primary healthcare, ongoing regulation of pharmacy is justified and needs to remain in place. However, current regulations preventing pharmacists from choosing freely where to locate their pharmacies, and limiting ownership to pharmacists and friendly societies, impose costs on consumers.

Further, developments in Australia strengthen the case for repealing the present arrangements and replacing them with new regulations that better serve consumers and are less harmful to competition. There is also evidence of overseas experience to draw upon.

Recent developments include the rise of discount pharmacy groups and online prescriptions as well as the accumulation of evidence about the effects of deregulation in other Australian health sectors, in particular, general practice medicine. Further changes to the location rules would represent a continuation of steps already taken towards relaxation. This would be consistent with the findings of the Post-implementation Review that further targeted easing of the rules could deliver additional benefits.

Accordingly, the Panel considers that present restrictions on ownership and location are unnecessary to uphold the quality of advice and care provided to patients. Further, it is clear that such restrictions limit both consumers' ability to choose where to obtain pharmacy products and services, and providers' ability to meet consumers' preferences.

The Panel also notes that the current Fifth Community Pharmacy Agreement expires on 1 July 2015, and negotiations for the next agreement will be well under way when this Final Report is delivered to the Australian Government. These negotiations provide an opportunity for the Government to implement a further targeted relaxation of the location rules, as part of a transition to their eventual removal.

If changes during the initial years of the new agreement prove too precipitate, there should be provision for a mid-term review to incorporate easing of the rules during the life of the next agreement.

Competition between pharmacies is not sufficient on its own to meet the access objectives of the National Medicines Policy, most especially in rural and remote areas. The supply of medicines in remote areas is already partly conducted through channels other than retail pharmacies, including through Aboriginal Health Services. That is unlikely to change even if the current pharmacy location and ownership rules are reformed.

However, a range of alternatives to the current pharmacy ownership and location rules exist to secure access to medicines for all Australians that are less restrictive of competition among pharmacy service providers. In particular, tendering for the provision of pharmacy services in underserved locations and/or funding through a community service obligation should be considered.

Since access to medicines is less likely to be an issue in urban settings, the rules for urban pharmacies could be eased rapidly at the same time that rural location mechanisms are established.

Implementation

Reform of pharmacy ownership and location rules will involve the Australian Government and state and territory governments.

Pharmacy location rules arise from the Australian Community Pharmacy Agreement between the Australian Government and the Pharmacy Guild. Accordingly, the negotiations for and

implementation of the next Australian Community Pharmacy Agreement, due to commence in July 2015, provide the opportunity to introduce transitional arrangements towards the eventual removal of location rules. Such transitional arrangements may explicitly recognise CSO aspects of pharmacy.

Pharmacy ownership rules arise from state and territory legislation. The Panel considers that, within two years of Governments accepting the recommendation, these rules should be removed and replaced with regulation that achieves the desired policy outcomes without unduly restricting competition. It is likely that transitional arrangements would be an integral part of any such change.

If alternative mechanisms are introduced for underserved locations, the rules that effectively apply only to urban pharmacies could be eased rapidly at the same time that mechanisms to ensure access in rural locations are established.

Recommendation 14 — Pharmacy

The Panel considers that current restrictions on ownership and location of pharmacies are not needed to ensure the quality of advice and care provided to patients. Such restrictions limit the ability of consumers to choose where to obtain pharmacy products and services, and the ability of providers to meet consumers' preferences.

The Panel considers that the pharmacy ownership and location rules should be removed in the long-term interests of consumers. They should be replaced with regulations to ensure access to medicines and quality of advice regarding their use that do not unduly restrict competition.

Negotiations on the next Community Pharmacy Agreement offer an opportunity for the Australian Government to implement a further targeted relaxation of the location rules, as part of a transition towards their eventual removal. If changes during the initial years of the new agreement prove too precipitate, there should be provision for a mid-term review to incorporate easing of the location rules later in the life of the next Community Pharmacy Agreement.

A range of alternative mechanisms exist to secure access to medicines for all Australians that are less restrictive of competition among pharmacy service services providers. In particular, tendering for the provision of pharmacy services in underserved locations and/or funding through a community service obligation should be considered. The rules targeted at pharmacies in urban areas should continue to be eased at the same time that alternative mechanisms are established to address specific issues concerning access to pharmacies in rural locations.

11 Infrastructure Markets

The energy, water and transport sectors provide critical inputs to the Australian economy. Applying competition policy to these infrastructure markets significantly affects the choices available to and prices paid by consumers for almost all goods and services consumed in Australia. By helping to reduce the cost of infrastructure services, the National Competition Policy (NCP) reforms increased choice across the economy.

These reforms remain important. The Business Council of Australia nominates removing cabotage restrictions, finalising energy reform, recommitting to water reform and starting a process to introduce cost-reflective road pricing as priorities (DR sub, page 7).

Twenty years ago, infrastructure markets were characterised by vertically integrated, government-owned monopolies that were not responsive to changes in consumer tastes or needs.

For example, electricity consumers across Australia were limited to one tariff from one company; whereas, consumers can now access sites like www.energymadeeasy.gov.au to assist them to choose among a range of offers. This degree of consumer choice and empowerment was almost non-existent when Hilmer reported in 1993. Box 11.1 outlines the electricity sector as a case study of reform.

The extension of the *Trade Practices Act 1974* (now the *Competition and Consumer Act 2010* (CCA)) to government businesses, along with competitive neutrality policy, structural reform of government businesses (including the separation of natural monopoly from contestable elements, privatisation, the move to cost-reflective pricing), and third-party access arrangements for infrastructure services have all left their mark on Australia's infrastructure markets.

Although most infrastructure markets have been substantially reformed, the Panel has heard numerous examples that suggest progress has been patchy, the degree of reform differs among sectors and much more needs to be done to provide greater choice and better service levels for consumers and businesses across the economy.

Structural reform

In most sectors, structural reform and separating monopoly from contestable elements has been heavily pursued. In the electricity market, generators have been separated from networks and sold. Competition in retailing has been introduced, and monopoly networks have been subject to price regulation by independent regulators. Networks have also been privatised in some jurisdictions. Reform in gas markets has followed a similar path to electricity, with competition introduced to wholesale gas markets.

Structural separation was extensively pursued in rail. The main interstate freight network was brought together under the ownership of the Australian Rail Track Corporation, while above-rail[277] freight operations have been privatised. Jurisdictions have access regimes in place for regional freight lines. Although competition in above-rail services has emerged on some routes, on many others volumes have been too low to support competitive entry. Parts of the rail freight sector face strong

277 'Above-rail' means those activities required to provide and operate train services such as rolling stock provision (i.e. trains and carriages), rolling stock maintenance, train crewing, terminal provision, freight handling and the marketing and administration of the above services.

competition from road transport. The major ports have also been reformed with port authorities now typically acting as landlords for competing service providers rather than directly providing services.

Although competition was introduced in telecommunications, the dominant fixed-line provider, Telstra, was privatised without being structurally separated. Instead, reliance was placed on providing third-party access to Telstra's fixed-line network. On the face of it, this has seen less fixed-line retail competition in telecommunications than might have been expected. Dissatisfaction with access arrangements also led Optus to build its own hybrid fibre-coaxial network.

Over time, changes in technology have strengthened competition in telecommunications. Data rather than voice is now the dominant form of demand in the market, and wireless technologies compete effectively with fixed-line technologies in many applications.

Applying the CCA to government businesses and introducing competitive neutrality requirements for all significant government businesses were also integral to making government businesses more commercially focused (for more detail on competitive neutrality, see Chapter 13). This enabled private businesses to compete alongside government-owned businesses.

Today there are many privately owned electricity generators competing alongside the remaining government-owned generators. Private operators have also entered the market in rail, with most rail freight services now privately owned and operated.

In contrast, there has been little private investment in urban water supply, except for desalination plants.[278] These plants rely on government contracts and are shielded from demand risk. To the extent that roads have been privately provided, this has occurred through direct government contracting.

Similarly, public transport services are either provided directly by government businesses or through contracting out. Restrictions remain on the private provision of public transport services. For example, bus operators in New South Wales providing a public transport service less than 40 kilometres in length must have a contract with the New South Wales Government.[279]

Privatisation

Since the Hilmer Review, governments have increased the role of the private sector in infrastructure markets. Government ownership of infrastructure assets has been greatly reduced through privatisation in most infrastructure sectors. In the electricity and gas markets, some jurisdictions have already privatised or are in the process of privatising generation, retail and network assets. In telecommunications, assets have been fully privatised, although the NBN is now being built by an Australian Government-owned company. There have also been a number of public-private partnerships (PPPs), particularly in urban roads and water.

All the major airports have been privatised through long-term leases. The Australian Government has also privatised its airline. In rail, above-rail freight operations have been privatised, as have many regional freight lines. However, the Australian Rail Track Corporation remains an Australian Government-owned corporation. In contrast, in the water sector there has been little consideration

278 Productivity Commission 2011, *Australia's Urban Water Sector*, Canberra, pages 42-45.

279 IPART, sub 1, page 9.

given to privatising dams and the water reticulation network. Similarly, privatisation has not been pursued in the roads sector to any extent, although there have been some privately built toll roads.

The increased role of the private sector in infrastructure has brought considerable public benefit. Governments have been able to redirect resources from asset sales into, for example, human services, and retail competition has emerged in many markets. Privatisation has also delivered more efficient management of assets and investments have been more responsive to changes in market demand. For example, airports have been increasing capacity as demand dictates.

The New South Wales Government's *Electricity Prices and Services: Fact Sheet 11*[280] shows the movement in average annual real electricity network prices being lower in jurisdictions where network assets have been privatised (Victoria and South Australia) compared to those where they have not (such as New South Wales and Queensland). Further evidence of the benefits of privatisation is provided by the Australian Energy Regulator's (AER) November 2014 *Electricity distribution network service providers Annual benchmarking report.*[281] The report found 'the state wide average indicates that the Victorian and South Australian distributors appear to be the most productive'. Victoria and South Australia are the only States to have privatised their distribution businesses.

EnergyAustralia notes that there are distortions or inefficiencies caused by government ownership:

> ... a policy tension is created where Governments continue to own generation and network assets creating the potential to influence policy positions to the detriment of customers and/or taxpayers through unnecessarily high reliability standards or intervention in natural commercial processes. The NEM [National Electricity Market] has developed as a robust market with significant private investment and Government policy has the ability to significantly shape how investment is made. (sub, page 7)

The issue of how to privatise effectively is demonstrated by port infrastructure, where it is important to ensure that the regulatory regime can sufficiently influence port authority activities to constrain monopoly power. While some ports, particularly bulk ports, may have only a few large customers that can exert countervailing power, others may have significant market power in the absence of effective regulation.

The ACCC also cites anecdotal evidence suggesting ports are being sold or considered for sale with restrictions on competition in place to enhance sale prices. It notes:

> Privatisation of port assets can raise issues of efficiency where monopoly rights are conferred by state governments, with no consideration to the prospect for competition and/or the need for economic regulation. This has the potential to result in lost efficiencies and/or higher charges which may be hard to remedy after the assets are sold. (sub, page 38)

Sydney Airport serves as another example where privatisation occurred with a monopoly right in place, namely, a first right of refusal to operate a second Sydney airport (ACCC sub 1, page 36).Although the Australian Government may have achieved a higher sale price, this has come at the longer-term cost of a less competitive market structure.

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280 New South Wales Government 2014, *Electricity Prices and Services: Fact Sheet 11* NSW Government, Sydney, viewed 6 February 2015 www.nsw.gov.au/sites/default/files/miscellaneous/fact_sheet_11.pdf.

281 Australian Energy Regulator 2014, *Electricity distribution network service providers Annual benchmarking report*, Melbourne, page 6.

Pricing reform and access

Pricing reform and the move to cost-reflective pricing has been pursued extensively in most infrastructure markets, driving efficiency and allowing markets to offer more consumer choice; for example, through facilitating retail price competition.

Benefits from pricing reform in infrastructure sectors arise through encouraging better use of existing infrastructure, which can delay the need for infrastructure investment. Where cost-reflective pricing is present, consumer demand will also provide a more accurate guide to infrastructure investment. This increases the likelihood that such investment is efficient and responds to actual changes in demand and consumer preferences. These factors lower the cost and increase the responsiveness across markets to the benefit of consumers. It also means governments can better target assistance to vulnerable consumers in those markets, reducing the burden on taxpayers.

Pricing reform has generally been pursued through deregulating prices where markets are sufficiently competitive, while subjecting the monopoly parts of markets to price oversight, direct price regulation and access regimes. For example, in the electricity market, wholesale prices are deregulated as are retail prices in some jurisdictions, while network prices are subject to pricing determinations.

Similarly, in telecommunications markets, prices for mobile and retail services are deregulated, but Telstra's fixed-line network is subject to pricing and access determinations. Airports and ports are subject to prices oversight and a range of other regulatory tools, which can be used to prevent monopoly pricing. Access declarations remain available as a regulatory tool for airports and ports, but for the most part have not needed to be pursued.

In contrast, in water and in roads there has been little progress introducing pricing that reflects the actual cost of use on the network, such as time and location charging. Investment in those sectors is either funded directly from budgets or by users across the network rather than from users according to the costs they impose on the network. Roads in particular have also been subject to investment bottlenecks.

Box 11.1: Electricity as a case study

Reform of the electricity sector is often considered a success, and the lessons are likely to prove instructive for other sectors. The Australian Energy Market Commission (AEMC) notes:

> Energy markets in the Eastern States are generally characterised by competitive wholesale and retail markets. This is due in large part to a history of successful structural and institutional reform that created the framework for competition to develop. (sub, page 1)

Electricity is provided to most of Australia through the National Electricity Market (NEM), which includes all jurisdictions apart from the Northern Territory and Western Australia. The sector is broken into the competitive wholesale and retail markets, on the one hand, and the distribution and transmission networks on the other.

Box 11.1: Electricity as a case study *(continued)*

The AEMC points out in its *National Electricity Market: A Case Study in Successful Microeconomic Reform*[282] that there were a number of factors to that success:

- the material problems were defined and clear reform objectives were set;
- reform took high-level political drive, provision of time, energy and, according to many reform participants, financial incentives;
- strategies were developed to enhance confidence in the reforms;
- strong and appropriate support structures were established with key stakeholder participation;
- the pace of the reform allowed for effective consultation across all stakeholders; and
- getting the industry structures right was key for effective competition.

The way forward

The importance of further reform in infrastructure is clear: the Panel considers that infrastructure reforms are incomplete, even in the sectors where most progress has been made. The Panel recognises some hard-won gains in the infrastructure sectors, but reform needs to be finalised where it is flagging or stalled.

Furthermore, in some sectors very little progress has been made. Consumers are seeing significantly cheaper air travel as a result of reforms to the aviation sector. In contrast, there has been little progress in attempting to introduce cost-reflective pricing in roads and linking revenue to road provision. As a consequence, there is criticism that new roads are being built in the wrong places for the wrong reasons, while too little attention is paid to getting more efficient use of existing road infrastructure.[283]

The Panel outlines in the remainder of this part where it has identified further reforms that should be undertaken in the infrastructure markets.

282 Australian Energy Market Commission 2013, *National Electricity Market: A Case Study in Successful Microeconomic Reform*, Sydney, page 6.

283 See for example, City of Whittlesea sub, pages 1-2.

The Panel's view

Reform of Australia's infrastructure markets has generally served consumers well, creating a greater diversity of choice and ability to negotiate prices in utilities and transport compared to two decades ago.

However, further benefits could be harnessed through finalising the application of those reforms and extending further reforms.

Well-considered contracting out or privatising remaining infrastructure assets is likely to drive further consumer benefits through comparatively lower prices flowing from greater discipline on privatised entities. Governments need to approach privatisation carefully, ensuring that impacts on competition and consumers are fully considered and addressed.

Where monopoly infrastructure is contracted out or privatised, it should be done in a way that promotes competition and cost-reflective pricing. Maximising asset sale prices through restricting competition or allowing unregulated monopoly pricing post sale amounts to an inefficient, long-term tax on infrastructure users and consumers.

11.1 Electricity and gas

Electricity

Electricity has seen significant reform as part of the NCP agenda, increasing choice for consumers. However, recent hikes in electricity prices have caused concern among consumers and businesses (see Box 11.2). Further reform must ensure that future price increases are no greater than necessary. National Seniors Australia notes:

> Firstly, priorities should include the more important unfinished NCP reforms, in particular those that:
>
> - address unprecedented recent growth in household energy and water bills … (sub, page 4)

Australian Industry Group submits:

> The Federal and State Governments have already formally recognised the importance of this reform to consumers in the COAG Energy Market Reforms Plan (2012). Ai Group would urge the Federal Government to prioritise the implementation of this, and the other reforms contained in the Plan, as important contributions to enhancing competition in the energy sector. (sub, page 41)

The Council of Australian Governments' (COAG) Energy Market Reforms from 2012[284] referred to by the Australian Industry Group, include:

- deregulating retail prices, to ensure efficient and competitive retail energy markets for the benefit of consumers and the energy sector alike;
- ensuring consistent national frameworks, including applying the National Energy Retail Law, which is designed to harmonise regulation of the sale and supply of energy to consumers; and

284 Council of Australian Governments 2012, *COAG Energy Market Reform — Implementation Plan,* COAG, Canberra, viewed 9 February 2015, www.coag.gov.au/node/481.

- developing a national regime for reliability standards delivering the right balance for consumers between security of supply and costs of delivery through the development of a national regime.

The Panel supports finalisation of these reforms. In relation to retail price regulation, the Energy Retailers Association of Australia submits:

> Much of the increase in energy prices over recent years has been due to higher cost factors outside retailers' control. It was often viewed that regulating prices would protect those consumers most in need. Yet price regulation does not operate to protect hardship customers because of the hardship they are facing. Similarly, price regulation cannot protect hardship customers from being disconnected. Using retail price regulation to artificially suppress retail prices only delays an inevitable price increase in the future and can make increases worse than they otherwise might have been. (sub, page 12)

The Panel also notes concerns raised in submissions, such as EnergyAustralia's (sub, page 8), that inconsistent application diminishes the benefits from a harmonised National Energy Retail Law (sometimes referred to as the National Energy Customer Framework or NECF). These benefits include reduced costs to business and consumers, and improved choice through lowering barriers to energy retailers operating across state and territory borders.

The Queensland Competition Authority notes:

> So far, the NECF has commenced in all states, except Queensland and Victoria. No state has adopted the NECF without variations. While some variations may have been considered necessary to reflect the particular circumstances in that state, the higher costs of retailers complying with additional obligations and the potentially negative impacts on competition should be carefully considered against the benefits. Nevertheless, in this case partial harmonisation may be better than the status quo. (sub, page 8)

The AEMC, in its *2014 Retail Competition Review*, found that the state of competition for small customers varies across the NEM and enforced the need to finalise the above reforms to improve competition. The AEMC recommended that jurisdictions:

- consider options for raising awareness of the tools available for comparing energy offers to improve customer confidence in the market;
- ensure concession schemes are delivering on their intended purpose in an efficient and targeted way;
- continue to harmonise regulatory arrangements across jurisdictions to minimise costs, including implementing the National Energy Customer Framework; and
- remove energy retail price regulation where competition is effective.[285]

While reliability standards are not currently set through a national framework, the Panel notes work is underway to move towards one.[286] Other regulatory provisions may usefully be transferred to the national framework as well. Origin Energy notes:

> ... there are other examples of cross sector regulation that have a significant bearing on energy market participants, such as the various state regimes for licensing. Multiple frameworks increase the regulatory burden for all market participants and ultimately raise

285 Australian Energy Market Commission 2014, *Retail Competition Review, Final Report*, Sydney, page iv.

286 COAG Energy Council, 1 May 2014, Communique #1, Brisbane.

> costs for consumers. Therefore, achieving framework consistency should be a policy priority. (sub, page 2)

The Panel sees significant benefit in a national framework for reliability standards, noting the link between jurisdictional reliability standards and recent price increases. This is demonstrated in Box 11.2, which outlines the drivers of recent electricity price increases.

Box 11.2: Electricity prices — a failure of competition policy?

A common concern raised through consultation was the impact of electricity price rises on business and consumers. Often stakeholders felt the price rises were the result of privatisation; many others felt it was because of the application of competition policy.

The AEMC undertakes annual pricing trend reports, most recently reporting in 2014 on expected price trends over the three years to 2016-17. Nationally, the AEMC projected residential electricity prices to fall in 2014-15 in most States and Territories, following the removal of the carbon tax. The extent of this decrease varies between jurisdictions, as the savings are offset by changes in other supply chain components that make up electricity prices.

The AEMC noted that, in 2015-16 and 2016-17, prices are expected to show modest declines or be stable across most States and Territories. This trend is being driven by subdued wholesale energy costs and lower network prices. Network prices are expected to fall in response to reduced financing costs and declining growth in peak demand.

The report notes that the average residential electricity price in 2014-15 consisted of:

- 50 per cent regulated network costs, which includes costs associated with building and operating transmission and distribution networks, including a return on capital. This was the main component of the average electricity bill;
- 8 per cent renewable energy target and state and territory feed-in tariff and energy efficiency schemes ; and
- 40 per cent competitive market costs, which includes wholesale energy purchase costs and the costs of the retail sale of electricity.

The AEMC's report on 2011-12 electricity prices identified network costs as the main driver of upward pressure on retail prices at that point. The anticipated stabilisation has been borne out in the new report. The increases in network prices largely reflected the costs of replacing and upgrading the network infrastructure.

A number of processes are underway to improve the efficiency of regulated network costs. For example, new rules made by the AEMC in November 2012 have given the Australian Energy Regulator greater discretion and more tools to determine efficient costs and revenues when undertaking network regulatory determinations.

The AEMC has finalised a rule change process on the way distribution network businesses set their network tariffs. The AEMC considered how distribution businesses can be encouraged to set network tariffs in a more cost-reflective manner in undertaking this rule change.

Rather than finding that competition has contributed to price increases, the report notes that competition in retail markets has allowed consumers to access better deals on price. Policies in most NEM jurisdictions allow for market-based prices and consumers in those States have been able to save by shopping around for the best deal and switching from regulated offers.

Box 11.2: Electricity prices — a failure of competition policy? *(continued)*

For example, the AEMC estimates that consumers in Queensland could save 7 per cent if they changed from a regulated tariff to a market offer.[287] When competition reforms are finalised, such as the full implementation of the National Energy Retail Law, this should further mitigate future price increases.

The Panel sees scope to go further than the previously agreed reforms to develop competition in the sector. For example, the Energy Networks Association writes that it:

> … strongly supports the transfer of economic regulatory functions under the National Electricity Law and National Gas Law and Rules from the WA Economic Regulation Authority and NT Utilities Commission to the Australian Energy Regulator, and the consistent application of the third-party access pricing rules (in particular, Chapters 6 and 6A of the National Electricity Rules, and the National Gas Rules) to energy networks in WA and NT. (sub, page 7)

Despite strong arguments — mostly on the basis of geography and high transmission losses — for the Western Australian and Northern Territory markets not to be physically joined to the National Electricity Market, the benefits of those jurisdictions adopting the national legislative and institutional frameworks can be realised without physical connection. The Panel notes and supports moves underway for this to occur.

For example, the Northern Territory Government 'has committed to adopting the national framework for the regulation of electricity networks which will see greater alignment of arrangements with those operating in the National Electricity Market, including transfer of economic regulation of networks from the Territory's Utilities Commission to the Australian Energy Regulator and implementing a phased transition to adopting the National Electricity Law and Rules' (DR sub, page 3).

Alinta Energy notes that it:

> … is broadly supportive of the suggestion put forward in the Draft Report that there may be benefits to the Western Australia (WA) and the Northern Territory energy markets in adopting the NEM legislative, institutional and market arrangements in their relevant jurisdictions. This would potentially reduce overall market operational and governance costs, promote greater regulatory consistency and remove unnecessary barriers to entry into other energy markets across Australia for retailers. (DR sub, page 1)

Alinta Energy goes on to note:

> The current Electricity Market Review being undertaken by the WA Government has involved broad consideration of whether the existing framework and arrangements remain appropriate, including the underlying wholesale market design and institutional arrangements. Specifically, its remit has included considering whether the NEM arrangements should be adopted which overlaps with the recommendation made by the Draft Report. (DR sub, page 2)

287 Australian Energy Market Commission 2014, *Final Report: 2014 Residential Electricity Price Trends*, Sydney, page iv.

The Panel agrees that Western Australia and the Northern Territory should consider adopting the national framework and urges the Western Australia Electricity Market Review to consider the benefits of doing so.

Gas

Reform in the gas sector has largely mirrored that in the electricity sector. The 2014 Eastern Australian Domestic Gas Study (the Study),[288] which examined the market in detail, found that effective competition in wholesale gas markets is linked to access to efficiently priced gas transportation, processing and storage services — which in turn relies on a combination of efficient price signals and regulatory arrangements.

The Study notes that this has worked well to date, with a consistent build and re-development of infrastructure to meet growing demand in recent years. However, it also flags significant changes in the market and notes changes that could be made in the regulatory and commercial arrangements to address gas supply.

The Study summarises options for government consideration, including addressing regulatory impediments to supply, improving title administration and management, jointly facilitating priority gas projects and improving access to and co-operation on pre-competitive geoscience.

The Study also indicated that a review into competition in the gas market is an option to consider. This was echoed by EnergyAustralia in its recommendation:

> The Commonwealth Government request that the Productivity Commission conduct a high level coordinated review of market design, gas market competition, the direction and structure of the existing trading and related financial markets, and the suitability of carriage models for pipeline regulation. (sub, page 6)

The Energy Green Paper[289] states:

> An ACCC Price Inquiry into the eastern Australian wholesale gas market, under Part VIIA of the Competition and Consumer Act 2010, or a Productivity Commission review, could examine the levels of competition in the eastern gas market. Such an inquiry could inform consumers about future market conditions and opportunities to increase competition in the upstream market, including opportunities to remove unnecessary regulation, and issues that may limit wholesale market competition.

The Panel considers the White Paper should go further than the Green Paper and commit to a review examining, among other things: barriers to entry in the gas market; whether access regimes are working effectively to encourage upstream and downstream competition; and regulatory and policy impediments to Australia's gas market operating efficiently.[290]

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288 Department of Industry and the Bureau of Resource and Energy Economics 2014, Eastern Australian Domestic Gas Market Study, Canberra, page 47.

289 Australian Government 2014, *Energy White Paper: Green Paper*, Canberra, Page 45.

290 Although the Draft Report did not make a recommendation on a review of competition in gas, support for the Panel's view on the matter was provided by the Australian Pipeline Industry Association (DR sub, page 3) and Business SA (DR sub, page 6).

The Panel's view

Energy sector reform remains important, since energy is a critical input to other sectors of the economy. Increasing competition in energy will help place downward pressure on energy prices to the benefit of consumers.

Reform of the electricity and gas sectors is well progressed compared to other sectors, but it is unfinished. Reforms COAG committed to in December 2012 are still not complete.

Examples of previously agreed reforms that should be finalised are the National Energy Retail Law implementation (designed to harmonise regulations for the sale and supply of energy) and retail price deregulation. The Panel notes with concern changes to the template legislation some jurisdictions have made in applying the National Energy Retail Law and observes that this will detract from the originally intended benefits.

Further benefits may be realised in the electricity and gas sectors from transferring more functions, such as reliability standards and licensing arrangements, to the national regime.

Competition benefits may also be realised from greater integration of the Western Australia and Northern Territory energy markets with the National Electricity Market, noting this does not require physical interconnection.

The Panel notes the findings of the Eastern Australian Domestic Gas Market Study that competition is largely working, but that further monitoring of the market may be needed, as it is currently in a transitional phase. The Panel supports a further, more detailed review of competition in the gas sector as proposed in the Study and in the Energy Green Paper.

Implementation

The Australian Government should commit to a detailed review of competition in Australian gas markets, to commence within six months of accepting the recommendation.

States and Territories should finalise previously agreed electricity market reforms within two years, with progress monitored by the Australian Council for Competition Policy (ACCP).

Recommendation 19— Electricity and gas

State and territory governments should finalise the energy reform agenda, including through:

- application of the National Energy Retail Law with minimal derogation by all National Electricity Market jurisdictions;
- deregulation of both electricity and gas retail prices; and
- the transfer of responsibility for reliability standards to a national framework administered by the proposed Access and Pricing Regulator (see Recommendation 50) and the Australian Energy Market Commission (AEMC).

The Panel supports moves to include Western Australia and the Northern Territory in the National Electricity Market, noting that this does not require physical connection.

The Australian Government should undertake a detailed review of competition in the gas sector.

11.2 WATER

Water sector reform has not progressed as far as electricity reform and, perhaps as a result of the absence of a national framework, has been more piecemeal. Each jurisdiction has made progress, but none could be said to have fully realised the potential consumer choice and pricing benefits from reforms in the sector.

The Panel notes comments in the *Report of the Independent Review of the Water Act 2007* that arrangements for the Murray-Darling Basin in the *Water Act 2007* will not be rolled out fully until 2019. The Panel supports the view that 'Australian and Basin State governments and their agencies need to work together to clearly and transparently communicate how reforms are being implemented'. [291]

Under the 2004 National Water Initiative, governments committed to best-practice water pricing. In 2011, the Productivity Commission (PC) identified economic efficiency as the overarching objective for urban water pricing.[292] The PC considered that equity issues are best dealt with outside the urban water sector through, for example, taxation and social security systems.

Notwithstanding this (and other) reports, the National Water Commission (a body that provides advice to the Council of Australian Governments on water and was announced in the 2014-15 Budget to be abolished)[293] found that a failure to implement pricing reforms meant that jurisdictions were not realising the full intended benefits.

The National Water Initiative encompasses the objectives of two reforms: independent economic regulation; and the institutional separation of service providers from the regulatory and policy functions of governments. However, in the Panel's view, neither of these objectives have been met on a nationally consistent basis. Both reforms are important to delivering efficient pricing where there is a natural monopoly or where markets are not well developed. The National Water

291 Australian Government 2014, *Report of the Independent Review of the Water Act 2007*, *Canberra page x.*

292 Productivity Commission 2011, *Australia's Urban Water Sector*, Canberra, page 69.

293 National Water Commission 2011, *Review of Pricing Reform in the Australian Water Sector*, Canberra, page xii.

Commission notes[294] that it continues to support independent economic regulation and institutional separation as important complements to pricing reforms.

PwC identified a number of drivers for reform in the water sector in its 2010 report (prepared for Infrastructure Australia), *Review of Urban Water Security Strategies*.[295] They are:

- **Drought and climate change**. In the past decade, rainfall and inflows to water storages in southern Australia have been considerably lower than long-term averages.
- **Higher than expected population growth**. In September 2008, the Australian Bureau of Statistics updated its projections for the States and capital cities based on the results of the 2006 census.
- **A legacy of under investment in water infrastructure**. Until recently, expenditure on water infrastructure to service urban populations has been relatively small (compared to other essential services) due to a combination of capital/funding constraints, political constraints to the construction of new dams and the belated recognition of a changing climatic pattern.
- **Inadequate institutional structures and management arrangements**. The scale of changes in water demand and rainfall are such that some States are not sufficiently equipped to respond to achieve adequate levels of urban water security and consumer choice.

Pricing that better reflects the cost of provision may address these concerns by increasing incentives for the private sector to invest in water infrastructure. This would allow the market to better address issues related to meeting increased demand. The Australian Water Association notes:

> In order to attract private investment the regulation of the water sector will need to change. There is a desperate need for consistency of economic regulation across all states and territories to attract long-term private investment. (DR sub, page 2)

The Panel agrees, noting that governments have been slow to respond to changing demand for water, and to put in place incentives for sufficient investment (either private or public). The PwC report also states, 'Most jurisdictions can point to ongoing pricing reform, and it is important to acknowledge that phased implementation is a justifiable policy' (page 59).

Major 'overnight' changes to water prices would impose a considerable economic shock on individuals and businesses, whose capacity to change water-use behaviour in the short term is limited. Unfortunately, institutional inertia and the lack of political acceptability and public understanding of reforms are also impediments to progress.

IPART notes:

> ... there is significant scope to reform the water sector. (sub, page 14)
>
> Postage stamp pricing reflects the average cost of servicing a given area (eg, Sydney Water's area of operations). The National Water Initiative (NWI) pricing principles allow postage stamp pricing, but state a preference for differentiated prices in specific areas. However, postage stamp pricing remains NSW government policy. (sub, page 17)

294 Ibid., page xiv.
295 PwC 2010, *Review of Urban Water Security Strategies,* Sydney, Page 9.

IPART further notes that it is:

> ... important to develop nationally consistent principles in relation to competition and private sector participation in the water market, similar to the reform of water entitlements from the 2004 National Water Initiative. (sub, page 20)

This view is supported by Infrastructure Australia in its National Infrastructure Plan.[296] The Plan states that Australia's water industry has a complex regulatory structure, with each State and Territory having its own economic regulator. In comparison, the UK has one water regulator to serve 60 million people. The Panel has proposed creating an Access and Pricing Regulator (see Recommendation 50) which may reduce this complexity should States and Territories refer national water functions to it.

The Panel's view

Progress in the water sector has been slower than reforms in electricity and gas.

The National Water Initiative set out clear principles which, if fully implemented, would better reflect the cost of providing water, promote greater private involvement in the sector and establish more rigorous economic regulation. Those principles remain appropriate and state and territory governments should continue to progress their implementation.

The Panel believes that the ACCP (see Recommendation 43) can play a role in improving pricing in jurisdictions through working with state and territory regulators to develop a national pricing framework, with potential application to all jurisdictions.

Implementation

Further reform in the water sector is the responsibility of States and Territories. All jurisdictions should develop timelines to implement the principles of the National Water Initiative within six months of the ACCP developing pricing guidelines.

The ACCP should develop best-practice pricing guidelines in consultation with state and territory regulators.

296 Infrastructure Australia 2013, *National Infrastructure Plan*, Sydney, page 60.

Recommendation 20 — Water

All governments should progress implementation of the principles of the National Water Initiative, with a view to national consistency. Governments should focus on strengthening economic regulation in urban water and creating incentives for increased private participation in the sector through improved pricing practices.

State and territory regulators should collectively develop best-practice pricing guidelines for urban water, with the capacity to reflect necessary jurisdictional differences. To ensure consistency, the Australian Council for Competition Policy (see Recommendation 43) should oversee this work.

State and territory governments should develop clear timelines for fully implementing the National Water Initiative, once pricing guidelines are developed. The Australian Council for Competition Policy should assist States and Territories to do so.

Where water regulation is made national, the responsible body should be the proposed national Access and Pricing Regulator (see Recommendation 50) or a suitably accredited state body.

11.3 TRANSPORT

Aviation

All major Australian airports have been privatised either through outright sale or through 50-year leases.[297] Airports tend to have strong natural monopoly characteristics. Consequently, the effectiveness of the regulatory framework applying post-privatisation is important to ensure appropriate prices and quality of service.

In 2011, the PC reported on the regulation of airport services, concluding that: airports' aeronautical charges, revenues, costs, profits and investment look reasonable compared with airports overseas, which are mostly non-commercial; and existing safeguards have seldom been used — including Part IIIA access declarations. There has also been significant investment at airports, which as a result have not suffered bottlenecks compared to other sectors.[298]

The PC noted that capital city airports possessed significant market power and found that price monitoring data since 2002-03 showed substantial price increases at most of the monitored airports. However, taken in context, price increases did not indicate systemic misuse of market power.[299]

The increase in prices has, however, raised concerns with users. The Board of Airline Representatives Australia notes:

> While the industry has achieved large improvements in productivity, international aviation in Australia is facing significant cost pressures from the prices associated with its 'aviation infrastructure' (jet fuel supply, airports, air traffic management and fire services), which will have consequences for air travel affordability and the economic growth the industry generates. (sub, page 3)

297 With a 49-year extension available.

298 Productivity Commission 2011, *Economic Regulation of Airport Services*, Canberra, Finding 4.1, pages XX, XLVI.

299 Ibid., Finding 7.2, page XLVIII.

Despite substantial regulation in place constraining the market power of airports, an opportunity for promoting competition was lost when Sydney Airport was privatised. When it was sold in 2002, the Australian Government provided the acquirer with the right of first refusal to operate a second Sydney airport. The ACCC notes that the right of first refusal confers a monopoly to Sydney Airport over the supply of aeronautical services for international and most domestic flights in the Sydney basin. While including this right increased the sale price, it likely had an anti-competitive impact on the aviation sector (sub 1, page 36).

The Australian Airports Association considers that land use planning and other restrictions limit the ability of smaller airports to compete with larger ones (sub, page 5).

Other issues raised in submissions include the lack of competition between jet fuel suppliers at airports and the cost of services provided by Airservices Australia.

The Board of Airline Representatives Australia notes that international airlines operating to Australia pay some of the highest 'jet fuel differentials' globally (sub, page 7).

In relation to services provided by Airservices Australia, the Board of Airline Representatives Australia notes that the existing structure of Airservices' prices encourages inefficiency in the aviation industry and distorts competition, both between regional airports and with other modes of transport (sub, page 4). The Panel notes the PC has recommended that the Australian Government conduct a scoping study to investigate efficiency gains and other merits of privatising some or all of the business activities of Airservices Australia, including reviewing its capital expenditure program.[300]

A number of submissions raise the potential need for access regulation at Australian airports. This issue is discussed in Chapter 24.

The Panel's view

The price monitoring and 'light-handed' regulatory approach in aviation appears to be working well overall. However, if prices continue to increase as fast as they have been, that would raise concerns and may warrant a move away from light-handed regulation for individual airports.

Although the regulatory framework for airports appears to be working well, airport privatisation could have been handled better. A significant opportunity for greater competition was lost as a result of Sydney Airport being privatised with the new owner given first right of refusal to operate the second Sydney Airport.

Privatising in a way that restricts competition may result in a higher sale price, but it comes at the long-term cost of a less competitive market structure.

Competition in jet fuel supply and the pricing structure for services provided by Airservices Australia should be a focus of further reform efforts in the sector.

Ports

Port reform has resulted in the corporatisation of ports in all States and the Northern Territory. Most major ports have moved to a landlord model, where the authority is involved in providing core activities only and more contestable elements, such as stevedoring, dredging and towage, are

300 Productivity Commission 2014, *Public Infrastructure*, Canberra, Recommendation 2.2, page 41.

provided by private contractors.[301] Some ports have been privatised while others remain in government hands.

Declaration of harbour towage services was repealed in 2002, as the industry was deemed sufficiently competitive.[302]

Stevedoring activities remain declared services and subject to price monitoring by the ACCC. The most recent report by the ACCC, *Container stevedoring monitoring report no. 15,* highlights that competition in the sector is increasing and past reform focused on improving productivity has been successful, with users benefiting through lower real prices and better service levels.[303]

However, the ACCC notes that returns in the industry remain persistently high, suggesting more investment in capacity and greater competition may be needed.[304] This raises the question of whether port authorities are giving sufficient consideration to the need to foster greater competition through making land available for new entrants. New terminals are opening in Brisbane and Sydney and one is in prospect for Melbourne. However, as Hutchison Ports Australia notes, for its entry to occur:

> ... governments had to decide to develop and offer extra land for a new operator and Hutchison needed to submit a winning bid and invest hundreds of millions of dollars establishing new terminals. (sub, page 2)

As with airports, an important issue when privatising ports is ensuring the regulatory regime can sufficiently influence port authority activities to constrain their monopoly power. Some bulk ports may have only a few large customers that can exert countervailing power, but others may have significant market power in the absence of effective regulation. This creates the potential for monopoly pricing in the absence of effective post-sale regulation.

An example of the former is the Hunter Valley coal chain, which brought together 11 coal miners, four rail haulage providers and three terminals to optimise the coal export chain in the Hunter Valley.[305] Most city container ports are likely to fall into the latter category, with neither shipping lines, stevedores nor shippers having the countervailing power and/or the incentive to effectively constrain the port authority or each other.

The ACCC also cites anecdotal evidence suggesting ports were being sold or considered for sale with restrictions on competition in place to enhance sale prices (sub, page 37). The ACCC notes:

> Privatisation of port assets can raise issues of efficiency where monopoly rights are conferred by state governments, with no consideration to the prospect for competition and/or the need for economic regulation. This has the potential to result in lost efficiencies and/or higher charges which may be hard to remedy after the assets are sold. (ACCC sub 1, page 38)

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301 Productivity Commission 2005, *Review of National Competition Policy Reforms,* Canberra, page 15.

302 Ibid., page 15.

303 Australian Competition and Consumer Commission 2013, *Container stevedoring monitoring report no. 15*, *Canberra,* page viii.

304 Ibid., page ix.

305 Hunter Valley Coal Chain Coordinator, viewed 9 February 2015, www.hvccc.com.au/AboutUs/Pages/History.aspx.

The Panel considers that land leased at ports to terminal operators and other service providers should reflect the opportunity cost of that land rather than the ability of the port authority to charge monopoly prices.

The recent policy focus has largely been on infrastructure provision at the ports and in the port surrounds rather than the regulatory framework. For a port to operate effectively, road and rail links also need to be optimised. Better use of ports is linked to improvements in land-use planning as well as pricing of other transport modes.[306]

A number of submissions raise the potential need for access regulation at privatised ports in the future. This issue is discussed in Chapter 24.

The Panel's view

Significant reform of ports has been achieved, which has benefited users. Nonetheless, various participants in many of the port services chains have significant market power. Regulators and regulatory frameworks need to recognise this, including through the application of pricing oversight and, if necessary, price regulation.

Leasing costs at ports subject to price regulation should aim to reflect the opportunity cost of the land and not the ability to extract monopoly rents. The latter represents an inefficient tax on consumers and business.

As with other privatisations, port privatisations should be undertaken within a regulatory framework that promotes competition and prevents monopoly pricing, even though this may result in a lower sale price.

Cabotage (coastal shipping and aviation)

Australia has a policy of reserving coastal shipping for locally flagged vessels, although foreign-flagged ships may carry cargo and passengers between Australian ports after being licensed to do so.

Significant changes were made to the process of licensing foreign vessels under the *Coastal Trading (Revitalising Australian Shipping) Act 2012*.

This process is intended to grant Australian ships the opportunity to argue that they are in a position to undertake voyages proposed to be undertaken by foreign vessels, and therefore foreign vessels should not receive licenses. This represents a form of protection for Australian-registered ships.

On 8 April 2014, the Australian Government announced separate Department of Infrastructure and Regional Development-led consultations on coastal shipping regulation.[307] In view of the separate Government process to consider possible reforms to coastal shipping, the Panel has not examined this issue in detail.

However, the Panel has received many submissions arguing that changes made under the Coastal Trading (Revitalising Australian Shipping) Act have raised the cost and administrative complexity of coastal shipping regulation without improving its service or provision.

306 For further discussion see Australian Competition and Consumer Commission 2013, *Container stevedoring monitoring report no. 15*, Canberra, page 18 and Infrastructure Australia 2011, *National Ports Strategy*, Sydney.

307 See Australian Government 2014, *Options Paper: Approaches to regulating coastal shipping in Australia*, Canberra.

This is highlighted by the Tasmanian Farmers and Graziers Association that notes:

> ... one of the key regulatory impediments in Tasmania is the lack of competition and demarcations surrounding coastal shipping.
>
> These onerous regulations result in the 420 km distance across Bass Strait being the most expensive sea transport route in the world. (sub, page 8)

The Department of Infrastructure and Regional Development notes:

> A review into coastal shipping regulation is currently underway by the Australian Government, with a view to revising or reversing measures that hinder the competitiveness of Australia's shipping services. (DR sub, page 7)

Similar to coastal shipping, Australia also prevents foreign-flagged airlines from picking up domestic passengers on a domestic leg of an international flight. The Panel received representations during its visit to Darwin that aviation cabotage prevents domestic passengers from embarking on foreign-flagged international flights that transit through Darwin.

For example, a foreign-flagged flight originating in Malaysia and travelling to Darwin and then on to Sydney cannot embark domestic passengers for the Darwin to Sydney leg, yet an Australian international carrier flying the same route could embark passengers for the Australian leg.

Air cabotage restrictions in Australia are stricter than those in shipping. Generally foreign-flagged ships can apply for permits to engage in coastal shipping where there is no Australian-flagged vessel to undertake the task, but this is not available to foreign-flagged airlines.

Lateral Economics notes:

> Banning foreign carriers everywhere is a blunt instrument for assisting domestic operators who care mainly about protecting their east coast custom. (DR sub, page 4)

The Department of Infrastructure and Regional Development considers that reducing restrictions on air cabotage could compromise safety.

> The Draft Report's proposal is likely to be seen as winding back some of the safety arrangements applicable to domestic aviation. (DR sub, page 5)

However, it is not clear what additional safety considerations emerge from allowing flights that are already transiting Australia or allowed to fly to Australia to embark domestic passengers or cargo.

As Lateral Economics notes:

> While no supranational body exists for ocean travel, safety, security, environmental standards for air travel are already set by the International Civil Aviation Organisation. Expectations and legal frameworks around labour conditions for foreign workers servicing short stay planes are also less contentious than for longer stay coastal ships. (DR sub, page 5)

The Panel sees considerable benefits flowing from removing air cabotage restrictions for remote and poorly served domestic routes and regards the current blanket air cabotage restrictions on foreign-flagged carriers as inefficient.

Consideration should be given to removing cabotage restrictions for all air cargo, and for passengers for specific geographic areas, such as island territories, and for poorly served routes. One way this

could be achieved is through a permit system, allowing foreign carriers to carry domestic cargo or passengers on specific routes for a defined period of time.

The Panel's view

The Panel considers that reform of coastal shipping and aviation cabotage regulation should be a priority.

Consistent with the approach the Panel recommends for other regulatory reviews, the Panel considers that restrictions on cabotage for shipping and aviation should be removed, unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs and the objectives of the policy can only be achieved by restricting competition.

This approach should guide the current Australian Government consultation process in relation to coastal shipping.

The Panel sees considerable benefits flowing from removing air cabotage restrictions for remote and poorly served domestic routes and regards the current blanket air cabotage restrictions as inefficient.

Implementation

Within 12 months of accepting the recommendation, the Australian Government should identify remote and poorly served routes on which air cabotage restrictions could be removed for passenger services. Within two years of accepting the recommendation, cabotage restrictions that are not in the public interest could be removed on these routes for air passenger services as well as for air cargo. Cabotage restrictions on coastal shipping that are not in the public interest should also be removed following the current Australian Government review.

A permit system could be used if needed to monitor and regulate foreign-flagged air services operating domestically.

An independent body, such as the proposed ACCP (see Recommendation 43), should report on progress in reducing cabotage restrictions.

Recommendation 5 — Cabotage — coastal shipping and aviation

Noting the current Australian Government Review of Coastal Trading, cabotage restrictions on coastal shipping should be removed, unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the government policy can only be achieved by restricting competition.

The current air cabotage restrictions should be removed for all air cargo as well as passenger services to specific geographic areas, such as island territories and on poorly served routes, unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the restrictions can only be achieved by restricting competition.

Introducing an air cabotage permit system would be one way of regulating air cabotage services more effectively where necessary.

Rail freight

In the rail sector, the NCP reforms focused on the structural separation of the interstate track network from above-rail operations. This included forming the Australian Rail Track Corporation and developing access regimes and regulatory bodies. Networks have been declared under the National Access Regime or equivalent state-based regimes. Open access was also applied sporadically to related rail assets, such as bulk handling assets, intermodal terminals, coal ports and grain export facilities.

At a national level, the objectives set by the original NCP have been largely met. The application of price controls and the oversight of regulators appear to have addressed concerns about possible monopoly pricing. Regulatory regimes have generally promoted competition and entry has occurred in some access-dependent markets.

Issues raised in submissions include: the complexity of access issues, with some above-track operators having to contend with multiple access regimes to provide a single rail service; that structural separation has been imposed in areas where above-rail competition has not and is unlikely to emerge; and that vertically integrated railway operators can discriminate anti-competitively against above-rail competitors.

In relation to access regimes, Asciano notes:

> Asciano operates its above rail operations under six different access regimes with multiple access providers and multiple access regulators. This multiplicity of regimes adds costs and complexity to rail access for no benefits, particularly as many of the access regulation functions are duplicated across states. (DR sub, page 7)

The value of structural separation of track from above-rail operations is more contentious. Aurizon considers that costs of structural separation may pose an additional impost in an industry that struggles to compete with road transport. Aurizon notes:

> The fundamental economic problem for the interstate rail network is a lack of scale, which manifests as an inability to compete effectively with road transport. (sub, page 39)

While rail track may be considered a natural monopoly, intermodal competition can act as an effective constraint. This has reduced the need for heavy-handed regulation in much of the rail sector.

However, other stakeholders contend that important parts of the rail freight industry are not competitively constrained by road. Asciano notes:

> Rail networks predominantly carrying coal, for example, in the Hunter Valley and Central Queensland, are not competitively constrained by road. The nature of the product (i.e. volume and weight) means that the freight task cannot be met by road. In this situation the track providers have significant unconstrained monopoly power. (DR sub, page 10)

And

> ... a constant concern is the lack of constraint upon the vertically integrated monopolist's ability to anti-competitively discriminate against its above rail competition such as Asciano. (DR sub, page 11)

Australian Rail Track Corporation considers:

> Structural separation has been successful at promoting competition on the interstate network, since the reforms of the 1990's there has been around 25 operators enter the market, three have exited and 15 have consolidated into four main operators. (DR sub, page 2)

The Panel's view

Rail reform has been relatively successful and proceeded at a reasonable pace. Many rail freight tasks face significant competition from road freight, which has made efficiency-enhancing reforms relatively palatable.

Structural separation of track from above-rail operations has increased competition and innovation in the sector, improving rail's efficiency to the benefit of consumers. However, regulators and policymakers should be pragmatic about structural separation of railways, recognising that on some low-volume rail routes vertical integration may be preferable. This may be particularly so where road freight offers effective competition.

Policymakers should look to reduce the number of access regimes and regulators in the rail sector as far as possible as excessive complexity imposes costs on users.

Where rail operators are vertically integrated, access regimes need to have strong non-discrimination provisions and effective compliance and enforcement to promote competition in above-rail operations.

Road transport

Australia is highly reliant on its road network for the efficient movement of goods and people both in cities and the regions. More than 70 per cent of domestic freight is transported by road.[308]

Australia's road transport industry has historically operated in a diffuse regulatory and funding framework, which has imposed significant costs on some road users. Government involvement in the road transport sector covers licensing, access rules, safety regulation and road construction, maintenance and safety.

The pace of road reform in Australia has been slow compared to other reforms of transport and utilities. This is partly due to roads and road transport being traditionally administered through

308 Australian Trucking Association 2013, *A Future Strategy for Road Supply and Charging in Australia* Canberra, page 3.

government departments, while airlines, airports, and rail have been operated by public companies. Roads have also been seen as public goods, administered by a large number of authorities at the Commonwealth, state and territory and local level, and it has not been widely accepted that a public utility-style organisation could charge directly for them.

As a consequence, the Australian Government and state and territory governments have shown reluctance to explore more direct charging arrangements for roads. Instead, road users are subject to general revenue-raising taxes such as fuel excise, registration and licence fees and other taxes such as stamp duties and the luxury car tax. As a result, road investment decisions are made in the absence of price signals about road network use that would indicate where increased capacity is warranted.[309]

To date, heavy vehicles, being a significant contributor to road damage over time, have been the main focus of road-charging reforms. The current heavy vehicle charging regimes use a combination of registration fees and fuel-based charges to recover cost on average and do not reflect the actual cost to the road network of an individual vehicle. Moreover, taxes and charges on road users in general are not directly linked to the provision of roads.[310]

By contrast, other natural monopoly sectors, such as electricity and water, are independently regulated to identify efficient costs and prices, with fixed and use-based charges used to fund the provision of the service.[311]

Several submissions raise the lack of effective institutional arrangements to support efficient planning and investment in the roads sector.

The Australian Automobile Association considers:

> ... changes to the current public infrastructure governance model are now well overdue and should be at the forefront of the Government's response to this review or more appropriately, through response to the Productivity Commission's review into public infrastructure. The AAA supports any governance model that bolsters the link between consumer demand and investment in an economically efficient way while taking into consideration equitable access to infrastructure. A move to user pays system for roads will lead to greater efficiency and fairness for motorists, so long as existing indirect taxation is reduced. (DR sub, page 2)

The Business Council of Australia recommends:

> Governments should promote efficient investment and use of road transport infrastructure through adoption of broad-based user charging, as part of comprehensive tax reform and reform of Commonwealth and state funding arrangements. (sub, Summary Report, page 15)

Lack of proper road pricing distorts choices among transport modes: for example, between roads and rail in relation to freight, and roads and public transport in relation to passenger transport. Aurizon notes that the lack of commercial viability of much of the rail freight industry is:

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309 Productivity Commission 2014, *Public Infrastructure*, Canberra, page 145.

310 Productivity Commission 2014, *Public Infrastructure*, Canberra, page 145.

311 Australian Trucking Association 2013, *A Future Strategy for Road Supply and Charging in Australia*, Canberra, page 3; also Productivity Commission 2014, *Public Infrastructure*, Canberra, page 142.

> ... exacerbated by the lack of competitively neutral pricing for heavy vehicle freight transport on national highways and arterial roads, despite Federal, and State Government policy advocating the shift of long-haul freight from road to rail for economic and social policy reasons. (sub, page 4)

Lack of proper road pricing also contributes to urban congestion, which is a growing problem in Australia's capital cities.[312] With road users facing little incentive to shift demand from peak to off-peak periods, greater road capacity is needed. As IPART notes:

> During peak periods of demand, roads are allocated through queuing which imposes a far greater cost to road users and the economy than would an effective pricing mechanism. (sub, page 22)

A large number of submissions to the Draft Report come from individuals who consider that existing roads should not be subject to tolls on the basis that they 'have already been paid for'. The Panel considers that roads need to be viewed as a network, since pricing decisions on any road can have implications for other roads. Further, maintenance, traffic and safety improvements to existing roads consume a significant proportion of road budgets and need to be funded just as new road construction must be funded.

Importantly, direct road pricing need not lead to a higher overall financial burden on motorists since existing indirect taxes should be reduced as direct charging is introduced. Road authorities would be subject to prices oversight and independent pricing determinations in similar fashion to monopoly networks in other sectors. As the revenue from direct charging increases and is channelled into road funds, direct budget funding for road authorities should be reduced.

Modelling undertaken by Infrastructure Partnerships Australia suggests that rural and regional drivers will benefit most from a move to replace indirect charges with cost-reflective direct road user charges. This is because rural and regional drivers typically pay large amounts in fuel excise while imposing little cost on the network in the form of congestion or road damage.[313] There is also a case for part of the road network to be funded from Community Service Obligations (CSOs), which is likely to favour rural and regional residents.[314]

The Panel draws a distinction between current tolling arrangements, which are for the most part designed to facilitate private financing of roads, and cost-reflective road pricing, which is designed to provide signals to users and road providers.[315] Imposing tolls on new roads but not on existing roads creates distortions and inequities among road users. Tolls do not provide a signal about which roads are most heavily used and therefore where additional investment is most needed.

The Panel recommends that proper investment and demand management signals for the road network should be the long-term goal. A shift to more direct charging for roads should be pursued in a way that reconfigures current revenues and expenditures to deliver the best results for road users

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312 The Bureau of Infrastructure, Transport and Regional Economics estimates the costs of road congestion in Australian capital cities to have been $9.4 billion in 2005 and projected to more than double by 2020; see Bureau of Infrastructure, Transport and Regional Economics 2007, *Estimating urban traffic and congestion cost trends for Australian cities*, Canberra.

313 Infrastructure Partnerships Australia 2014, Road Pricing and Transport Infrastructure Funding, Sydney, page 9.

314 Productivity Commission 2014, *Public Infrastructure*, Canberra, page 159.

315 For an extensive discussion of road pricing see Infrastructure New South Wales 2012, *Pricing Congestion in Sydney*, Sydney.

and the community rather than as an additional tax impost. This will build public confidence in the reform.

Technologies are available that allow greater use of cost-reflective pricing (i.e., a regulated price that estimates the cost of providing the road). Revenue generated from road pricing should be used for road construction, maintenance and safety. This would make the provision of roads more like the provision of other infrastructure, since road authorities would charge directly for their use and allocate the revenue raised towards the operating and construction costs of the road network. As the PC notes in its recent report on infrastructure:

> The adoption of a well-designed road fund model or a corporatised public road agency model is paramount to delivering net benefits from the funding and provision of roads. In the future, road funds may be able to consider direct road user charges, which would facilitate more effective asset utilisation and more rigorous assessment of new investments.[316]

Consult Australia considers:

> … a comprehensive debate regarding the full application of road user charging, including the development of a national scheme, is long overdue in Australia. Reliance on traditional fuel excise as the key revenue tool to fund infrastructure is internationally recognised as having limited longevity, with diminishing reserves and increased fuel efficiency curtailing revenues. An infrastructure funding regime based on fuel taxes has no sustainable future. (DR sub, page 2)

Importantly, greater use of cost-reflective pricing linked to road provision holds the prospect of both more efficient use of road infrastructure as well as more efficient investment based on clearly identified demands. The Department of Infrastructure and Regional Development notes:

> The Department is of the view that road investment and pricing reform is the next area of major economic reform for Australia, reflected by activities already included in the current reform agenda. (DR sub, page 1)

Considerable work has been undertaken by the Heavy Vehicle and Investment Reform project to progress both user-charging and institutional reform.[317] The project identified the necessary elements of an integrated charging, funding and investment framework and the processes needed to successfully implement the reforms. The framework includes:

- planning and expenditure reforms to encourage better investment decisions in Australia's road network;
- funding reforms to link revenue raised from road users to road investments and reduce reliance on taxation at a local, state and territory and Commonwealth level through the annual budgetary process;
- better investment in the road network to provide more access for high-productivity vehicles;
- an appropriate system of accountability through economic regulation to ensure that charges are set so as to promote efficient and sustainable use of the road network; and

316 Productivity Commission 2014, *Public Infrastructure*, Canberra, page 21.

317 National Transport Commission, *Heavy Vehicle Charging and Investment Reform, Overview*, Canberra.

- charging that is fair, transparent and sustainable and reflects the costs road users impose on the network.[318]

The challenge is now to agree on a model of implementation.

Given the size and importance of the road transport industry for the economy, and the importance of efficient road use and provision for urban and regional amenity and consumer wellbeing, much greater progress needs to be made in this area.

This policy shift will require co-operation from all levels of government. As road pricing is introduced by the States and Territories, the Australian Government should reduce excise and grants to the States and Territories. This would allow the reform to be fiscally neutral.

The Panel's view

Reform of road pricing and provision should be a priority. Road reform is the least advanced of all transport modes and holds the greatest prospect for efficiency improvements, which are important for Australian productivity and community amenity.

Technologies are available that allow for more widespread application of cost-reflective pricing in roads, taking into account location, time and congestion. Revenue raised through road pricing should be channelled into road funds to promote more efficient road use and investment.

Co-operation from all levels of government will be needed to ensure that road pricing does not result in an additional impost on road users.

Implementation

Introducing road pricing to fund road provision is a long-term reform that requires community confidence in the benefits to be gained.

Governments should make a long-term commitment to transform the road transport sector to operate more like other infrastructure sectors. Infrastructure providers should bill users directly for usage and base investment decisions on their economic value, supplemented by government CSO payments where necessary.

As an initial step, road funds could be set up separately to governments' general budgets to increase transparency around road funding. Fuel taxes and other indirect taxes levied on road users should be hypothecated to these road funds. Over time, as direct road charges increase, these taxes should be reduced. Australian Government grants to the States and Territories should also be adjusted in line with the fall in Australian Government revenue from fuel excise.

Within 12 months of agreeing to this recommendation, a working group of Australian Government and state and territory transport and treasury officials should be commissioned to develop pilots and trials. This working group will advise governments around: choosing technologies to allow mass time-of-use and location-based charging; creating road funds and directing revenues to these funds; and reforming road authorities to restructure their operations along the lines of other infrastructure network providers.

318 For more details, see National Transport Commission, *Heavy Vehicle Charging and Investment Reform, Elements of Reform*, Canberra.

The proposed ACCP (see Recommendation 43) should report on progress in road transport reform as part of its annual competition policy assessments.

Recommendation 3 — Road transport

Governments should introduce cost-reflective road pricing with the aid of new technologies, with pricing subject to independent oversight and revenues used for road construction, maintenance and safety.

To avoid imposing higher overall charges on road users, governments should take a cross-jurisdictional approach to road pricing. Indirect charges and taxes on road users should be reduced as direct pricing is introduced. Revenue implications for different levels of government should be managed by adjusting Australian Government grants to the States and Territories.

Public transport

Public transport reforms have not been pursued as part of competition policy. Public transport governance systems vary from State to State and city to city. However, public transport is mostly owned and operated by government. Where the private sector provides substantial operations (for example, private bus operators, taxis and hire car services), these are often regulated or licensed by governments.

The experience in Victoria serves as an example of public transport reforms that have ultimately delivered significant benefits despite some initial problems. In the early 2000s urban rail, tram and country passenger rail operations were privatised. However, within a few years most of the operators needed to be bailed out by the Victorian Government. Despite significantly improved service levels and increased passenger satisfaction, overestimates of patronage built into the bids meant that the subsidies agreed to under the contracts were insufficient to keep the operators solvent.[319]

Although the Victorian Government needed to bail out operators, it did not retake ownership of services. Train, tram and bus services continue to be operated privately and managed through complex contractual arrangements that provide incentives to maintain and improve service quality.

Applying the lessons learned from other sectors to public transport could see greater use of contracting out, privatisation or franchising, subject to a regulatory regime imposing safeguards to maintain service levels. Through careful contracting, service levels and choice can be maintained or improved. Bus services are likely to be contestable and, although governments may wish to mandate a minimum level of service, they should not restrict other providers from entering the market.

The Panel's view

Extending NCP principles to public transport could see more franchising and privatisation of potentially competitive elements of public transport, stronger application of competitive neutrality principles and removal of regulation that limits competition. This holds the prospect of providing services more efficiently and improving service levels.

319 Victorian Department of Infrastructure 2005, An Overview of Passenger Rail Franchising in Victoria, Melbourne, pages 8-9.

12 HUMAN SERVICES

The lives of Australians are immeasurably richer when they have access to high-quality human services. The human services sector covers a diverse range of services, including health, education, disability care, aged care, job services, public housing and correctional services.

Good health makes it easier for people to participate in society. Education can help put people on a better life pathway; quality community services, including aged care and disability care and support, can provide comfort, dignity and increased opportunities to vulnerable Australians.

Given the size of the human services sector, which is set to increase further as Australia's population ages,[320] even small improvements will have profound impacts on people's standard of living and quality of life. As Australian Unity notes:

> Without fundamental change to the health and aged care systems, the ageing of Australia's population will mean a future of greater government-managed care and increased rationing of health services. Fundamental change must revolve around the greater adoption of market economy ideals including a focus on consumer, rather than producer, interests. Competition reform is a critical component. (DR sub, page 4)

Governments at all levels have traditionally played an important role in delivering human services. A number of human services serve important social objectives (for example, equal access to education and health services) and users of human services can be among the most vulnerable and disadvantaged Australians. Because of these characteristics, the scope to use competition or market-based initiatives may be more limited than in other sectors.

Despite the complexity of many human services markets, there is growing interest, both in Australia and overseas, in opportunities to make use of competition-based instruments to secure better outcomes for users of human services and better value for money. As the ACCC states:

> There is scope for greater competition in human services, the potential benefits of which may include lower prices, greater efficiency in service provision, greater innovation and improved consumer choice. (sub 1, page 8)

In many human services, choice and diversity of service providers already exist, for example, general practitioners, dentists, physiotherapists, private hospitals and private schools. In recent years, governments have also introduced choice in areas such as disability and aged care.

Panel discussions with States and Territories also highlighted innovative approaches to delivering human services, with policies reflecting the unique characteristics of each jurisdiction and the service in question (see Section 12.1).

320 Australian Government 2015, *2015 Intergenerational Report, Australia in 2055*, Canberra.

A number of submissions to the Draft Report support the principles identified in the Panel's Draft Recommendation on human services[321] that:

- user choice should be placed at the heart of service delivery;
- funding, regulation and service delivery should be separate;
- a diversity of providers should be encouraged while not crowding out community and voluntary services; and
- innovation in service provision should be stimulated while ensuring access to high-quality human services.

However, some submitters note that changes in human services require a cautious approach, due to the unique challenges of implementing choice and competition in the diverse human services sector, and the impact on people's lives if changes are poorly implemented.[322]

Some submissions and feedback from consultations note that the Panel's discussion of the separation of funding, regulation and service delivery in human services in the Draft Report could have been more nuanced. In particular, the Panel is urged to acknowledge that governments will continue to play a role as market stewards, even where they no longer provide services (see National Disability Services, DR sub, page 2).

The importance of access for users to appropriate data and information in human services is also stressed in feedback. These issues are discussed separately in Chapter 16 on 'Informed choice'.

12.1 Evolving approaches to human services

The Panel recognises that Australians' experiences of human services vary significantly between jurisdictions and across sectors and sub-sectors. As the Joint Submission from Regional Victorian Not-for-profit agencies notes:

> Human services does not really describe a single sector at all. It is a variety of sub-sectors, where both supply and demand differ dramatically. (DR sub, page 3)

Differences across jurisdictions and between sectors (and sub-sectors) mean that a variety of approaches is needed to improve people's experience of human services. As the Joint Submission from Regional Victorian Not-for-profit agencies notes 'Because the availability of and access to services differs so dramatically it is hard to design a one-size fits all approach' (DR sub, page 3).

Over time, governments have played an ever larger role in determining which human services are supplied, how much is supplied (through the budget process) and in delivering many of the services as well. However, all Australian jurisdictions have also gone some way towards including choice and competition principles into various human services sub-sectors.

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321 Submissions that generally support the principles include: ACCC, DR sub, page 17; National Disability Services, DR sub, page 1; Northern Territory Government, DR sub, page 1; and NSW Business Chamber, DR sub, pages 1-2. Submissions that generally do not support the principles in the context of some or all human services include: Australian Education Union, DR sub, page 2; Community and Public Sector Union, DR sub, page 2; and Consumer Action Law Centre, DR sub, page 2.

322 See, for example: CHOICE, DR sub, pages 10-12; National Seniors Australia, DR sub, pages 5-6; and South Australian Government, DR sub, pages 6-10.

The Business Council of Australia notes:

> Most governments in Australia have already started to introduce competition into the delivery of some areas of human services … They are giving consumers more choice, taking regulation out of government departments and giving it to independent authorities
>
> ... Each area of human services is different and each jurisdiction is at varying stages of reform in these sectors. (DR sub, page 8)

The concept of best practice in service delivery has also changed. Alford and O'Flynn conclude in their book, *Rethinking Public Service Delivery*:

> In the post-war era, when services were delivered by the governments' own employees, the quest was to make them work more efficiently, so managerialist reforms… were the keys to better government. In the 1980s, the answer changed. Better and cheaper government would come from handing public services over to private enterprise, in a new era of contractualism — separating purchasers from providers, and subjecting providers to classical contracting and competitive tendering. By the turn of the twenty-first century, the answer changed again. More integrated and responsive public services would come from greater collaboration — between government agencies, private firms and non-profits ...
>
> In fact, none of these waves of reform eliminated what had come before. Rather, each phase overlaid its predecessor, so that today, public managers deal with a whole variety of external providers, through an array of relationships… It may be that there is a new public sector reform panacea waiting in the wings. But…we offer a different answer: *there is no 'one best way'*. Instead, the new world of public service delivery is one where there are different ways for different circumstances.[323]

Panel discussions with States and Territories highlighted innovative approaches to human services delivery, with policies reflecting the unique characteristics of each jurisdiction and the service in question.

Box 12.1 provides some examples of these innovative approaches to improving human services delivery across Australian jurisdictions through: designing contracts to focus on user demand and outcomes (rather than outputs or inputs); governments partnering with not-for-profit providers and communities to deliver services; and using new forms of financing, such as social benefit bonds.

Governments have also moved towards directly funding users to purchase services. Box 12.2 provides examples of these innovative approaches.

323 Alford, J and O'Flynn, J 2012, *Rethinking Public Service Delivery*, Palgrave Macmillan, Basingstoke, page 254.

Box 12.1: Innovations in human services delivery

Jurisdictions across Australia have developed human services delivery models that better reflect outcomes desired by service users and local communities.

Australia has a long tradition of using public-private partnerships (PPPs) to deliver infrastructure projects. More recently, PPPs have been used to improve human services delivery outcomes. The Western Australian Economic Regulation Authority notes that newer PPPs are a:

> ... mechanism to introduce incentives for a greater level of private sector innovation and contestability into government services and associated infrastructure delivery.[324]

The West Australian Joondalup Health Campus PPP, which is the largest health care facility in Perth's Northern suburbs, provides 24-hour acute care from an integrated public and private campus. Established in June 1996, it is operated by Ramsay Health Care — Australia's largest private hospital operator. The hospital treats public patients on behalf of the State Government under an outcomes-based contract.[325]

Infrastructure Partnerships Australia notes that the Joondalup Health Campus is 'widely considered to be one of the nation's best examples of a successful healthcare PPP',[326] achieving consistent 'A' ratings in reviews conducted by the Western Australian Department of Health's Licensing Standards and Review Unit.[327] Joondalup offers innovative services, responding to user feedback by introducing an online patient admission system in late 2013.

South Australia is using a PPP framework for the new Royal Adelaide Hospital[328], and the New South Wales Government PPP for the new Northern Beaches Hospital includes clinical and other services for public patients under a contract with the New South Wales Government (New South Wales Government sub, page 24).[329]

Governments are also working with communities and not-for-profit providers to design service delivery systems that meet the needs of local communities. Under the Australian Government's Communities for Children initiative,[330] non-government organisations are funded as 'Facilitating Partners' to develop and implement a whole-of-community approach to early childhood development in consultation with local stakeholders. Examples of services delivered under this initiative include home visits, early learning and literacy, and child nutrition. A national evaluation of Communities for Children found:

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324 Western Australia Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia: Final Report*, Perth, page 128.

325 The Western Australian Department of Health Annual Report states: 'The Department of Health contributes to "Outcomes Based Service Delivery."' As part of the annual report, Joondalup Health Campus is assessed against several outcomes-based KPIs including: Proportion of privately managed public patients discharged to home, unplanned readmission rate, and survival rates for sentinel conditions of privately managed public patients. See Western Australian Department of Health, *Annual Report 2011 — 12*, Perth, page 62.

326 Infrastructure Partnerships Australia 2013, *A Submission on the Future Direction for Public Private Partnerships*, Sydney, page 16.

327 Joondalup Health Campus 2011, 2011 *Annual Report*, Joondalup, page 2.

328 SA Health Partnership 2013, *The new Royal Adelaide Hospital,* SA Health Partnership, Adelaide, viewed 24 October 2014, www.sahp.com.au.

329 New South Wales Government 2015, *Northern Beaches Health Service Redevelopment*, New South Wales Government, Sydney, viewed 5 February 2015, http://nbhsredev.health.nsw.gov.au/.

330 Australian Government Department of Social Services 2014, *Families and Children's Services*, Department of Social Services, Canberra, viewed 5 November 2014 www.dss.gov.au/our-responsibilities/families-and-children/programs-services/family-support-program/family-and-children-s-services.

Box 12.1: Innovations in human services delivery *(continued)*

> The number and strength of networks increased, as did trust and respect between service providers … Facilitating Partners have been most effective when the non-government organisations they represent have been well-known in the community … Having a community focus has enabled service delivery to be flexible to meet the needs of the community.[331]

The Western Australian government partners with local community groups through its Delivering Community Services in Partnership Policy. This policy moves away from input funding and funds not-for-profits for achieving outcomes and sustainable prices. It seeks to improve outcomes for all Western Australians by building partnerships between the public and community sectors in policy, planning and delivery.

Governments also use new funding channels to increase the reach of social programs. The New South Wales Government has partnered with the private and community sectors to develop two social benefit bonds:

- with UnitingCare Burnside for the New Parent Infant Network (Newpin) bond; and
- with a consortium of The Benevolent Society, Westpac and Commonwealth Bank.

These programs are initially funded by private investors, who receive a return on their investment if improved social outcomes are achieved.

Newpin is a child protection and parent education program that works with families to enhance parent-child relationships. The social benefit bond has allowed UnitingCare to expand and enhance its existing program. An early evaluation of the program recognises that much has been achieved in a short timeframe, including:

- Newpin staff working more closely as a team, translating to better continuity of care for families, more informed practice, and a greater focus on priority needs;
- formalising family assessments, planning and reporting processes, creating a more transparent basis for action and tracking progress over time — which is energising and motivating for both staff and parents; and
- introducing more comprehensive data capture and reporting, forming a stronger basis for reflecting on and improving practice.[332]

In Victoria, the Homelessness Innovation Action Projects have supported innovative approaches to tackling homelessness. In Stage One the government selected 11 projects to be delivered by private organisations based on their ability to provide a new approach to service delivery in the area of homelessness, with a focus on prevention and early intervention.

After a comprehensive and independent evaluation of the project performance the seven projects that demonstrated the best outcomes for clients were funded to continue to Stage Two. These included a project linking employment, housing, and personal support programs for vulnerable young people; and a regional outreach project for elderly homeless people.[333]

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331 Muir et al 2010, 'The national evaluation of the Communities for Children initiative', *Family Matters* No. 84, Australian Institute of Family Studies, Melbourne.

332 Urbis 2014, *Evaluation of the Newpin SBB program Implementation Report*, NSW Treasury, Sydney.

333 Victorian Department of Human Services 2015, *Homelessness Innovation Action Projects*, Department of Human Services, Melbourne, viewed 29 January 2015 www.dhs.vic.gov.au/about-the-department/funding,-grants-and-tenders/homelessness-innovation-action-projects.

Box 12.2: Examples of direct user choice

With the introduction of the National Disability Insurance Scheme[334] (NDIS) over the next five years, disability service providers will move from being contracted by governments to being registered providers with the National Disability Insurance Agency (NDIA). Funding for disability support will follow individual service users rather than service providers, allowing individuals to choose the providers from whom they wish to receive services. Individuals electing to receive direct payments for purchasing their support (subject to a risk assessment) will not be restricted to choosing providers registered with the NDIA.

This builds on previous work undertaken by the States to personalise disability care and support. For example, in Queensland the 'Your Life, Your Choice' disability support initiative allows eligible Queenslanders to participate actively in planning and delivering their own disability support and services. The South Australian Government submission also notes:

> Prior to the Australian Government's announcement of the NDIS, the South Australian Government had already commenced a transition towards individualised funding for clients, including self-management, in order to allow people with disability to have choice and control over their own support packages. (DR sub, page 8)

In the area of dental services, both New South Wales and Queensland have introduced voucher schemes for citizens who are eligible for publicly funded dentistry. These vouchers can be redeemed at private dental practices, providing more accessibility and choice for users. In Queensland, the dental voucher scheme has reduced the number of people waiting more than two years for dental procedures from 62,513 to zero.[335]

The Australian Government is providing consumer-directed Home Care Packages for older Australians who want to remain in their own home but need some assistance with transport, domestic chores or personal care. Under these packages, government provides funding to users who have the right to use their budget to purchase the services (within the scope of the program) they choose. Users enter into a contract with home care providers to deliver the services. An advocate can represent the user in this process, if desired.

There are a large number of government approved home care providers across the States and Territories, including for-profit and not-for-profit, religious and non-denominational bodies. Users may choose to 'top up' their packages by purchasing additional care and services through their home care providers.[336]

12.2 GOVERNMENTS AS STEWARDS

Innovation in the design and management of human services receives cautious support in submissions, including from organisations that supply human services to the most vulnerable

334 National Disability Insurance Scheme 2015, *National Disability Insurance Scheme*, National Disability Insurance Agency, Canberra, viewed 29 January 2015 www.ndis.gov.au/.

335 Queensland Government 2014, *Queensland's Renewal Program: Achievements, July–September 2014 Quarterly Update*, Brisbane, page 14.

336 Australian Government Department of Social Services 2015, *Home Care Packages,* Commonwealth of Australia, Canberra, viewed 29 January 2015 www.dss.gov.au/our-responsibilities/ageing-and-aged-care/aged-care-reform/reforms-by-topic/home-care-packages.

members of the community.[337] However, they stress that the Panel's approach should not be seen as bolstering simplistic arguments for privatisation or contracting out of public services, nor giving comfort to a philosophy of 'private good, public bad'.

The Panel heard two particular notes of caution expressed through consultations and in submissions.

First, governments cannot distance themselves from the quality of services delivered to Australians. Policy in human services cannot simply be set and then forgotten. It needs to evolve over time in response to user experience with different approaches to service quality and access.

Second, although changes in human services can often be urgent, they should not be rushed. There are complex issues that will take time to work through so that people's lives, particularly those facing disadvantage, are not unduly or unhelpfully disrupted.

For example, Western Australia began work to reform disability care and support services well in advance of the NDIS being introduced. Western Australia's disability system has 'evolved through 25 years of bipartisan reform and funding growth' to a place where it is recognised for its focus on 'individualised funding, on developing local relationships and for the support provided to people through the network of local area coordinators'. [338] Even after 25 years, Western Australia continues to refine its disability services system, with a focus on giving people with disability, their families and carers genuine choice and control in their lives.

These notes of caution emphasise the need for governments to retain a stewardship role in the provision of human services.

This will have some similarities with the ongoing stewardship role of government in other sectors, such as the electricity market. Governments have established both an energy market operator to keep energy services delivered and a separate rule-maker to change the way the energy market operates over time so that it continues to meet the long-term interest of consumers. In reforming the electricity market, governments have recognised the role of a strong consumer protection framework in building confidence in the market.

Good stewardship is important in human services since human services can be just as essential to many Australians, especially those facing disadvantage, as access to electricity in securing the quality of their daily lives. As the National Disability Services submission states:

> **Establish a market stewardship function:** Where governments apply choice and competition principles in the field of human services there is a corresponding responsibility to invest in overseeing the impact of the policy on the market. Governments must also respond to findings and as required, adjust funding, investment in sector development and regulation settings. (DR sub, page 2)

Market stewardship is about governments' overall role in human services systems. Australia's systems of human services cover policy design, funding, regulation and provision — and they also reflect our federal structure. Across many human services, the policy responsibility for human services lies with the States and Territories; however, the Australian Government has some leverage through financial grants and Council of Australian Governments (COAG) processes. For example, tied

337 See, for example: Jesuit Social Services, DR sub, page 2; National Employment Services Association, DR sub, page 5; and South Australian Government, DR sub, page 7.

338 Commonwealth of Australia Parliamentary Debates 2012, Senate, No. 13, 1 November, page 103.

grants made to tertiary education institutions give the Australian Government an ongoing and dominant role in university policy.

Stewardship relates not just to governments' direct role in human services but also to policies and regulations that bear indirectly on human services sectors. For example, the Productivity Commission (PC) identified planning restrictions as affecting the provision of child care services in Australia.[339]

Given the importance of human services to the everyday lives of Australians, policies and regulations that indirectly affect human services must be subject to review, including against a public interest test as set out in Recommendation 8.

Market co-design

In fostering a diverse range of service models that meet the needs of individuals and the broader community, governments can benefit from working collaboratively with non-government human services providers to effectively 'co-design' the market, incorporating the services that users are demanding and how they might be best delivered.

As the South Australian Government notes:

> ... co-design of human services is an emerging policy direction in human services delivery ... Co-design refers to the involvement of consumers of services, as well as other partners such as service providers and non-government organisations (NGOs), in the design of human services. (DR sub, page 7)

There are advantages for governments in partnering with community organisations to design and deliver services. The Joint Councils of Social Service Network notes, 'Community organisations are usually embedded within the communities they serve, creating trust' (DR sub, page 2).

Collaboration in the design and delivery of human services will be particularly important where users have an ongoing relationship with their service provider built on mutual trust. While some human services are 'transactional' in nature (for example, a knee replacement operation generally does not require a patient to have an ongoing relationship with a surgeon), many others are 'relational', meaning that users benefit from continuity of service provision from a trusted and responsive provider.

Jesuit Social Services states:

> A transactional approach to human services simply won't work when it comes to people leaving prison or state care, young people living with mental illness or drug and alcohol issues, refugee or newly arrived migrant communities, or Aboriginal communities. Instead, services are at their best when they comprise longstanding and sophisticated networks made up of people, places and institutions that are grounded in relationships of trust. (DR sub, page 4)

A necessary first step in co-design is to articulate the desired impact or change. Governments can work with service providers and prospective users to discuss their needs and the best strategies to meet those needs. This allows co-design to play an important part both in policy formation and in the actual delivery of services.

339 Productivity Commission 2014, *Childcare and Early Childhood Learning,* Inquiry Report No. 73 Canberra, page 298-308.

One example of the results from a co-design approach is the 'Family by Family' program currently operating in Adelaide and in Mount Druitt, New South Wales. This program aims to reduce the number of families in need of crisis services and help to keep kids out of the child protection system.

The Australian Centre for Social Innovation, a not-for-profit agency, spent 12 months working with service users to co-design a program that would enable them to make changes in their lives. The resulting program takes a 'peer to peer' approach. The not-for-profit agency provides training and coaching to families that have overcome challenges, such as debt and addiction, so they can mentor and assist families that are still struggling.[340] In its first year of evaluation, most families participating in Family by Family met their goals, with 90 per cent of families saying things were 'better' or 'heaps better'.[341]

Ways of funding human services

Funding is and will continue to be the most important part of both human services policy and governments' role as market stewards. The Panel makes no recommendations regarding overall levels of funding for human services — funding decisions are a matter for governments and are generally determined through budgetary processes. However, funding levels and methods can have important implications for choice, diversity and innovation in human services markets.

Funding decisions centre on setting the bounds of services that will be paid for or subsidised by governments and structuring the funds that flow from the government to users or providers. While some human services are block-funded, others have 'entry criteria' that qualify an individual for funding associated with a level of service. Policymakers may change entry criteria from time to time; for example, to better reflect changing demographics.

The NDIS rollout required an initial policy decision as to who will qualify for public disability funding. During the launch period (July 2013 to 30 June 2016), individuals qualify if they are in a launch location, are the right age for that location and meet either the disability or early intervention requirements.[342]

As a general policy, wherever possible, funding should follow user choices to ensure that providers are rewarded when meeting, and being responsive to, user preferences.

Although some human services funding is transparent and directly related to a specific service — for example, Medicare provides a direct benefit to patients when they visit a GP — other types of funding is less transparent.

Several submissions point to traditional methods of funding community service obligations (CSOs) as typically lacking transparency. A CSO is a service that provides community or individual benefits but would not generally be undertaken in the normal course of business. Many human services are expected to be available on a universal basis, which is a CSO. Government providers may be required to fulfil CSOs or the government may contract with private providers to deliver CSOs on its behalf.

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340 The Australian Centre for Social Innovation 2014, *What is Family by Family?,* The Australian Centre for Social Innovation, Adelaide, viewed 30 January 2015 http://tacsi.org.au/project/family-by-family/.

341 Family by Family 2014, *Our first independent evaluation report is in!,* The Australian Centre for Social Innovation, Adelaide, viewed 5 February 2015, http://familybyfamily.org.au/2012/10/our-first-independent-evaluation-report-is-in/.

342 National Disability Insurance Scheme 2014, *My Access Checker: Access Requirements,* National Disability Insurance Agency, Canberra, viewed 3 June 2014 www.ndis.gov.au/sites/default/files/media/mac_access_requirements.pdf.

IPART points out:

> ... providers are often required to absorb the cost of CSOs into their operating budgets, often involving non-transparent internal cross-subsidies … because CSOs are not directly funded by the government, agencies have to overcharge for some of their other services in order to cover the costs of their CSOs … This in turn can lead to the restriction of competition in otherwise contestable areas so the internal cross-subsidies can be maintained. (sub, pages 4-5)

More transparent CSOs can improve diversity and choice. Where there are significant CSOs, potential suppliers may not be able to match the cost structure of public providers, which can limit the private and not-for-profit providers entering the market. On the other hand, providers tasked with delivering CSOs may become unsustainable as the 'higher prices needed to fund the subsidy to CSOs can be undercut by competitors that only supply those users which generate profits'.[343]

By making CSOs transparent and funding them directly, important community services can continue while leaving room for new providers to enter and offer other innovative services.

Separating policy-making from regulation and service provision

In the Draft Report, the Panel recommends separating funding from regulation and provision of human services. Separating funding, regulation and provision of human services need not involve any reduction in government funding. However, it will involve introducing greater independence into service regulation and the potential for competition into service delivery.

This is underpinned by the notion that good market stewardship delivers clarity about whose interests the government is serving when it acts. In many human services sectors in Australia, there are still instances where the government develops policy, block funds, regulates and provides services through the one organisation.

Some submitters note actual or potential difficulties with separating functions in human services. For example, the Australian Education Union states, 'there should not be a separation between funder and provider of service delivery' (sub, page 2) and adds that separating these functions may lead to increased costs to users and issues of access and equity (sub, page 3).

The New South Wales Government also notes, 'In some cases, however, the separation of funding, regulation and service provision roles may bring unintended consequences if incentives and roles are not appropriately aligned' (DR sub, page 16-17).

While the potential challenges associated with separation must be recognised, separating policy (including funding) and regulation decisions from provision can ensure that providers have greater scope to make decisions in the best interests of users and that policy settings do not give special preference to public providers.

Many States, including New South Wales and South Australia, have recently separated public TAFE providers from policy functions in vocational education and training. As South Australia's former Minister for Employment, Higher Education and Skills noted:

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343 Australian Government, House of Representatives Standing Committee on Financial Institutions and Public Administration 1997, Cultivating Competition, *Report of the Inquiry into aspects of the National Competition Policy Reform Package*, Australian Government Publishing Service, Canberra, pages 33-34.

> This separation [of policy from provision] allows the department to focus on driving [policy] reforms and make independent decisions regarding the availability of funding for training, a crucial element of this increasingly competitive sector.[344]

TAFE New South Wales notes that, in response to its recent separation from the New South Wales Department of Education and Communities, 'Becoming a separate agency again will give us greater opportunity to adapt and respond to our changing customer needs.'[345] Further, the PC has observed that, where a regulator and provider are the same entity, regulators 'often find ways of favouring the arms of their own businesses'.[346]

Regulation that is independent of any provider (including government providers) can help to encourage entry into service delivery markets by ensuring all providers operate on a 'level playing field'— leading to greater choice, diversity and innovation in service provision.

With regard to separating policy (including funding) from regulation, the OECD has noted:

> A high degree of regulatory integrity helps achieve decision-making which is objective, impartial, consistent, and avoids the risks of conflict, bias or improper influence ... Establishing the regulator with a degree of independence (both from those it regulates and from government) can provide greater confidence and trust that regulatory decisions are made with integrity. A high level of integrity improves outcomes.[347]

The submission from National Disability Services discusses challenges that arise from insufficient distance between the regulator and policymakers, including that 'there can be a tendency for bureaucracies to create unwieldy regulation in response to risk which reduces the effectiveness of service providers' (DR sub, page 4).

Box 12.3 describes the role of the NDIA as an independent regulator in the disability care and support sector.

344 Kenyon, T (Minister for Employment, Higher Education and Skills) 2012, *TAFE SA Established as Statutory Corporation*, media release, 4 October, Adelaide.

345 Christie, P (Managing Director TAFE NSW) 2014, *Announcement: TAFE NSW*, news item, 1 July, Sydney.

346 Productivity Commission 2011, *Disability Care and Support Report* Vol. 1, Canberra, pages 407-408.

347 OECD 2014, *The Governance of Regulators*, OECD Best Practice Principles for Regulatory Policy, OECD Publishing, page 47.

Box 12.3: Disability care and support regulator

The NDIA is a statutory agency whose functions include delivering the NDIS.

The NDIA assists participants in the NDIS to develop plans with individualised packages of support, which include the reasonable and necessary support directly related to meeting a participant's ongoing disability support needs. These plans are reviewed regularly and can be modified, for example, when a participant's circumstances and needs change.

The NDIA (through its CEO) has a range of decision-making powers under the *National Disability Insurance Scheme Act 2013* including:

- **access decisions** — assessing whether a person meets the access criteria to become a participant in the NDIS;
- **planning decisions** — for NDIS participants, approving and reviewing plans, including the reasonable and necessary supports that will be funded or provided through the NDIS;
- **registered provider decisions** — approving persons or entities to be registered providers of supports under the NDIS; and
- **nominee decisions** — appointing a nominee for certain NDIS participants who need assistance in developing and managing their plan.

In its Disability Care and Support Report, the PC argued that the type of individualised assessment of participants undertaken by the NDIA is 'an essential element of avoiding … chronic underfunding'.[348]

The design of the NDIS is intended to ensure that the NDIA is able to change individual plans quickly and efficiently when required.

The Panel's view

High-quality human services can significantly improve peoples' standard of living and quality of life. Particularly with Australia's ageing population, the size and importance of the human services sector will increase into the future.

Governments cannot distance themselves from the quality of human services delivered to Australians — they will continue to have an important role as market stewards in human services sectors, including through policy and funding decisions.

In undertaking their stewardship role, governments should:

- foster a diverse range of service models that best meet the needs of individuals and the broader community;
- co-design markets with human services providers to build on the trust and relationships that already exist between service providers and users;
- separate their interest in policy (including funding) and regulation from provision;
- vest rule-making and regulation with a body independent of government's policy (including funding) role;
- allow funding to follow people's choices; and
- fund community service obligations in a transparent and contestable manner.

348 Productivity Commission 2011, *Disability Care and Support Report* Vol. 1, Canberra, page 21.

12.3 EXPANDING USER CHOICE

Traditionally, governments have decided which human services would be delivered, in what quantities and to whom. One result of this practice was that individual needs were rarely reflected in the standard service offering.

The PC points to some important reasons for expanding choices for people who use human services.

- There is a social expectation that people should be able to run most aspects of their lives.
- Users will have different and changing preferences about what matters in their lives, and these are not easily observable by others.
- Lack of choice can result in poorer quality and more expensive services, and less diversity and innovation. In contrast, user control of budgets creates incentives for suppliers to satisfy the needs of users, given that they would otherwise lose their business. That in turn typically leads to differentiated products for different niches.[349]

In many instances, users (rather than governments or providers) are best placed to make appropriate choices about the human services they need.

Providing users with a direct budget may allow them to effectively exercise choice. However, there will not just be one model of user choice. For example, in school education effective choice may come down to making sure that schools are able to respond to the needs and demands of families in the local community. This could be achieved by providing more autonomy to the school decision-makers, such as allowing principals to hire teachers with special skills or qualifications (for example, teaching English as a second language) to meet the needs of students and families in the community.

Box 12.4 provides examples of the benefits of choice in aged care from the perspective of service users.

349 Productivity Commission 2011, *Disability Care and Support Report* Vol.1, Canberra, pages 355-357.

Box 12.4: Benefits of choice — aged care examples

The Brotherhood of St Laurence released a paper[350] on user choice in aged care services, which surveyed some of the advantages aged care users have enjoyed from increased choice.

Overall, aged care users found that having control of funds meant that service providers became more responsive to their individual requirements. This increased the bargaining power that users had with service providers, case managers and other professionals.

The paper provided some examples of choice:

- One man employed someone to fetch a meal from his local pub after rejecting 'meals on wheels'. In another case, a user employed a support worker who cooked meals of the person's choosing.
- An aged care user applied funding to purchasing assistive technology, such as sensors that automatically switched on a light when the person got out of bed and a lifeline alarm to summon help in case of a fall.
- One group of users of mixed ages living independently in their own flats pooled their funding to buy services, giving them greater purchasing power.
- Aged care users also benefited from being able to choose their support workers rather than being assisted by pre-assigned agency staff, who often rotate through their positions. One user stated:

  > Direct payments give me control. I now have a say in what I eat and drink, what I do and when I do it. I can choose carers that can help me to live my life. I can have continuity instead of a different carer every day.[351]

There are various approaches to expanding user choice in human services. The UK Government has decided to put user choice at the heart of service delivery across the board, accepting a presumption that user choice will generally be the best model (discussed in Box 12.5).

An alternative approach is to analyse services market-by-market, extending choice gradually into selected human services as appropriate.

350 Laragy, C and Naughtin, G 2009, *Increasing consumer choice in aged care services: A position paper*, Brotherhood of St Laurence, Fitzroy.

351 Ibid., pages 8-9.

Box 12.5: UK reform of public services

The UK has gone further than Australia in introducing competition and choice into the delivery of public services. The Open Public Services White Paper[352] proposes five principles for modernising the UK's public services.

- **Increasing choice** wherever possible — which means putting people in control, either through direct payments, personal budgets, entitlements or choice. Where direct user control is not possible, elected representatives should have more choice about how services are provided.
- **Decentralising** to the lowest appropriate level — where possible, this will be individuals; otherwise to the lowest-level body, such as community groups or neighbourhood councils.
- Opening service delivery to a **range of providers** — high-quality services can be provided by the public sector, the voluntary sector and the private sector. This means breaking down regulatory or financial barriers to encourage a diverse range of providers. It also means transparency about the quality and value for money of public services so that new providers can enter and challenge under-performers.
- Ensuring **fair access** — government funding should favour those with disadvantage.
- **Accountability** to users and to taxpayers.

Different public services have different characteristics. The White Paper identifies three categories of public services and more detailed principles for each type of public service.

1. Individual services:

- funding follows people's choices;
- robust framework of choice in each sector;
- publishing key data about public services and provider performance;
- target funding at disadvantage (for example, a 'pupil premium' paid to schools that take on disadvantaged students);
- license individual providers through a relevant regulator; and
- access to redress, including through an ombudsman.

For specific services, users have a legal right to choose and must be provided with choices by law. For example, when GPs refer health services users to medical specialists, they must offer a shortlist of hospitals or clinics among which the users can choose.

2. Neighbourhood services: these are services used by the community collectively, such as local libraries and parks. In line with the principle of decentralising to the lowest appropriate level, the UK is looking to encourage higher levels of community ownership.

352 UK Government 2011, *Open Public Services White Paper*, The Stationery Office, Norwich.

Box 12.5: UK reform of public services *(continued)*

3. Commissioned services: these are services where user choice is unlikely to work as a model, for reasons such as:

- the service is a natural monopoly;
- the service is being provided for people who are not able to make the appropriate choices themselves (such as drug rehabilitation); or
- there are security-related or quasi-judicial issues (such as the court system or planning laws).

In this case, the UK has decided to switch the default from the government providing the service to the government commissioning the service from a range of providers — and to separate purchasers from providers to encourage innovation.

Should user choice be applied to every human service?

Different factors make it easier or harder to apply user choice to particular services. A user choice model might not be right for every service. The traditional block-funding approach, where the user is a passive recipient of services often from one provider, may remain appropriate in some circumstances. The Panel recognises that access to quality services will be a prerequisite for effective choice and that accessibility will be particularly important in remote and regional areas.

The diagram below provides high-level guidance on some of the features that may determine the suitability of user choice for particular human services.

The application of user choice to human services

Easier to apply user choice		Harder to apply user choice
Nature of the market		
Competitive range of providers	Somewhat competitive/contestable	Natural monopoly
Complexity of service		
Simple, or good information available to guide users or intermediaries		Highly complex outputs and uncertain outcome
Nature of the transaction		
Repeat transaction		One-off or urgent transaction
Capacity constraints		
Low		Very high
Switching costs or transaction costs for users		
Low		Very high
Government specifications on service delivery		
Performance-based standards which allow for innovation and product differentiation		Highly prescriptive standards with limited ability for suppliers to compete on price or quality

Sometimes the market will be a natural monopoly, which can only support one supplier or where the government achieves efficiencies by being the only supplier or purchaser. For example, the Australian Government is currently the sole purchaser of Pharmaceutical Benefits Scheme (PBS) subsidised pharmaceuticals, which may achieve lower pharmaceutical prices.

In situations where the service is highly complex and there are uncertain outcomes, it may be more difficult to apply user choice; for example, providing support services to people who are experiencing multiple sources of disadvantage.

It will be easier to apply user choice to a repeat or ongoing transaction (for example, choice of in-home disability support) rather than to a one-off transaction. In addition, users who are in a catastrophic situation, such as requiring emergency surgery, may not have the capacity to exercise choice.

Capacity constraints are a broader issue in human services since the number of places that can be offered may restrict user choice. For example, not all children can go to the same school and not all emergency patients can be treated in the same hospital simultaneously. If choice leads to an excess of demand over supply, some way of managing demand will be needed. This may lead to constrained choice or queuing, which may nevertheless still be a better outcome for users than no choice at all.

On the other hand, allowing for user choice, particularly in areas where the government was previously the main or sole service provider, opens up the possibility that some providers will not attract enough customers to survive. Provider failure is a normal part of providing goods and

services. Moreover, if providers face no credible threat of exit when they underperform, the full user benefits of provider choice are unlikely to be realised. Part of governments' stewardship role includes making arrangements for service continuity in case of provider failure.

It will be easier to apply user choice where users can easily switch between service providers. User choice may not lead to efficient or competitive outcomes where there are financial costs (for example, increased travel costs associated with a new provider) or non-financial costs (for example, a child may be unwilling to change schools on account of the loss of his or her social networks). Wherever possible, governments should take steps to lower switching costs, so users can easily switch to a provider better placed to meet their needs. For example, users should not 'lose their place in the queue' if they switch providers, nor need to undergo further eligibility assessment.

If governments wish to exercise tight control and set prescriptive standards over the products or services provided to users, the usual benefits of competition — diversity of product, innovation and price competition — are unlikely to materialise. In these cases, it may be more efficient for governments to remain sole providers of the service or to pursue joint ventures or managed competition models with non-government providers.

Limits to user choice in human services

In some circumstances, users may not be in the best position to choose the appropriate service, and hence another model (for example, government choice or service provider choice) may be more appropriate.

Some vulnerable users are less able to exercise choice. In other cases, users may view choice as a burden they do not wish to bear, suggesting that a 'default option' should always be available. There also may be cases where choice is limited, such as in rural and remote locations.

Special consideration is also needed to empower people with multiple disadvantages or severe disadvantage to exercise effective choice. Even when presented with perfect information, severely disadvantaged users may lack the confidence or experience to choose the best pathway to meet their needs.

The Joint Councils of Social Service Network notes:

> ... some people experiencing poverty and inequality are placed at a significant disadvantage in exercising choice in market-based mechanisms. Factors influencing this disadvantage include mental or chronic illness, unemployment, insecure housing or homelessness, and income inadequacy or insecurity. (DR sub, page 9)

The consequences of users making the wrong choice in certain contexts can be very severe. As the Consumers' Federation of Australia notes:

> ... the risk of making a 'wrong' choice in health or education can have significant long-term consequences … it is not appropriate or fair to pass on those risks [to users] in the absence of an appropriate, and high standard, safety net in public services. (sub, pages 8-9)

In different circumstances, choice may need to be balanced against other factors, including access to high-quality services and social equity. For example, in school education, a recent OECD report found:

> School systems with low levels of competition among schools often have high levels of social inclusion, meaning that students from diverse social backgrounds attend the same

> schools. In contrast, in systems where parents can choose schools, and schools compete for enrolment, schools are often more socially segregated.[353]

Someone will always be making a choice about what service is provided to users: governments, service providers (for example, doctors), purchase advisors or users themselves. The question is how best to match the choices made with the needs and preferences of users of human services.

User information in human services

In order to choose what is right for them, users must be able and willing to gather and process the right information. Ideally, this information should be freely available, aggregated (for example, on a single website), easy to interpret and access, and relevant to the users' needs. Users should have access to objective, outcomes-based data on available services, and/or to feedback from previous users of the service — noting that this may raise issues of privacy and misinformation.

CHOICE highlights:

> ... the importance of better information on factors that matter to consumers, in forms that they can use, in any extension of competition within health and education. This will require government to ensure that suppliers make base data available, in usable formats. (sub, page 27)

Box 12.6 describes some of the websites that provide users with information on health and school services.

Box 12.6: Human services user information systems

Health information: Some national Australian databases of health information (for example, myhospitals.gov.au), publish comparative data on hospital performance, including average waiting times and infection risks. Health service users can also visit ahpra.gov.au to check that their health practitioner is registered and check whether he or she has been reprimanded or has conditions imposed on his or her right to practice.

The UK has gone even further. The national website, NHS choices, provides extensive health information to health service users in an accessible format. Information includes: services offered by individual health professionals; their risk-adjusted patient mortality rate; and user reviews of health services.

When data on individual consultant treatment outcomes were first provided, the National Medical Director of NHS England noted:

> This is a major breakthrough in NHS transparency. We know from our experience with heart surgery that putting this information into the public domain can help drive up standards. That means more patients surviving operations and there is no greater prize than that.[354]

353 OECD 2014, 'When is Competition Between Schools Beneficial?', *PISA in Focus*, No. 42, OECD Publishing, Paris.

354 NHS England News 2015, *Major breakthrough in NHS Transparency as consultant mortality data goes online for first time*, NHS England, Redditch, viewed 29 January 2015 http://www.england.nhs.uk/2013/06/28/mjr-brkthgh-nhs-transp-cons/.

Box 12.6: Human services user information systems *(continued)*

School information: myschool.edu.au enables parents and carers to search detailed profiles of Australian schools simply by entering a school's name, suburb or postcode. It contains data on factors including academic achievement (as measured by the NAPLAN national testing), school finances and a mapping function to show a school's location along with other schools in the same area. The site now has six years of data available, which parents and carers can use to compare a particular school's progress with that of schools serving similar student populations. It is widely used, with over 1.2 million visitors in 2013.[355]

Disadvantaged individuals and groups may need greater assistance in navigating the choices they face. This can include providing information through accessible communication channels that suit individual users' needs.

Where complexity is high, there can be a role for 'mediated choice', such as using purchase advisors (for example, a GP to assist in choosing a surgeon), or where the individual is not in a good position to make a choice (for example, a relative to assist in choosing care for a dementia sufferer).

Where a purchase advisor is used, the incentives facing the advisor must be aligned with those of the user. The purchase advisor should not have financial or other incentives to over-service the user (for example, by referring them for unnecessary health tests) or to refer the user to one particular service provider.

Mediated choice could also be facilitated through community co-ordinators. For example, Western Australia's disability care and support program includes a role for Local Area Co-ordinators. Co-ordinators are located throughout Western Australia and have local knowledge to help advocate, plan, organise and access the support and services people with disabilities need. Each Co-ordinator works with between 50 and 65 people with disability, providing support that is personalised, flexible and responsive.[356]

Information systems can also play an important role in helping service providers better understand their strengths and weaknesses. Service providers can use feedback and data to improve their own performance, leading to more responsive services and better overall outcomes. An example from the US is presented in Box 12.7.

355 My School 2014, *My School*, Commonwealth of Australia, Sydney, viewed 25 August 2014 www.myschool.edu.au/.

356 Government of Western Australian Disability Services Commission 2015, *Local Area Coordination*, Government of Western Australia, Perth, viewed 29 January 2015 www.disability.wa.gov.au/individuals%1efamilies%1eand%1ecarers/for%1eindividuals%1efamilies%1eand%1ecarers/local%1earea%1ecoordination/.

Box 12.7: Service providers and feedback systems

Since 1990, the US State of New York has publicly released risk-adjusted outcomes for patients undergoing coronary artery bypass graft surgery, with the goal of enhancing the quality of care for heart surgery patients.

The collection and release of this information involves collaboration between hospitals and doctors involved in cardiac care as well as the New York State Department of Health and the New York State Cardiac Advisory Committee. The program promotes improved outcomes not just through service user knowledge but also through competition between hospitals and surgeons.

New York State Department of Health's 2008 — 2010 evaluation of the program notes:

> The overall results of this program of ongoing review show that significant progress is being made. In response to the program's results for surgery, facilities have refined patient criteria, evaluated patients more closely for pre-operative risks and directed them to the appropriate surgeon. More importantly, many hospitals have identified medical care process problems that have led to less than optimal outcomes, and have altered those processes to achieve improved results.[357]

American news outlets also reported in 2012 that, since the program began, the death rate for bypass surgery has dropped around 40 percent, and continues to fall.[358]

An important aspect of any feedback system is that providers should not be able to 'game' the system. Although the New York State program reports risk-adjusted outcomes (i.e., the reported data are adjusted to take account of each patient's specific health profile), several media outlets report that high-risk patients are often turned away by doctors who fear that the patient may affect their outcomes score.[359]

Governments or other providers must therefore ensure that data systems avoid creating opportunities for providers to protect their ratings by turning away those most in need.

Australian governments already collect and store significant amounts of data on various human services, including health and education. Careful release of existing data, with particular attention to ensuring that the information is not 'gamed', could play an important role in helping users make informed choices and helping providers to deliver responsive and high-quality services.

Informed choice is discussed more broadly in Chapter 16.

357 New York State Department of Health 2012, *Adult Cardiac Surgery in New York State 2008 — 2010*, Albany, page 11.

358 Sternberg, S 2012, 'At New York Hospitals, Heart Patients' Death Rates Are an Open Book', *US News*, 18 October, Washington DC.

359 Altman, L 1990, 'Heart-Surgery Death Rates Decline in New York', *The New York Times*, 5 December, New York; Kolker, R 2005, 'Heartless', *New York Magazine*, 24 October, New York.

The Panel's view

User choice in human services, as in other areas, can provide benefits to users and promote diversity and innovation in service delivery.

The UK has a 'presumption of choice' operating across most public services, and has adopted high-level choice principles. The Panel considers that, in a federation such as Australia, it would be useful for all governments to agree on common principles to guide the implementation of user choice in human services.

The Panel's view is that the Australian Government and state and territory governments should agree on choice principles and that user choice should continue to be implemented in Australian human services markets, beginning with markets where choice is most easily established.

In putting user choice at the heart of service delivery, governments should:

- recognise that users are best placed to make choices about the human services they need and design service delivery, wherever possible, to be responsive to those choices;
- recognise that access to quality services will be a prerequisite for effective choice and that accessibility will be particularly important in remote and regional areas;
- ensure that users have access to relevant information to help them exercise their choices, including, where appropriate, feedback from previous users of services;
- in sectors where choice may be difficult, make intermediaries or purchase advisors available to help users make decisions, with policies designed to align the incentives of purchase advisors with the best interests of users;
- ensure that a default option is available for users unable or unwilling to exercise choice;
- lower financial and non-financial switching costs to enable switching wherever possible — for example, users should not 'lose their place in the queue' if they switch providers, or need to undergo further eligibility assessment; and
- offer disadvantaged groups greater assistance in navigating the choices they face through, for example, accessible communications channels that suit their needs.

12.4 Commissioning Service Delivery

Although it is possible to introduce user choice into many human services, including aged care and disability care and support, in other human services governments will continue to play a role in commissioning services on behalf of users.

Over recent years, governments have looked at different approaches to commissioning human services. Approaches have evolved from early, less sophisticated attempts at competitive tendering towards approaches reflecting contestability and some degree of user choice (see Box 12.1).

Consultations with, and submissions from, human services providers emphasise the value of social capital and community service contributions that providers can bring to their relationships with service users. These 'value added' services can be overlooked in traditional tender processes.

For example, the Joint Councils of Social Service Network notes:

> Competitive price tendering undermines the integration and coordination of services; favours larger, more established services over smaller agencies and community groups; and measures efficiency in terms of low cost, when the measurement of social and

> economic outcomes requires a far more nuanced approach and a capacity to identify preventive benefits over long-term periods. (DR sub, page 13)

As in Australia, tendering decisions in the UK have historically focused on cost and value for money, which may come at the expense of care and relationships. A 2014 UK report on the future of the home care workforce presented findings about the impacts of commissioning practices. It found:

> [home care] is not organised nearly as well as it could be and it appears designed to keep caring professional relationships from forming between workers and those they care for ...
>
> [home care is an] inflexible system that is defined by specific tasks and little continuity among care workers ...
>
> No one would have designed commissioning to achieve the state of care we have now, but incremental changes to drive down price and the need to be able to monitor care contracts has meant that the time and task commissioning [commissioning that focusses on inputs, such as time spent with a user, or outputs, such as tasks completed, rather than outcomes] is where we have ended up.[360]

Contestability and commissioning

Australian jurisdictions have begun to focus on more innovative and collaborative methods of service delivery. As the New South Wales Government states:

> There are more significant benefits from competition and innovation when governments take a less prescriptive approach to service delivery reform. This can allow greater adaptability and flexibility … the focus should be on specifying desired outcomes and ensuring space for innovation. (sub, page 27)

The New South Wales Government submission to the Draft Report says:

> ... a truly contestable system provides the competitive tension that ensures the provider is always incentivised to cost effectively provide the best service to the customer. There is a broad range of service delivery models which can underpin a truly contestable system … including:
>
> - Keep-and-improve: applying contestability to government service provision by benchmarking it against potentially alternative service providers…
> - Recommissioning: redesigning previously outsourced or privatised services to improve outcomes
> - Payment by results: paying providers based on outcomes rather than inputs or outputs…
> - Public-private joint ventures: allows the technical expertise of the public sector to be brought together with the commercial and managerial expertise of the private sector ... (DR sub, pages 17–18)

Newer approaches to commissioning focus more on collaboration and contestability rather than strict competitive tender processes. A paper on contestability in the UK health system noted:

360 Koehler, I 2014, *Key to Care*, LGiU, London, page 16.

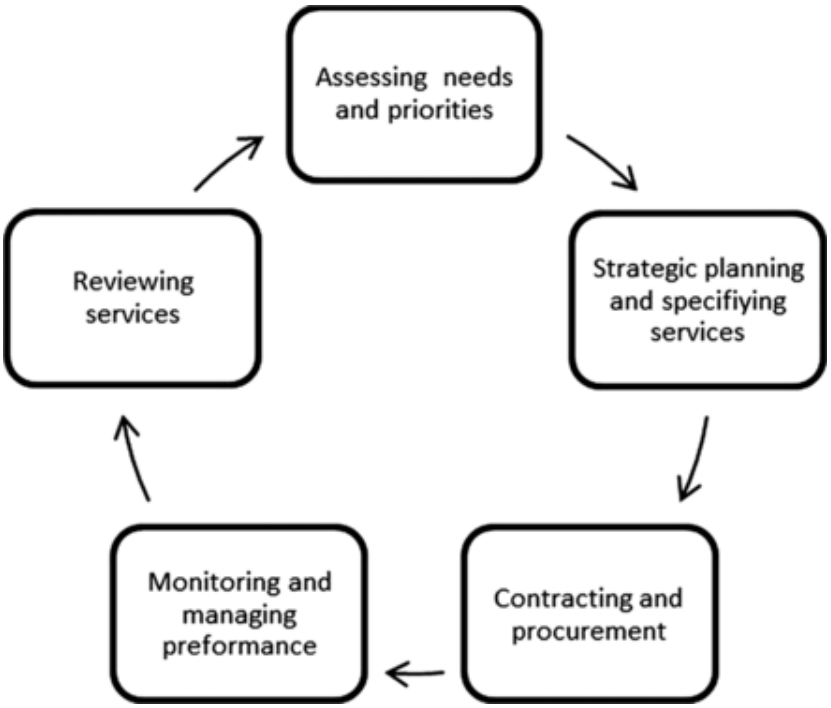
> In recognition of the limits of competition, managers and doctors have moved increasingly to establish collaborative arrangements in which purchasers and providers work together on a long term basis ...
>
> … the stimulus to improve performance which arises from the threat that contracts may be moved to an alternative provider should not be lost. The middle way between planning and competition is a path called contestability. This recognises that health care requires cooperation between purchasers and providers and the capacity to plan developments on a long term basis. At the same time, it is based on the premise that performance may stagnate unless there are sufficient incentives to bring about continuous improvements.[361]

Contestability necessarily includes performance management, such that service providers face credible threats of replacement for poor performance. This requires careful management by governments, who must balance performance management with the need to give providers certainty.

The commissioning cycle recognises that assessing needs and priorities (including the unique priorities of each jurisdiction or local community) and monitoring and reviewing services are both important and necessary steps in commissioning for service delivery.

361 Ham, C 1996, 'Contestability: A Middle Path for Health Care', *British Medical Journal*, Vol 312, London, pages 70-71.

The Commissioning Cycle[362]



Moves to introduce greater contestability in human services commissioning need to be approached with care. In many cases, service providers will need to undergo significant cultural change to adapt to new methods of commissioning. In the context of the NDIS, National Disability Services notes 'An example of cultural change is that disability providers lack marketing skills' (DR sub, page 2).

Governments will need to work with existing providers to build capacity and ensure that they can continue to offer high-quality services that meet user needs during the transition to new forms of service delivery.

Contracting for outcomes

Contracting for outcomes is an important method that allows governments to engage with service providers to directly meet user needs.

Contracting for outcomes may require significant investment by government agencies in specifying what the desired outcomes are. This may involve a cultural shift for both government agencies and service providers. The Joint Councils of Social Service Network notes 'Too often public services are delivered ... without a clear and articulated set of outcomes to be achieved' (DR sub, page 7).

An outcomes focus allows service providers to suggest different approaches for achieving the desired result rather than having to demonstrate specific activities, tasks or assets. It allows potential providers to offer new and innovative service delivery methods and helps to encourage a diverse range of potential providers.

362 Shaw SE, Smith JA, Porter A, et al. 2013, *The work of commissioning: a multisite case study of healthcare commissioning in England's NHS,* BMJ Open, London.

Governments have used contracting for outcomes for some time. As the National Employment Services Association notes:

> There has long been an emphasis on outcomes in employment services. However, in the 2015 model, there is a strengthened focus on outcomes and longer term (26 week) outcomes payments. (DR sub, page 6)

Contacting for outcomes also needs to recognise that different users may need different levels of care or support. For example, the National Employment Services Association notes the different payment levels for employment placement outcomes, 'For a 26 week outcomes the range of payment is between $3,400 (Stream A) and $11,000 (Stream C: hardest to place)' (DR sub, page 6).

In some cases, innovation and high-quality user outcomes can be encouraged by offering financial rewards for performance above specified targets. For example, in the New South Wales social benefit bonds program, discussed in Box 12.1, private investors receive a return on their investment if agreed social outcomes are achieved. The New South Wales Government is now building on the success of social benefit bonds with a range of social impact investments, which bring together capital and expertise from the public, private and not-for-profit sectors. These initiatives aim to deliver better outcomes in areas such as managing chronic health conditions and supporting offenders on parole to reduce their levels of re-offending.[363]

Contracting for outcomes can also allow governments to recognise and reward the social capital and value-add that community organisations bring to service delivery.

For relational services, a stable and predictable regulatory environment, including through sufficiently long contracts, will be important in the contracting and procurement phase. Moving away from very short-term contracts allows service providers to invest in necessary infrastructure, systems and 'front line' staff. The Western Australian Delivering Community Services in Partnership Policy (discussed in Box 12.1) encourages a move to longer-term contracts (up to five-year terms) to 'provide funding certainty ... and minimise transition and re-bidding costs'.[364]

Even simple steps by governments commissioning services can make an important difference to human services providers and their ability to be responsive to user needs. The Joint Councils of Social Service Network suggests:

> ... service procurement processes should include better notification and greater clarity; and tendering timelines should allow sufficient time for collaboration, the formation of consortia and innovative service design. (DR sub, page 7)

As with any other method of service delivery, great care is needed when moving to outcomes-based contracting. For example, if the provision of a certain education service is commissioned based on students successfully completing a course, this may lead to providers passing students who have not effectively met the course requirements.

In many cases, it may be preferable to commission services using a carefully specified blend of outcomes and outputs.

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363 NSW Government Premier & Cabinet, Social Impact Investment Knowledge Hub, Accessed on 12 February 2015, www.dpc.nsw.gov.au/programs_and_services/social_impact_investment/nsw_policy.

364 Western Australian Department of Premier and Cabinet 2012, *Partnership Forum Fact Sheet 6*, Perth.

The Panel's view

In the past, contracting for the provision of human services was often achieved through competitive tendering. However, tendering can focus on price at the expense of other factors, including fairness and responsiveness to individual needs.

More recently, governments have begun to trial innovative approaches to commissioning that give providers greater scope to meet user needs, while allowing governments to step in and remove poor performers.

By commissioning the provision of human services with an outcomes focus, governments can encourage a diversity of provider methods and types, which can have important benefits for users in relation to choice, adaptability and innovation.

In commissioning human services, governments should:

- encourage careful commissioning decisions that are sensitive and responsive to individual and community needs, and recognise the contribution of community organisations and volunteers;
- ensure that commissioned services are contestable and service providers face credible threats of replacement for poor performance;
- establish targets and benchmarks for service providers based on outcomes, not processes or inputs; and
- offer financial rewards for performance above specified targets.

12.5 Diversity of service providers

Having a diversity of service providers is not a goal in and of itself, but it can lead to more choice for service users and more efficiency in service delivery due to increased competitive pressures.

The Panel notes that diversity in the provision of human services offers a number of potential benefits. For example, the National Employment Services Association notes 'diversity is critical to job seeker and employer choice, and provides for the creation of specialist expertise to be targeted to individual cohorts' (DR sub, page 5).

As noted in the *Reform of the Federation White Paper on Roles and Responsibilities in Health*, the existence of multiple providers, including smaller providers, can be beneficial. It can enhance competition and allow small providers to respond flexibly to local issues.[365]

Although the Panel favours encouraging diversity in provider methods and types, it recognises that some markets may not have sufficient depth to support a number of providers — for example, certain services in remote and regional areas. Providing access to services and regulation to maintain and improve service quality will be an important implementation issue, even in the absence of competitive pressures.

Also, where there are economies of scale, good quality services may best be achieved by having a few large providers. For example, in some highly specialised health services, having 'centres of specialisation' can avoid duplicating infrastructure and machinery, allowing medical specialists to

365 Australian Government 2014, *Reform of the Federation White Paper: Roles and Responsibilities in Health*, Canberra, page 31.

practice frequently and collaborate to sharpen and extend their skills. In such situations, competitive pressures could still be maintained by having competition for the contract to supply the services or by benchmarking the quality of service provided.

In Australia, many human services, including health, education and social housing are delivered by a range of public and private for-profit and not-for-profit providers. The Panel is conscious of the current diversity of human services providers and does not underestimate the contribution currently made by the private sector and non-government organisations.

The UK has again gone further than Australia in its *Open Public Services White Paper*, which establishes a policy principle to open service delivery to a range of providers. This means that:

> ... high-quality services can be provided by the public sector, the voluntary and community sector or the private sector … That means breaking down barriers, whether regulatory or financial, so that a diverse range of providers can deliver the public services people want, ensuring a truly level playing field between the public, private and voluntary sectors. It means being totally transparent about the quality and value for money for public services so that new providers can come in and challenge under-performance.[366]

In recommending a greater diversity of providers in human services, the Panel does not wish to diminish, discourage or crowd out the important contribution made by the not-for-profit sector and volunteers to the wellbeing of Australian users of human services.

Human services providers

The delivery of human services is widely seen as a responsibility of government. Yet, in practice, few human services are delivered exclusively by government.

In some instances, including in early childhood education and hospital care, private for-profit and not-for-profit providers operate in the same market as governments, offering similar services and increasing the range of user choice.

Increasingly, services are being delivered outside the government sector. The significant changes in the disability services sector are a recent example of this development. As the ACCC points out:

> Despite the historical role of government in providing human services, a degree of competition already exists in many human services markets. This includes competition between private hospitals, doctors, secondary schools and vocational training providers, to name but a few examples. (sub 1, page 68)

Government, not-for-profit and private for-profit providers are likely to have different strengths. There is a place for all of these different types of providers in human services markets.

366 UK Government 2011, *Open Public Services White Paper*, The Stationery Office, Norwich, page 9.

Government providers

One of the features of the competition reforms at the time of the National Competition Policy (NCP) was a change in the organisational arrangements for government providers of infrastructure services. Rather than being provided by government authorities, electricity and water entities were set up as Government Business Enterprises, which were more independent of Ministers but subject to clearer objectives and overseen by a board of directors.

Part of the reason for the Government Business Enterprise form in utilities was that it largely replicated the corporate for-profit form of competitors that were emerging in markets such as electricity. As the non-government organisational forms in human services markets are more complex (they include for-profit and different types of not-for-profit), developing a single model for government providers is unlikely to be practical.

Rather, government reforms to the provision of human services have focused on an expanded role for the for-profit and not-for-profit sectors. In many human services sectors, particularly in aged care and disability care and support, governments have encouraged not-for-profits and charities to play an important role in meeting user needs.

For-profit providers

The private, for-profit sector makes up a large part of service provision in some human services markets, including aged care and child care (see Box 12.8).

Box 12.8: For-profit provision of human services in Australia

Private hospitals service around 40 per cent of hospital inpatients.[367] Around 60 per cent of private hospitals operate on a for-profit basis.[368]

General practitioner, allied health and dental services are largely delivered by the for-profit sector.

In child care, around 70 per cent of long-day care is provided by the for-profit sector.[369]

The private for-profit sector provides 36 per cent of residential aged care.[370]

Private prisons hold around 18 per cent of prisoners in Australia.[371]

For-profit providers can bring particular strengths to human services markets. They are likely to face stronger incentives to minimise cost, including through adopting new technologies and innovative methods of service delivery. This may improve the diversity of providers and service offerings in human services markets and increase the efficiency of government expenditure.

Users have been willing to place their trust in for-profit providers, with high levels of confidence and satisfaction recorded in relation to for-profit providers, such as local GPs.[372]

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367 Productivity Commission 2009, *Public and Private Hospitals*, Research Report, Canberra, page 46. Data is for 2007-08.

368 Ibid., page 46. Data is for 2006-07.

369 Productivity Commission 2014, *Childcare and Early Childhood Learning*, Inquiry Report No. 73, Canberra, page 351. Data is for 2012.

370 Steering Committee for the Review of Government Service Provision 2015, *Report on Government Services Volume F: Community Services*, Productivity Commission, Canberra, page 13.5. Data is for June 2014.

371 Steering Committee for the Review of Government Service Provision 2015, *Report on Government Services Volume C: Justice*, Productivity Commission, Canberra, page 8.5. Data is for 2013-14.

Concerns have been raised that for-profit providers are likely to 'cherry pick' the lower-risk or more profitable users.[373] Policy design needs to be sensitive to this issue. For example, policy can include measures such as: limiting the amount of control service providers have over which customers they can accept; or designing the scheme to reward service providers on a 'value added' basis (for example, providing greater rewards to job service agencies that find jobs for long-term unemployed people).

Not-for-profit providers

In its report on the *Contribution of the Not-for-Profit Sector*, the PC observed:

> [Not-for-profits] have long been part of the Australian community landscape, encompassing both secular and non-secular organisations …
>
> The most recognised part of the sector is involved in human service delivery, including community services, education and health … More recently, the sector is being viewed as a means to address social disadvantage. [Not-for-profits] are generally viewed as more trustworthy than government or business, and hence, worthy of support.[374]

The Panel recognises that the not-for-profit sector makes an enormous contribution to the lives of Australians. In 2006-07 the sector accounted for 4.1 per cent of GDP (excluding the contribution of volunteers), employed close to 890,000 people and utilised the services of some 4.6 million volunteers.[375]

The Panel is concerned to preserve and enhance this contribution, while advancing diversity, innovation and choice in human services. As National Disability Services notes:

> Increased competition would be counter-productive if it undermined the ability of not-for-profit disability support services to cooperate and collaborate, particularly in relation to community development and the production of social capital. (sub, page 3)

Mutual providers

The Business Council of Co-operatives and Mutuals and the Australian Public Service Mutual Task Force have released *Public Service Mutuals: A Third-way for delivering public services in Australia White Paper* (White Paper) on public service mutuals that seeks to explore an alternative where co-operatives and mutuals play an expanded role in delivering human services.

A public service mutual is:

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372 Roy Morgan 2014, *Image of Professions Survey 2014,* Melbourne — Doctors were rated as 'ethical and honest' by 86 per cent of survey participants, coming second only to nurses.

373 Hems et al 2014, *Public Service Mutuals: The case for a Third-way for delivering public services in Australia Green Paper,* Net Balance Research Institute, Sydney, page 20.

374 Productivity Commission 2010, *Contribution of the Not-for-Profit Sector,* Research Report, Canberra, page 2.

375 Ibid., page 53.

> An organisation … whereby members of the organisation are able to be involved in decision-making, and benefit from its activities, including benefits emanating from the reinvestment of surpluses.[376]

The White Paper suggests public service mutuals deliver several benefits, including that they can:

- Increase organisational diversity in public service markets.
- Harness the ethos and professionalism of public service employees and unleash their entrepreneurialism.
- Increase consumer choice and control.
- Stimulate public service innovation.[377]

The White Paper notes that:

> ... innovation through consumer, employee or enterprise ownership structures can help address issues in areas such as disability, aged care, affordable housing and employment services.[378]

In the case of disability care and support, the White Paper discusses potential advantages of mutuals, including: purchasing co-operatives being used for rural and Indigenous groups and other people with common equipment or treatment needs; and staff-based co-operatives being used in areas where staff attraction and retention have proven problematic.[379]

Although public service mutuals are not common in the provision of human services in Australia, there is evidence of mutuals working with communities to deliver human services. The recent *Interim Report of the Reference Group on Welfare Reform to the Minister for Social Services* provides an example:

> Westfund Health Insurance, which operates throughout Australia, [reinvests] its profits into healthcare. As a result its members have access to state of the art dental clinics which has taken the stress off public dental service provision.[380]

Public service mutuals now play a significant role in some other jurisdictions, including the UK where there has been concerted effort through public policy levers and capacity-building activities to establish and expand public service mutuals.

As user needs and preferences continue to evolve, public service mutuals could play a greater role in meeting individual and community needs, possibly in conjunction with other significant government initiatives. Indeed, the White Paper suggests that NDIS trial sites could prove ideal for piloting a disability staff co-operative. [381]

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376 Hems et al 2014, *Public Service Mutuals: A Third-way for delivering public services in Australia White Paper*, Net Balance Research Institute, Sydney, page 9.

377 Ibid., page 13.

378 Ibid., page 13.

379 Ibid., page 14.

380 Department of Social Services 2014, *A New System for Better Employment and Social Outcomes — Interim Report of the Reference Group on Welfare Reform to the Minister for Social Services*, Canberra, Page 123.

381 Hems et al 2014, *Public Service Mutuals: A Third-way for delivering public services in Australia White Paper*, Net Balance Research Institute, page 14.

The role of government in fostering diversity

As discussed in Section 12.3, in many human services, users benefit from direct choice and control. In these instances, a range of diverse providers and provider types can be an important factor in ensuring that users have access to meaningful choice.

Minimum quality standards will be important in most aspects of human services, even where users have access to good information. Standards must be set to balance necessary quality requirements without raising artificial barriers to entry — so that new entrants can offer innovative and responsive services to users.

Where direct user choice is not possible, governments can play an important role in encouraging diversity through commissioning processes and decisions. Where they directly commission services, governments can: specify contracts with duration periods that do not exclude potential competitors for extended periods of time; and institute processes that avoid allowing monopoly providers to develop over time.

Governments have experience with encouraging a diversity of providers through commissioning processes. For example, diversity was a key consideration for the Job Services tender, with the former Department of Employment and Workplace Relations noting, 'Job seekers and employers would benefit from the diversity in provider type, philosophy and approach to employment services by choosing a provider that suited them best.'[382]

Contestability is also an important factor in structuring contracts. As discussed in Section 12.4, performance may stagnate unless there are sufficient incentives to bring about continuous improvement. Governments can introduce contestability through benchmarking incumbent providers against potentially alternative service providers.

Governments should encourage diversity through promoting low barriers to entry for new providers, while maintaining appropriate quality standards. Low barriers to entry could be promoted through allowing independent regulators to license any provider that meets and maintains prescribed standards. This is the case under the NDIS model, where the NDIA fulfils the role of regulator.

Government contracts could be co-ordinated and designed so that particular services are commissioned, where possible, with overlapping timeframes. This can allow different providers to enter the market at different points in time (and/or retain some attachment with the market), supporting a diversity of providers.

Commissioning should also provide for sufficient information and feedback loops to improve the design and targeting of contracts over time, including by identifying the relative strengths of different service provider types.

Users may require access to different types of human services as part of dealing with complex issues, such as chronic or mental illness. Governments should recognise the integrated nature of many human services markets and their joint role contributing to end-user outcomes. This will require understanding the relative strengths of different providers in different parts of a co-ordinated service supply chain. It may be appropriate to have one provider co-ordinating services for an individual, or

382 Department of Employment and Workplace Relations 2002, *Submission to the Independent Review of Job Network*, Canberra, page 14.

alternatively to put the individual in contact with a diverse range of providers, depending on the circumstances.

The Panel's view

Many human services are delivered by a range of public, private and not-for-profit providers. Each type of provider makes an important contribution to individual users of human services and to the broader community.

Governments may have significant influence over the diversity of providers in human services, particularly through commissioning arrangements.

Recognising the beneficial impact on innovation and user responsiveness that arises from a diversity of providers, governments should encourage diversity by:

- allowing independent regulators to license any provider that meets and maintains prescribed standards, where minimum standards address quality requirements without raising artificial barriers to entry; and/or
- directly commissioning services with co-ordination and processes that:
  - avoid monopoly providers developing over time; and
  - specify contracts with duration periods that balance the need to afford providers some level of certainty without excluding potential competitors for extended periods of time; and
- in support of their role as market stewards, undertake commissioning that:
  - provides for sufficient information and feedback loops to improve the design and targeting of contracts over time, including by identifying the relative strengths of different types of service provider;
  - recognises the integrated nature of many human services and their joint role in contributing to end-user outcomes, and the relative strengths of different providers in different parts of a co-ordinated service supply chain; and
  - is co-ordinated over time, where possible, maximising opportunities for contracts with overlapping timeframes and supporting a diversity of providers in the market at any point in time.

12.6 Implementation issues

Like any changes to public policy, implementing changes to human services needs to be well considered. Human services have a lasting impact on people's lives and wellbeing, increasing the importance of 'getting it right' when designing and implementing policy changes.

The PC notes:

> Experience with market-based instruments in human services (and other sectors) in Australia suggests that such mechanisms often require refinement over time to promote improved outcomes. (sub, page 37)

National Disability Services similarly notes that reform of human services, including introducing choice and competition, 'must be introduced slowly with ongoing monitoring' (DR sub, page 1).

Policy changes in this area have often been implemented via a staged process, sometimes involving trials or pilot schemes, with feedback from such trials being used to refine the program. Western Australia's continued work to refine its disability care and support, 25 years after it was first introduced, demonstrates the benefits of measured implementation with careful monitoring.

Human services reform must focus not just on users but also on providers, whose ability to respond positively to policy change will be an important factor in ensuring that Australians continue to enjoy access to high-quality human services.

Through consultations and submissions, the Panel heard representations from many human services providers noting that reform often involves cultural adjustment by providers. Governments, through retaining a market stewardship function, can play an important role in assisting providers to adjust to cultural change, including through introducing reform that progresses at an appropriate pace. For example, Catholic Social Services notes 'Governments need to develop sector adjustment policies so that the professional capability of the sector is not jeopardised by the introduction of competition policy' (DR sub, page 2).

Post-implementation reviews are an important part of monitoring the impacts of reforms. Box 12.9 describes the post-implementation review of the Job Network competition reforms.

Box 12.9: Assessing the outcomes of competition — example from Job Network

The PC reviewed[383] the impact of the Job Network reforms, and drew some general lessons for areas where government purchases services. Although the overall impact of these reforms was positive, the PC made specific recommendations for improving some implementation issues.

Choice and information

With the advent of competition in the market, most job seekers could choose from a number of providers in their area. However, the PC found that only around one in five job seekers were making an active choice. Providing accurate and relevant information would enhance user engagement and improve choice. In addition, once a job seeker was allocated to a provider, he or she was generally not permitted to switch providers.

Tendering versus licensing

The move from a monopoly provider to a tendered market did result in some benefits. However, tendering can be complex and expensive, and it might also result in an excessive focus on price, ultimately leading to a lower quality of service. The PC recommended that a licensing system could be more appropriate, which would allow any agency that met and maintained the prescribed standards to provide services at the going prices.

Regulation

In the job services market, the PC found that regulatory oversight imposed excessive compliance burdens, undermining the desirable flexibility of the system. The PC recommended adopting a risk management approach to contract monitoring based on minimum necessary surveillance to ensure accountability and achievement of specified goals.

Box 12.10 describes a UK post-implementation review of choice reforms, which had a particular focus on how the most disadvantaged users were exercising their new right to choice.

383 Productivity Commission 2002, *Independent Review of Job Network*, Report No. 21, AusInfo, Canberra.

Box 12.10: The UK experience — Barriers to Choice Review[384]

In 2013, the UK undertook a review to examine how people were using the choices they had been given in human services, with a particular focus on how choices were used and valued by the most disadvantaged.

The review's main were:

- Around half the population were exercising choice.
- The three top factors that people considered when choosing were the location (55 per cent), quality (15 per cent) and reputation (15 per cent) of the service.
- There was strong public support for being able to choose, but around one-third of the population found choice difficult.
- The biggest barriers to choice were a combination of access and information — people without access to computers or cars were at a double disadvantage when it came to exercising choice.
- People were generally happy with the service provided, including in situations where they had no choice.

The report proposed some improvements to the UK's choice-based system, including:

- The system should give more power to service users, especially disadvantaged groups — it was found that these groups were less comfortable about exercising choice, more frustrated by bureaucratic barriers and more affected by difficulties like transport.
- It should be simple and easy for users to switch providers without 'losing their place in the queue' or having to undergo further assessments of eligibility.
- Users should have a right to request flexible service delivery (for example, to talk to consultants on the phone or to study a different combination of subjects at school), and providers unwilling or unable to accommodate requests would be obliged to explain why not.
- Disadvantaged groups should be given more assistance with navigating the choices before them, since many do not use the internet and may be bewildered by choice — there was a need for better information about available choices, and access to face-to-face advice to assist users to interpret the information.

The review concluded that, although competition between rival service providers is a very important element of choice, the choice agenda needed to be broader. The focus should be on treating service users with dignity and respect and treating them as equal partners in the delivery of services.

The Panel recognises that reform in human services sectors can seem slow, but that the ultimate goal of improving the lives of Australians makes pursuing reform both important and worthwhile.

Potential issues with implementation do not mean that competition reforms in human services should be abandoned. In his review of government service sector reform, Peter Shergold noted:

384 Boyle, D 2013, *The barriers to choice review: How are people using choice in public services?,* UK Government, London.

> A culture of innovation needs to be actively encouraged. Risk should be managed prudently by a willingness to pilot, demonstrate and evaluate new approaches. In the public arena, as elsewhere, any innovation carries risk of failure. In the design of community services, there should be a willingness to trial often, fail early, and learn quickly from mistakes. At present too much public innovation involves frontline employees finding workarounds to heavily prescribed processes.[385]

The Panel favours an environment where individual jurisdictions work together and share lessons learned in an effort to encourage high-quality user outcomes. The process for working together need not be prescriptive. The Panel notes comments from the New South Wales Government:

> ... governments could consider developing their own frameworks for reform ... alongside this, there could be some merit in jurisdictions crafting a high-level agreement on reform principles as it could drive reform within jurisdictions and could align the efforts of jurisdictions to build deeper and more competitive national markets. (DR sub, page 16)

Results and feedback from trials or pilot schemes can be disseminated via an intergovernmental process. Through encouraging communication and knowledge sharing among jurisdictions, continuous learning can be factored into human services delivery models.

The Panel's view

Implementing changes to human services needs to be well considered and will require refinement over time to promote high-quality user outcomes.

Governments can progressively introduce change through trials or pilot schemes.

Although any change may result in implementation issues, the Panel considers that potential issues with implementation ought not to mean that competition reforms in human services should be abandoned.

Feedback and lessons learned from trials can be disseminated via an intergovernmental process that encourages jurisdictions continuously to improve service delivery.

In encouraging innovation in service delivery, governments should:

- encourage experimental service delivery trials whose results are disseminated via an intergovernmental process; and
- encourage jurisdictions to share knowledge and experience in the interest of continuous improvement.

Implementation

Within six months of accepting the recommendation, the Australian Government and state and territory governments should each develop an implementation plan reflecting the unique characteristics of providing human services in its jurisdiction. This plan should be founded on the guiding human services principles as well as the more detailed points set out in 'The Panel's view' boxes throughout this chapter. Although jurisdictions can undertake this work independently, collaboration among jurisdictions may confer significant benefits.

385 Shergold, P 2013, *Service Sector Reform — Reflections on the Consultations*, Victorian Council of Social Service, Melbourne, page 6.

Jurisdictions should then each nominate trial or pilot projects based on the human services principles within 12 months of accepting the recommendation. Each government should work with the Australian Council for Competition Policy (ACCP, see Recommendation 43) to discuss areas of overlap or areas where collaboration may lead to better user outcomes. Once the trials and pilots are completed, the ACCP should report on the outcomes.

A significant factor in the current environment is the reconsideration of the roles and responsibilities of the Australian and state and territory governments through the White Paper on the Reform of the Federation and the White Paper on Reform of Australia's Tax System (the White Papers).

The level of government with lead responsibility for policy in each market for human services will need to align with outcomes of the White Papers.

Recommendation 2 — Human services

Each Australian government should adopt choice and competition principles in the domain of human services.

Guiding principles should include:

- User choice should be placed at the heart of service delivery.
- Governments should retain a stewardship function, separating the interests of policy (including funding), regulation and service delivery.
- Governments commissioning human services should do so carefully, with a clear focus on outcomes.
- A diversity of providers should be encouraged, while taking care not to crowd out community and volunteer services.
- Innovation in service provision should be stimulated, while ensuring minimum standards of quality and access in human services.

13 COMPETITIVE NEUTRALITY

13.1 WHAT IS COMPETITIVE NEUTRALITY?

The concept of competitive neutrality is broad. The Organisation for Economic Co-operation and Development (OECD) recently defined competitive neutrality as occurring:

> … where no entity operating in an economic market is subject to undue competitive advantages or disadvantages.[386]

Competitive neutrality can be affected by ownership, institutional form or the specific objectives of entities.

The rationale for pursuing competitive neutrality is to improve the allocation of the economy's resources and to improve competitive processes. Governments compete with the private sector in a variety of markets. If governments enjoy undue advantage relative to other players, this can result in them having lower costs than private sector competitors.

Government ownership can result in undue advantage if one or more of the following apply to their business activities:

- tax exemptions or concessions (for example, relating to income tax, payroll tax, land tax or stamp duty);
- cheaper debt financing reflecting the lower credit risk of governments;
- the absence of a requirement to earn a commercial return on assets; and
- exemptions from regulatory constraints or costs.

As part of the Competition Principles Agreement (CPA), all Australian governments undertook to apply competition principles to government business activities. The objective of competitive neutrality, as expressed in the CPA is:

> … the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership.[387]

Competitive neutrality covers the behaviour of government businesses, not policy or other government decisions that affect markets or competition.

Each jurisdiction has developed its own competitive neutrality policy, guidelines and complaint-handling mechanism (some are handled by independent units; others by regulators or departments).[388]

Although there is some variation, the policies require government business activities to charge prices that fully reflect costs and to compete on the same footing as private sector businesses in terms of

386 OECD 2012, *Competitive Neutrality, Maintaining a level Playing Field between Public and Private Business*, OECD Publishing, page 17.

387 Council of Australian Governments 1995 (as amended to 13 April 2007), *Competition Principles Agreement*, page 3.

388 Victorian Competition and Efficiency Commission 2013, *Competitive neutrality inter-jurisdictional comparison paper*, Melbourne.

taxation, debt, regulation and earning a commercial rate of return. The principle of competitive neutrality does not extend to competitive advantages arising from factors such as business size, skills, location or customer loyalty. As the Victorian Government Competitive Neutrality Policy states:

> Competitive neutrality policy measures are designed to achieve a fair market environment without interfering with the innate differences in size, assets, skills and organisational culture which are inherent in the economy. Differences in workforce skills, equipment and managerial competence, which contribute to differing efficiency across organisations, are not the concern of competitive neutrality policy.[389]

Competitive neutrality arrangements apply to significant government businesses, where the benefits from doing so outweigh the costs, and not to non-profit, non-business activities (see Box 13.1). The threshold test used for identifying 'significant' business activities varies across the jurisdictions.

Box 13.1: Significant government business activity

The Australian Government Competitive Neutrality Complaints Office asks two questions to determine whether government entities are operating a significant business activity.[390]

Question 1: Is the entity conducting a business?

a) Does it charge for goods or services (not necessarily to the final consumer)?
b) Is there an actual or potential competitor (either in the private or public sector), noting that purchasers are not to be restricted by law or policy from choosing alternative sources of supply?
c) Do managers of the activity have a degree of independence in relation to the production or supply of the good or service *and* the price at which it is provided?

If the answer is yes to all these questions, then the entity is conducting a business.

Question 2: Is the business significant?

The following business activities are automatically considered significant for the purposes of competitive neutrality policy:

- all government business enterprises and their subsidiaries;
- all Australian Government companies;
- all business units;
- baseline costing for activities undertaken for market-testing purposes;
- public sector bids over $10 million; and
- other government business activities undertaken by prescribed agencies or departments with a commercial turnover of at least $10 million per annum.

Competitive neutrality arrangements apply to significant business activities but only to the extent that the benefits of the arrangements to the community outweigh the costs.

389 Department of Treasury and Finance, Victorian Government 2012, *Competitive neutrality policy*, Melbourne, page 2.

390 Australian Government 2004, *Australian Government Competitive Neutrality Guidelines for Managers*, Canberra, pages 9 and 13.

Applying competitive neutrality involves separating commercial from non-commercial activities of governments. As the OECD says:

> An important aspect in addressing competitive neutrality is the degree of corporatisation of government business activities and the extent to which commercial and non-commercial activities are structurally separated. Separation makes it easier for the commercial activities to operate in a market-consistent way, but may not always be either feasible or economically efficient.[391]

The CPA states that significant government business enterprises (classified as Public Trading Enterprises and Public Financial Enterprises under the Government Financial Statistics Classification) should adopt (where appropriate) a corporatisation model and impose similar commercial and regulatory obligations as those faced by private sector businesses.

For other significant business activities undertaken by agencies as part of a broader range of functions, the CPA suggests that the same principles should be applied or agencies should ensure that prices charged for goods and services reflect the full costs of service delivery (see Box 13.2).

Box 13.2: Corporatisation, commercialisation and full cost-reflective pricing

A range of measures have been adopted to achieve competitive neutrality, including corporatisation, commercialisation and cost-reflective pricing.[392]

Corporatisation —creating a separate legal business entity to provide the relevant goods and services. Such an entity is characterised by:

- clear and non-conflicting objectives;
- managerial responsibility, authority and autonomy;
- independent and objective performance monitoring; and
- performance-based rewards and sanctions.

Commercialisation — organising an activity along commercial lines without creating a separate legal business entity. This is typically achieved by introducing and applying a set of commercial practices to the business functions of the government agency. Relevant commercial practices can include separate accounting for, and funding, non-commercial activities and separating regulatory functions from commercial activities.

Full cost-reflective pricing — taking into account all the costs that can be attributed to the provision of the good or service, including cost advantages and disadvantages of government ownership.

Competitive neutrality policy does not require governments to remove community service obligations (CSOs) from their businesses but does require that CSOs be transparent, appropriately costed and directly funded by governments. The Australian Government Competitive Neutrality Guidelines for Managers states:

391 OECD 2012, *Competitive Neutrality, A Compendium of OECD Recommendations, Guidelines and Best Practice*, Paris, page 5.

392 For example, Department of Treasury and Finance, Victorian Government 2012, *Competitive neutrality policy*, Melbourne, pages 4-5.

> A best practice approach would be for CSOs to be funded from the purchasing portfolio's budget, with costs negotiated as if it were part of a commercially negotiated agreement. CSOs should include similar CN [competitive neutrality] requirements as other activities. For example, CSO activities should incorporate CN adjustments (for example tax adjustments) and earn a RoR [rate of return] (just as if they had been contracted out).[393]

One of the benefits of competitive neutrality is improved transparency and accountability of government business activities, including greater transparency of CSOs. This in turn provides a safeguard against distorting cross-subsidisation.

The need to comply with competitive neutrality policy can also improve government business performance. As Trembath has said:

> CN's [competitive neutrality] requirement for government entities to face comparable costs and regulations to the private sector (that is, to face market incentives) means that the owner governments make better informed decisions about the future of those entities. Full attribution of costs often leads governments to assess afresh whether they wish to provide a good or service directly through a subsidiary entity, to introduce tenders to allow competitive bidding for the provision of the good or service, or to vacate the area of production.[394]

The Australian Local Government Association provides examples of how competitive neutrality policy has changed the way councils operate:

> Application of competitive neutrality has required a substantial overhaul of how councils operate, including full-cost reflective pricing for competitive services.
>
> Full-cost pricing has ensured that local government does not provide subsidised services in competition with private providers. For example, Victorian local councils received complaints from private providers who accused local councils of cross-subsiding recreation services such as gyms and swimming pools. The Municipal Association of Victoria, by developing a model framework to determine the full-cost reflective pricing of these services, enabled councils to provide services in a competitive environment and fulfil its CPA obligations. (DR sub, page 3)

The Local Government Association of Tasmania, commenting on the changes councils made to comply with competitive neutrality policy in that State, notes that the changes 'have not been received well by all members of the community, particularly where consumers have to pay for a service that was previously free of charge' (DR sub, page 7).

13.2 Concerns raised about competitive neutrality policy

Stakeholders overwhelmingly support the principle of competitive neutrality, with calls for Australian governments to re-commit to competitive neutrality policy.[395]

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393 Australian Government 2004, *Australian Government Competitive Neutrality Guidelines for Managers*, Canberra, page 41.

394 Trembath, A 2002, *Competitive Neutrality: Scope for Enhancement*, National Competition Council Staff Discussion Paper, AusInfo, Canberra, page 7.

395 See, for example: Australian Competition and Consumer Commission, sub 1, page 69; Australian Information Industry Association sub, page 12; Australian Newsagents Federation, sub, page 8; Business Council of Australia, sub Summary Report, page 14: and QBE Insurance Australia, DR sub, page 2.

The OECD recently commented:

> The most complete competitive neutrality framework implemented today is the one found in Australia. … this framework is backed by separate implementation and complaints handling mechanisms.[396]

Capobianco and Christiansen also state:

> Australia's competitive neutrality policy has apparently worked well for the following reasons: (1) it deepened the reform of public enterprises in Australia; (2) it has been implemented by large governmental businesses, which led to significant efficiency gains; and (3) it substantially eliminated the advantages of government ownership.[397]

But submissions raise concerns about the implementation of competitive neutrality policy in a wide range of activities that compete with government. These include businesses in insurance, transport, energy, telecommunications, health, commercial land development, construction, accommodation, waste collection, printing, legal services, agriculture, tourism, childcare and education.

For example:

- The Australian Information Industry Association notes, 'there are some instances, notably in the telecommunications sector, where competitive neutrality seems to not function effectively' (sub, page 12).
- The Australian Private Hospitals Association says, 'distinctions between regulatory arrangements applicable to public and private sectors not only work against competitive neutrality but also limit private sector patient access to affordable and appropriate treatment options' (sub, page 8).
- Paramedical Services Pty Ltd claims a lack of competitive neutrality in the non-emergency patient transport sector, with government ambulance services enjoying an unfair advantage due to subsidisation (sub, pages 11-12).
- The Australian Education Union says, 'competitive neutrality policy has been disastrous where it has been introduced (primarily in VET [vocational education and training])' (sub, page 2).

A number of submissions express concerns about businesses competing with local government. For example, the Small Business Development Corporation says it:

> … is aware of a number of service-based activities operated by government entities (particularly at the local government level) that directly compete with the private sector. This type of competition is unfair as such entities have the significant competitive advantage of being backed by government. By way of examples, local governments often operate child care centres, aged care facilities, and gyms in sport and recreation centres in competition with private operators. (DR sub, page 10)

The Chamber of Commerce and Industry Queensland also raises the issue of councils charging for waste collection through rate payments, impeding private competitors that are able to offer lower prices, increased services and more choice for consumers. It raises concerns about local councils providing free access to showgrounds or parklands for motorhomes, which makes it difficult for local

396 OECD 2012, *Competitive Neutrality, Maintaining a Level Playing Field between Public and Private Business,* OECD Publishing, page 107.

397 Capobianco, A and Christiansen, H 2011, *Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options, OECD Corporate Governance Working Papers*, No. 1, OECD Publishing, page 16.

caravan park owners (who are subject to fees, licences, taxes and insurances) to compete (sub, page 5).

The Panel cannot adjudicate every competitive neutrality issue raised in submissions. However, it is possible that some of the complaints fall outside the parameters of current policy. For example, the government activity may not meet current definitions of 'significant business activity'.

However, as the Queensland Competition Authority states:

> The revenue thresholds may not be met on a council by council basis, but the impact could be significant if the same problems are recurring for the same types of businesses across the state. This is particularly problematic for small businesses that compete, or would like to compete, to provide services. (sub, page 14)

Queensland Law Society also argues:

> Local government protection of businesses that are not significant business activities is defeating competition. (DR sub, page 1)

Submissions raise concerns about a number of instances where governments exercise regulatory or planning approval functions while also operating businesses that compete with private sector enterprises. For example, Cement Concrete and Aggregates Australia raises concerns about local governments being both applicant and assessor within the planning and development application process (sub, page 2). The Construction Material Processors Association raises a similar concern about councils considering planning permits for an extractive operation that would be in direct competition with the Council's quarry (sub, page 11).[398]

IPART raises related concerns about State-owned Corporations having a mix of commercial and non-commercial principal objectives.

> ... it is important that SOCs [State-owned Corporations] are not placed at a disadvantage because they are required to pursue unfunded non-commercial objectives. We have identified some aspects of the *State Owned Corporations Act 1989* (NSW) (SOC Act) that inhibit competitive neutrality. (sub, page 23)

The structure and identity of government businesses can also affect competitive neutrality. As the OECD recently said:

> It is easier to pursue neutrality when competitive activities are carried out in an entity with an independent identity, operated at arm's length from general government. To achieve this governments can incorporate government businesses according to best practices (i.e. the OECD Guidelines on Corporate Governance of State-Owned Enterprises) or to structurally separate commercial from non-commercial activities. This could also be useful in countering ad-hoc political interventions that might impede competitive neutrality.[399]

398 See also: Australian Taxi Industry Association, sub, page 10; Chamber of Commerce and Industry Queensland, sub, page 5; and Victorian Caravan Parks Association, DR sub, page 2.

399 OECD 2012, *Competitive Neutrality: A Compendium of OECD Recommendations, Guidelines and Best Practice*, page 12.

Calls to improve transparency

Some submissions suggest that there is a lack of community awareness about competitive neutrality and limited public disclosure of governments' compliance with competitive neutrality. The Law Council of Australia — Competition and Consumer Committee notes:

> … the current system has limited visibility in the legal and business community, and lacks the machinery to enforce a complaint and incentives for ongoing compliance.
>
> A more effective system for dealing with specific complaints would need to involve formal obligations and enforceable adjudication by an independent body such as the Australian Competition Tribunal. Because most complaints would be likely to involve competing public policy objectives, any claim based on non-adherence to a competitive neutrality principle would need to be subject to an overall assessment as to whether the conduct had a net public benefit. (sub, pages 5-6)

Typical of these concerns are those expressed by the Australian Chamber of Commerce and Industry (ACCI):

> … few businesses know exactly what competitive neutrality is, few complaints are filed, and for those upheld, government's response is usually slow. A fundamental issue remains regarding the inadequacy of the enforcement process. (sub, page 23)

The Australian Competition and Consumer Commission (ACCC) also notes that, since 2005, there has been no significant reporting on competitive neutrality compliance across the jurisdictions. Prior to 2005, the NCC considered competitive neutrality implementation across jurisdictions as part of its annual progress assessment of NCP. (sub 1, page 26)

The Productivity Commission (PC) recommends that governments review 'whether processes for handling competitive neutrality complaints are identifiable, independent and accessible' (sub, page 34).

The Australian Newsagents' Federation Ltd argues:

> A more transparent process is important to remove any suspicion that the government agency investigating the competitive neutrality complaint may have a conflict of interest. (DR sub, page 7)

ACCI points to the small number of complaints as evidence that the system is not performing well (sub, page 24).[400]

In 2013, the Victorian Competition and Efficiency Commission undertook a comparison of competitive neutrality policies across Australian jurisdictions. It found that 112 competitive neutrality complaints were investigated across all jurisdictions between 1996 and 2012. During 2011-12 five complaints were investigated across all jurisdictions.[401]

The declining number of complaints could reflect government business activities becoming familiar with their competitive neutrality responsibilities and ensuring that breaches do not occur. The Panel heard from some jurisdictions that competitive neutrality was now part of the culture, with

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400 The ACCC also notes the significant decline in the number of completed competitive neutrality complaint investigations since 2006 (ACCC sub 1, page 26).

401 Victorian Competition and Efficiency Commission 2013, *Competitive Neutrality Inter-jurisdictional Comparison Paper*, page 9.

government businesses seeking advice on complying with competitive neutrality before making changes to business activities.

A recent article by competition law authors Alexandra Merrett and Rachel Trindade also noted:

> The very low level of complaints could be because government businesses across the country are so compliant that there's not even a suspicion that they could be failing to fulfil their obligations. On the other hand, it just might be that private businesses have no clue that such obligations exist or they (or their advisors) have no faith in the competitive neutrality process and cannot be bothered wasting time and money in pursuit of a complaint.[402]

The PC recommends that competitive neutrality policy require self-reporting in annual reports by government businesses of the steps taken to comply with the policy. The PC argues that this would:

> … both aid in the assessment of compliance and also provide some transparency to private sector competitors that the business is operating in line with government policy. (sub, page 34)

In addition, the PC recommends that the Heads of Treasuries should produce their annual competitive neutrality matrix within six months of the end of each financial year (sub, page 34).

The Northern Territory Government 'supports all governments including a statement of compliance with the competitive neutrality principles in their annual reports, provided the compliance burden of doing so is minimal' (DR sub, page 3). However, the South Australian Government suggests that such reporting duplicates current arrangements and would add to the administrative burden of States (DR sub, page 16).

The Panel considers that self-reporting by government businesses is important, not only for compliance transparency but also for instilling a culture within government businesses of complying with competitive neutrality policy.

A number of submitters raise the issue of the need for stronger obligations on governments to respond to documented breaches of competitive neutrality policy and associated recommendations for remedial action.[403]

The PC notes that there are no formal requirements for governments to do so, and that recent investigations undertaken by the Australian Government Competitive Neutrality Complaints Office have not received official responses (sub, page 34). The ACCC suggests that a review of the timeliness and transparency of complaints handling could promote more effective competitive neutrality regimes. (sub 1, page 26)

Calls to review competitive neutrality policy

Various submissions call for a review of competitive neutrality policy.[404] Areas identified where competitive neutrality policy could be improved to ensure better policy outcomes include:

402 Merrett A and Trindade R 2013, 'Has competitive neutrality run its course?', The State of Competition, Issue 13, page 5.

403 See, for example: ACCC, sub 1, page 26; ACCI, sub, page 24; BCA, sub Summary Report, page 14; PC, sub, page 34; and Queensland Competition Authority, sub, page 13.

- clearer guidelines on the application of competitive neutrality policy during the start-up stages of new government business enterprises that are, or will be, engaged in significant business activities, including the extent to which competitive neutrality provisions should be included in business models and initial planning;
- defining the 'longer term' to which the policy applies — a critical component of the application of competitive neutrality policy is that government businesses earn a commercial rate of return to justify the retention of assets over the longer term but, as the PC states, 'this term is not defined, nor is there guidance on its application to a start-up business' (sub, page 34); and
- principles for identifying and specifying non-commercial objectives of government businesses and those activities that should be funded transparently.

The Chamber of Commerce and Industry Queensland suggests that the small business community would be better served if the policy covered all government businesses that engage in commercial operations (sub, page 5).

The New South Wales Government considers that all jurisdictions should review their competitive neutrality policies as they apply to local governments, with a view to strengthening their application to relevant business activities (DR sub, page 15).

National Seniors Australia also argues for extending competitive neutrality policies:

> … to any area where government agencies may compete with private or not-for-profit bodies for the supply of services. (sub, page 6)

As discussed earlier, assessing government activities to which the current competitive neutrality policy applies is based on determining whether an activity is a 'significant business activity' (taking into account factors such as annual expenditure and market share) and whether the benefits of implementing the policy outweigh the costs (see Box 13.1). An important question is whether the scope of competitive neutrality policy should be extended to cover a wider set of government activities.

What competitive neutrality policies capture varies across the OECD. As the OECD recently said:

> Some national authorities apply competitive neutrality policies only to the activities of 'traditional' state-owned enterprises (SOEs). Others apply competitive neutrality practices to all types of government activities that can be characterised as 'commercial' in nature (for example where they provide goods and services in a given market), regardless of their legal form or profit objectives. There is no universal definition for what constitutes government 'business' activities; neither is there a clear definition for the demarcation between what constitutes commercial and non-commercial activities.[405]

That said, commercial activities are typically characterised as a combination of: where there is a charge for the good or service; there are no restrictions on profitability; and there is actual or

404 See, for example ACCC, sub 1, page 69; ACCI, sub, page 24; BCA, sub Summary Report, page 14; NSW Government, sub, page 10; and Chamber of Commerce and Industry Queensland, sub, page 4.

405 OECD 2012, *Competitive Neutrality, Maintaining a Level Playing Field between Public and Private Business*, OECD Publishing, page 18.

potential competition.[406] These characteristics are in line with the current business test the Australian Government applies under its competitive neutrality policy (see Box 13.1).

A further issue is the appropriateness of the threshold tests for identifying 'significant business activity'. The Western Australia Local Government Association says:

> Local Governments engaged in significant review activity in 1997-98 under the direction of the WA Department of Local Government. Reviews were required by Local Governments with an operating expenditure greater than $2 million and activities with a user-pays income of over $200,000. These thresholds are outdated and would need to be increased if competitive neutrality policy was once again actively applied to Local Governments in WA. (DR sub, page 6)

The New South Wales Government argues:

> A clear and common understanding between jurisdictions on how 'significance' should be evaluated will be important to strengthening the application of competitive neutrality principles. (DR sub, page 14)

The Queensland Law Society also points to the need to define 'significant business activity' to clarify what is and what is not covered (DR sub, page 2).

Some jurisdictions have not revised their competitive neutrality policy statements in more than a decade. The Australian Government has not revised its competitive neutrality policy since 1996. The ongoing applicability of competitive neutrality requires that governments maintain up-to-date policies.[407] Updating the policies can also reinvigorate governments' commitment to competitive neutrality policy.

In addition, since each jurisdiction is able to adopt its own approach to competitive neutrality, cross-jurisdiction comparisons can help to determine 'best practice' as a basis for updating policies and improving current arrangements.

Trembath[408] suggests that a best-practice model for determining the scope of competitive neutrality should involve all government activities that charge users and trade in goods or services being identified as 'businesses'. Identification of significant government business activities should refer to the conditions:

- that all government business enterprises be treated as significant businesses;
- that significance of other business activities depends on their impact on the relevant market(s); and
- that activities' status of significance or non-significance be regularly reviewed.

Also, allegations of non-compliance should be heard by a body separate from the government businesses, which could be the subject of complaint.

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406 OECD 2012, *Competitive Neutrality: A Compendium of OECD Recommendations, Guidelines and Best Practice*, page 26.

407 The Competitive Neutrality guidelines in SA were updated in 2010 and the thresholds for significant business activities have not been indexed so less significant entities are now captured that would have been excluded in 1995 (South Australian Government, DR sub, page 15).

408 Trembath, A 2002, *Competitive Neutrality: Scope for Enhancement*, National Competition Council Staff Discussion Paper, AusInfo, Canberra, pages 1-3.

Scope of competitive neutrality principles

Current competitive neutrality policies already apply to significant business activities, but the Panel seeks to extend consumer choice and diversity into human services.

The ACCC notes the scope for greater competition in human services and suggests that mechanisms by which this could be achieved include: facilitating competitive neutrality between private and public providers; and promoting competition between 'public' providers (sub 1, page 8).

Commenting on extending competition into human services, National Seniors Australia says it will be:

> … important to ensure that competitive neutrality policies extend to any area where government agencies may compete with non-government bodies. If incumbent providers enjoy competitive advantages simply by virtue of government ownership, this could prevent private firms and non-government organisations from winning contracts, even though they may be more efficient or offer services that are better tailored to consumer needs. (DR sub, page 11)

Commenting on competitive neutrality in higher education the Bond University says:

> Properly implemented, competitive neutrality in the higher education sector would ensure that user choice and diversity could drive the quality of education that is essential to Australia's future social and economic well-being. This is a reform worthy of prioritisation. (DR sub, page 2)

The New South Wales Government also sees scope to increase the contestability of markets for public services:

> In some areas, impediments exist that make it challenging for the private sector to effectively compete with the public sector, despite competitive neutrality requirements. There may be scope to increase contestability in public service markets, including for individual components of the service delivery chain, if community service obligations (CSOs) were transparent, explicitly priced and directly funded by the government. (sub, page 23)

The New South Wales Government notes that changes to increase contestability in the State's vocational education and training market will require TAFE Institutes to compete on a more neutral basis:

> These reforms include introducing a demand-driven system through individual student entitlements to government subsidised training for identified skills (from 1 January 2015), allowing the funds to follow the student to their choice of approved training organisation and increasing the contestability of government subsidies for training. The reforms also change TAFE governance structures, increasing competitive neutrality by separating the purchaser and provider roles and ensuring TAFE Institutes compete on a more neutral basis. (sub, page 25)

The main challenges in securing competitive neutrality in human services include: structural separation; determining the operational form for government business activities, particularly when the activities sit within a broader range of government functions; and transparent costing and funding of CSOs.

Appropriate cost-allocation mechanisms for identifying joint costs, assets and liabilities are also important when these are shared across a broad range of government business and non-business activities. If costs are not correctly attributed to the business activity, a government business could

undercut its private competitors. Transparency around cost structures also ensures that CSOs are not used to cross-subsidise commercial activities.

Getting the right competitive neutrality policy settings in place in human services will be crucial to securing the benefits of a diverse range of innovative providers, including expanding choice to users. As National Seniors Australia says:

> … we do not under-estimate the challenge of achieving competitive neutrality where government agencies, for-profit and not-for-profit providers are all competing to supply government funded services, since each sector is affected by somewhat different competitive advantages and disadvantages, and each has something unique but valuable to offer. (DR sub, page 11)

To ensure a consistent and evidence-based approach in all jurisdictions, National Seniors Australia suggests that consideration be given to commissioning an independent body to undertake a public inquiry to develop guidelines on how best to achieve competitive neutrality in markets for human services while maintaining scope of services and ensuring quality.

The Panel's view

The principle of competitive neutrality is an important mechanism for strengthening competition in sectors where government is a major provider of services.

Concerns about competitive neutrality policy were raised with the Panel, particularly where businesses, in many instances small businesses, compete with local government. Although the government activities may not be 'significant', as judged by relevant guidelines, the breadth of sectors where issues were raised points to this as a potential obstacle to small business competing in a range of markets.

The Panel is also concerned by the number of instances where local governments act as regulator and provider in a contested market. The operational forms through which government businesses conduct their activities can have implications for competitive neutrality.

The absence of any requirement to respond to documented breaches of competitive neutrality policy is clearly undermining its efficacy.

Competitive neutrality policies need to remain relevant and up-to-date. Specific matters that should be considered include: guidelines on the application of competitive neutrality policy during the start-up stages of government businesses; the period of time over which start-up government businesses should earn a commercial rate of return; and threshold tests for identifying significant business activities.

There is scope to increase the transparency and effectiveness of competitive neutrality complaints processes and compliance with competitive neutrality policy, including by:

- assigning responsibility for investigation of complaints to a body independent of government;
- requiring governments to respond publicly to the findings of complaint investigations; and
- requiring government businesses to include a statement on compliance with competitive neutrality policy in their annual reports.

Since each jurisdiction is able to adopt its own approach to competitive neutrality, cross-jurisdiction comparisons can help to determine 'best practice' as a basis for updating policies and improving current arrangements.

There is scope to extend the principles of competitive neutrality to markets where governments and other providers are supplying services, including human services.

The case for extending the principle of competitive neutrality is strongest when:

- there are different arrangements for government providers operating in the same market as alternative providers; and
- the differential treatment is not justified on net public benefit grounds.

Getting competitive neutrality settings right in human services will be crucial to facilitating choice for users and securing the benefits of a diverse range of service providers. Feedback on lessons learnt and different ways of achieving competitive neutrality in markets for human services across the jurisdictions could be incorporated into guidelines and practices.

Implementation

Competitive neutrality reforms require action by each government. Reviews of competitive neutrality policies and complaints processes should commence within six months of jurisdictions accepting the

recommendation. Government businesses should include a statement on competitive neutrality compliance in their next annual reports.

An independent body, such as the proposed Australian Council for Competition Policy, should subsequently review progress in each jurisdiction in reviewing competitive neutrality policies, improving the transparency and effectiveness of complaints processes and reporting on compliance with competitive neutrality principles in annual reports.

Recommendation 15 — Competitive neutrality policy

All Australian governments should review their competitive neutrality policies. Specific matters to be considered should include: guidelines on the application of competitive neutrality policy during the start-up stages of government businesses; the period of time over which start-up government businesses should earn a commercial rate of return; and threshold tests for identifying significant business activities.

The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy (see Recommendation 43).

Recommendation 16 — Competitive neutrality complaints

All Australian governments should increase the transparency and effectiveness of their competitive neutrality complaints processes. This should include at a minimum:

- assigning responsibility for investigation of complaints to a body independent of government;
- a requirement for government to respond publicly to the findings of complaint investigations; and
- annual reporting by the independent complaints bodies to the proposed Australian Council for Competition Policy (see Recommendation 43) on the number of complaints received and investigations undertaken.

Recommendation 17 — Competitive neutrality reporting

To strengthen accountability and transparency, all Australian governments should require government businesses to include a statement on compliance with competitive neutrality principles in their annual reports.

The proposed Australian Council for Competition Policy (see Recommendation 43) should report on the experiences and lessons learned from the different jurisdictions when applying competitive neutrality policy to human services markets.

14 Government Procurement and Other Commercial Arrangements

The commercial arrangements of government businesses are subject to competitive neutrality policy, as discussed in Chapter 13. But governments engage in a range of other commercial arrangements with the private sector and non-government organisations (NGOs). These include:

- purchasing goods and services from external sources for their direct use (covering a range of purchase contracts, such as cleaning and maintenance of government buildings and special one-off financial advice relating to the sale of a government asset);
- public-private partnerships (PPPs), which are long-term arrangements involving private sector delivery of large infrastructure and related services projects on behalf of governments (covering, for example, toll roads, hospitals and water supply facilities);
- commissioning for the direct provision of human services, such as out-of-home care, as part of the commissioning cycle (see Section 12.4); and
- fully exiting some activities through asset privatisations.

14.1 Government procurement

Government procurement often involves significant spending and large-value projects. Procurement decisions can affect the range of goods and services offered to consumers and to government. Procurement can therefore shape the structure and functioning of competition in markets.

Public procurement is about securing the best value for taxpayers' money.[409] This can only occur when businesses genuinely compete on price and quality, and there is scope for businesses to innovate. Both the design of the competitive bidding process and how the process is carried out can influence outcomes. For example, the number of potential bidders could be smaller than desirable where a tender is highly specific or where the time scheduled for responses is short.

As the Productivity Commission (PC) states:

> Government funding arrangements and procurement processes for service delivery can [also] distort competition if they preclude more efficient providers from entering the market, or can reduce the frequency of entry (and exit) through the lack of regular market testing. In some instances, government failure to create efficient market structures for the delivery of publicly funded services can also distort competition. (sub, page 8)

Procurement processes therefore need to be designed in such a way that they do not unintentionally limit the number of potential bidders or the quality of services they offer.

Tyro Payments Limited argues, 'the Government itself has the key to promote innovation and competition through its procurement' (DR sub, page 7).

409 Achieving value for money is the core rule of the Commonwealth Procurement Rules. Department of Finance 2014, Commonwealth Procurement Rules, Canberra, page 13.

The PC report on Public Infrastructure also states:

> … procurement practices that engender competition can improve efficiency by pushing firms to find cost savings or quality improvements but, in addition, may cause firms to trim the return they would expect to get, and this can improve value for money even further.[410]

A number of submissions raise issues about procurement, including complexity, risk, accessibility (particularly for small businesses trying to win government contracts) and competition. For example, the Chamber of Commerce and Industry Queensland says:

> Queensland businesses have raised significant and ongoing issues with the pre-existing procurement framework in Queensland, namely that they are not able to easily assess, access or participate in procurement opportunities.
>
> The following aspects of the procurement process need improvement: support and assistance provided by the agency or project tender manager, fairness and equity of the tender selection process, delivery of project and procurement and reporting requirements; and the application process and documentation required. (sub, page 10)

As discussed in Chapter 12 on human services, government procurement processes have often been risk-averse and prescriptive. A submission from Kevin Beck states that tender documents are 'prescriptively written to place the entire onus on the respondent with risk and accountability deflected away from the agency' (sub, page 3). Catherine Collins notes 'tender documents for government contracts are unnecessarily large and complex' (sub, page 1), which can make it particularly difficult for smaller businesses to compete.

The Chamber of Commerce and Industry Queensland also observes:

> … the tender process itself is highly onerous and often small businesses do not have the time and resources that large businesses do to effectively compete for local tenders. (sub, page 9)

In cases where governments require specific goods or services, governments can play a role in helping a range of businesses understand and bid for tenders. For example, the Western Australian Government hosts seminars for businesses wanting information on the government quote and tender process.[411] Governments can also take steps to ensure that contracts are written in a way that is easy for businesses to understand and which allows for a range of innovate solutions to be considered.

The Panel favours a focus on outcomes rather than outputs in government procurement. A focus on outcomes allows bidders to suggest different approaches that achieve the government's desired result rather than having to demonstrate specific activities, tasks or assets. It allows potential bidders to offer new and innovative ways to meet government demands and helps to encourage a diverse range of potential providers.

An example of outcomes-based procurement can be as simple as a tender for building maintenance specifying that floors must be clean and have a uniformly glossy finish (outcome

410 Productivity Commission 2014, *Public Infrastructure*, Report No. 71, Canberra, page 70.

411 See Small Business Development Corporation 2015, Tender Process, Government of Western Australia, Perth, viewed 9 February 2015 www.smallbusiness.wa.gov.au/tender-process/.

focus) rather than specifying that a contractor must strip and re-wax the floors weekly (output focus).[412]

In moving to PPP models that include service delivery, contract design takes on a new importance, with a need to ensure procurement is outcomes based. An outcomes focus allows providers to develop innovative ways of achieving the government's desired result. Outcomes-based PPP examples in the hospital sector are reported in Section 12.1.

Moving to outcomes-based procurement is not without challenges. Governments need to find ways to define desired outcomes and measure performance. The Panel notes the steps governments are already taking, including the New South Wales Government's Procurement Roadmap for 2013 and 2014, which includes a commitment to move away from 'one-size-fits-all' tenders and use more flexible and less complex procurement strategies.[413]

The balance in ensuring that procurement processes meet community needs, while allowing new innovative firms to compete, is captured in the New South Wales Government comment:

> Where reform involves contracting with non-government service providers, contracts should be structured to ensure competitive tension is maintained. For example, contract durations should be short enough to maintain competitive pressures on incumbent service providers, but of sufficient length to ensure service providers obtain a satisfactory return. (sub, page 27)

In considering ways to encourage innovation, choice and responsiveness in service provision, governments are using trials or pilots of different types of tenders. Feedback and lessons learned from pilot tenders can then be incorporated into future guidelines and practices.

Submitters also highlight the importance of adequate competition in procurement decisions. This relates both to governments looking to offer more, rather than fewer, procurement opportunities in the same market and to competition among suppliers once government procurement processes are put in place. For example, Australian Industry Group says:

> It is vital that Government procurement policy is directed at enhancing private sector access to the Government business market to ensure that there is an adequate level of competition among suppliers when a procurement strategy is executed. (sub, page 49)

Australian Industry Group also says that government agencies should implement an approach that shows their commitment to five procurement principles:

- value for money (looking beyond 'least cost' to also consider quality, after sales servicing and maintenance and ongoing supplier relationships);
- clarity, transparency and improvement of processes;
- full and fair access;
- full opportunities for local suppliers; and
- supporting industry through effective planning and communication (sub, pages 49-50).

412 Example taken from North, J and Keane B, 2014, Australia: Outcome-based contracting is on the up: Who's doing it, why, and what you need to know about it, Corrs Chambers Westgarth, 13 May.

413 NSW Government 2012, *Procurement Roadmap*, Sydney.

The National Commission of Audit also considered that the Australian Government's procurement policies could be improved in terms of value for money:

> While value for money is the core principle underpinning government procurement policy, significant opportunities exist to improve efficiency and effectiveness and to take a more strategic approach. …The interpretation of value for money should reflect a more rigorous and sophisticated approach that looks beyond simple cost per day or cost per unit. A better approach would take into account outcomes, benefit and importantly risk relative to price.
>
> Associated with this reform is a need to build the skills and capabilities of the public sector to enhance competencies around good contracting.[414]

Tyro Payments Limited recommends a review of Australian public procurement policies and procedures with a view to promoting competition and innovation through open panel tendering of available government services (DR sub, page 7).

The New South Wales Government points to recent reforms to the State's procurement policies that include an objective of promoting competition:

> … reforms are designed to encourage better value for money and improve outcomes through changes to procurement practices, and reducing the cost and complexity of doing business with the NSW Government. NSW agencies are required to encourage new entrants to apply for government business and expand the number of prospective suppliers where possible. The NSW Procurement Board is also required to take into account competition impacts in forming procurement category management plans. Reforms to the NSW procurement model supports testing the benefits of strategic commissioning approaches, such as outcomes-based contracting, which are designed to increase competition and contestability in government service delivery. (DR sub, pages 10-11)

The New South Wales Government provides examples of different delivery models, including introducing contestability in road maintenance and non-emergency patient transport services, a franchise model for Sydney Ferries and a Northern Beaches hospital public-private partnership. It notes:

> As these examples demonstrate, there is considerable scope for governments to promote increased competition in the delivery and procurement of government services. (sub, page 7)

Similarly, the South Australian Government states that it has a State Procurement Board[415] that acts to encourage competition in state procurement for regular requirements of state government, including the health and education systems. Procurement for infrastructure projects in South Australia is undertaken by the Department of Planning, Transport and Infrastructure, which oversees a competitive tender process for building and construction and maintenance services (DR sub, page 18).

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414 Australian Government 2014, *Towards Responsible Government - The Report of the National Commission of Audit Phase One*, Canberra, page 228.

415 Government of South Australia, *State Procurement Board, Procurement Policy Framework*, Adelaide.

In the context of public infrastructure, the PC commented, 'State and Territory governments have shown a strong interest in further improving their procurement practices and in promoting a more competitive environment', but also noted scope to improve public sector procurement practices.[416]

The PC identified 'smart procurement strategies' that governments can adopt to enable competition, such as:

- packaging major projects into smaller parts to increase the number of potential bidders, where the benefits outweigh the costs;
- taking into account that project scheduling can make a large difference to the number of potential bidders for a big project and therefore the prospects for genuine competition; and
- penalising market participants that engage in 'sweetheart' deals with unions, which raises costs and may limit competition.[417]

The competition principles set out in Recommendation 1 are aimed at encouraging governments to promote competition, choice and a diversity of providers in markets. These principles should guide procurement policies and decisions.

The Australian Government's Procurement Rules currently state that procurement should 'encourage competition and be non-discriminatory'.[418] The New South Wales Government ProcurePoint Statement on the Promotion of Competition also states that, competition, in the context of government procurement:

> Encourages new entrants to apply for government work and expands the number of prospective suppliers where possible;
>
> Improves whole of government procurement outcomes while encouraging competitive markets for good or service;
>
> Ensures government can be flexible, agile and adaptive as service delivery priorities change; and
>
> Promotes innovative market solutions to government service delivery objectives.
>
> As such, all agencies must act in a manner which promotes these principles. Promotion of competition includes price, product quality and service.[419]

The Panel also sees an opportunity to compare procurement policies across jurisdictions to determine 'best practice' as a basis for further updating procurement policies and improving procurement practices.

Privatisation

From the perspective of competition policy, privatisation can be thought of as a form of procurement: the transfer of assets from the public to the private sector rather than a transfer of activities — in effect, procurement that is not repeated.

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416 Productivity Commission 2014, *Public Infrastructure, Inquiry Report, Volume 2*, Report No. 71, Canberra, page 435 and page 2.

417 Productivity Commission 2014, *Public Infrastructure, Inquiry Report, Volume 1*, Report No. 71, Canberra, page 30.

418 Department of Finance 2014, *Commonwealth Procurement Rules: Achieving value for money*, Canberra, page 13.

419 NSW Government, *Direction 2013-02: Statement on the Promotion of Competition*, Sydney.

The PC states:

> Where the objective of reform is to achieve the most efficient management of assets, privatisation of utilities will often be the preferred policy option.

Also, that:

- for electricity network businesses, state-owned businesses, on average, have lower productivity than their private peers;[420]
- in some sectors, such as airports, privatisation has been consistent with the objective of achieving more efficient investment;[421]
- privatised entities will generally have a greater incentive for good project selection and efficient delivery of infrastructure than government-owned businesses as they are subject to capital market disciplines.[422] (sub, page 33)

However, submissions raise particular concerns about governments privatising assets without first putting in place appropriate regulatory settings, including for competition.[423] The Business Council of Australia (BCA), for example, says:

> Some government businesses that have been identified for sale will have monopoly power, or perform regulatory functions that create an actual or perceive conflict. It is important that prior to the sale of any such business that the structural issues are addressed, and measures put in place to enhance competition where appropriate. …Section 4 of COAG's Competition Principles Agreement (1995) addressed structural reform of public monopolies, including the need to review the scope for pro-competitive reforms prior to the sale of public monopolies. The agreement did not require that these reviews were public, and so it is not clear whether and how such analysis has been undertaken prior to recent sales/long-term lease of assets such as the NSW and Queensland ports. (sub, page 44)

The Australian Competition and Consumer Commission (ACCC) also expresses concern about governments privatising assets with a view to maximising proceeds of sale at the expense of competition. The ACCC provides the example of the Sydney airport — where the Australian Government-leased Sydney Airport with the right of first refusal to operate a second Sydney airport (recently announced to be located at Badgery's Creek).

The ACCC states, 'the right of first refusal confers on Sydney Airport a monopoly over the supply of aeronautical services for international and most domestic flights in the Sydney Basin, and forecloses the potential for competition between Sydney Airport and an independent operator of a second airport' (sub 1, page 36).

The ACCC is also concerned about the nature of the regulatory settings that apply to monopoly assets when privatised by governments:

> … at times, governments are not establishing appropriate access mechanisms prior to the sale of such assets, instead relying on contractual arrangements with the new owner. (sub 1, page 36)

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420 Productivity Commission 2013, *Electricity Network Regulatory Frameworks*, Report no. 62, Canberra.

421 Productivity Commission 2012, *Economic Regulation of Airport Services*, Report no. 57, Canberra.

422 Productivity Commission 2014, *Public Infrastructure*, Report no. 71, Canberra.

423 See also PC, sub, page 33.

The ACCC states that where the sale would otherwise be likely to result in a substantial lessening of competition in breach of section 50 of the CCA, the ACCC may be able to deal with infrastructure issues via undertakings accepted from infrastructure buyers to address those competition concerns. However, the ACCC considers that relying on the merger process is generally an inadequate way of dealing with complex issues of access to significant monopoly infrastructure.

> Section 50 remedies can only address competition concerns arising from an acquisition and therefore cannot extend to addressing competition issues arising from the monopoly characteristics of the infrastructure. In other words, where privatisation represents a bare transfer of the monopoly asset from the government to the private sector, the sale is unlikely to lead to a substantial lessening of competition in a market, and therefore merger remedies would not be available. (sub 1, page 37)

That said, in asset privatisation cases where the identity of a potential purchaser raises competition concerns because it holds an interest in competing assets (horizontal aggregation) and/or businesses at other levels in the supply chain (vertical integration), undertakings may be a mechanism to deal with merger concerns. But, as the ACCC notes, 'even in such cases it is not clear that section 50 remedies represent the most effective mechanism for ensuring appropriate terms and conditions of access to monopoly infrastructure' (sub 1, page 37).

There are calls for a framework and best practice guidelines for privatising assets. For example, the Queensland Competition Authority says:

> A framework is required to ensure that economic efficiency is the goal when privatising.
>
> Contestability and privatisation decisions should be made within a framework that requires both a preference for solutions that allow for more competition and a requirement to carefully consider the efficiency implications of the contracts that are signed with suppliers.
>
> Decisions with regard to privatisation and contestability need to be made transparently, with opportunity for informed debate. (sub, page 11)

The BCA comments that an adequate regulatory framework is a prerequisite for government asset sales to generate the greatest community benefit. Also, that:

> The regulatory frameworks — the rules, and the institutions that will administer them — must provide sufficient certainty to attract investors prepared to pay the full value of the assets, while encouraging competition and innovation in upstream and downstream industries. (sub, page 41)

The PC also notes that privatisation may need to be accompanied by complementary policies to ensure that outcomes are efficient and certain community goals are met, including: structural separation of potentially contestable elements from natural monopoly network infrastructure; the creation of a sound regulatory environment prior to privatisation, including third-party access arrangements; clearly specified hardship policies and community service obligations; and a well-planned process of privatisation (sub, page 33).

Undertaking regulatory reforms prior to privatisation is particularly important. As the OECD notes:

> Good practice calls for exposing as much as possible of an SOE's [state-owned enterprises] activities to competition no later than at the time of privatisation. If monopoly activities necessarily remain the government faces a choice:
>
> 1. Break up the company, sell the competitive parts and make specific regulatory arrangements for the rest;

> 2. If the company is to remain vertically integrated during and after privatisation then the need for independent and well-resourced regulation is further exacerbated.[424]

The ACCC points to the PC's government ownership framework for ensuring that governments make coherent choices about ownership. The PC states:

> The strongest (sound) rationale for government ownership is where governments find it difficult to write good contracts with private businesses or to regulate them effectively and where those contractual problems can be effectively overcome through government ownership.[425]

Drawing on best-practice guidance developed by the OECD[426] and experiences with privatisation in Australia and the UK, the PC recommends that governments should:

- be guided by the overarching objective of maximising the net benefit to the community, with clear identification and prioritisation of any subsidiary goals;
- undertake key regulatory reforms prior to sale;
- avoid the unjustified transfer to the new owner of liabilities, obligations or restrictions that may inhibit the future efficiency of the business;
- establish an expert unit within the relevant treasury to oversee the process, develop clear milestones and a timetable;
- undertake genuine consultation with the public and key affected groups, including likely beneficiaries, accompanied by effective communication of the benefits of privatisation; and
- ensure adequate accountability through independent auditing of the privatisation process.[427]

The first two guiding principles align with the competition principles set out in Recommendation 1. They are a critical feature of best practice guidelines and practices for privatisation. Public transparency of adherence to principles, as noted by the BCA,[428] is also important.

All Australian governments should have best-practice privatisation guidelines and processes. As the Panel recommends in the case of infrastructure markets (Chapter 11), where monopoly infrastructure is privatised, it should be done in a way that promotes competition. Maximising sale proceeds at the expense of competition effectively places a long-term tax on consumers. An independent body, such as the Australian Council for Competition Policy (see Recommendation 43), should be tasked with ensuring an adequate focus on competition in privatisation guidelines and processes.

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424 OECD 2010, *Privatisation in the 21st Century, Summary of Recent Experiences*, Paris, page 15.

425 Productivity Commission 2013, *Electricity Network Regulatory Frameworks*, Report no. 62, Canberra, page 265.

426 OECD 2010, *Privatisation in the 21st Century, Summary of Recent Experiences*, Paris, page 15.

427 Productivity Commission 2013, *Electricity Network Regulatory Frameworks*, Report no. 62, Canberra, page 293.

428 BCA sub, page 44.

The Panel's view

Government procurement guidelines and decisions can have a big impact on the range of goods and services ultimately available to consumers. Procurement can also affect the structure and functioning of competition in markets.

Tender documents have traditionally been written in a prescriptive fashion and with an overarching focus on value for money. Although risk management and value for money are both important considerations, too narrow a focus on these factors can constrain diversity, choice and innovation in government-commissioned provision of goods and services.

Governments can take steps to encourage diversity, choice and innovation in procurement arrangements. Tendering with a focus on outcomes, rather than outputs, and trials of less-prescriptive tender documents could encourage bidders to suggest new and innovative methods for achieving the governments' desired result. Education and information sessions can help a broad range of businesses understand the procurement process.

Competition principles, particularly those promoting choice and a diversity of providers, should be incorporated into procurement, commissioning, public-private partnerships and privatisation policies and practices.

Procurement and privatisation policies and practices should not restrict competition unless:

- the benefits of the restrictions to the community as a whole outweigh the costs; and
- the objectives of the policy can only be achieved by restricting competition.

Implementation

Reviews of procurement, commissioning, PPPs and privatisation policies and guidelines should be undertaken by all Australian governments, and commence within 12 months of accepting the recommendation. An independent body, such as the proposed Australian Council for Competition Policy, should report on progress in reviewing procurement and privatisation policies.

Recommendation 18 — Government procurement and other commercial arrangements

All Australian governments should review their policies governing commercial arrangements with the private sector and non-government organisations, including procurement policies, commissioning, public-private partnerships and privatisation guidelines and processes.

Procurement and privatisation policies and practices should not restrict competition unless:

- the benefits of the restrictions to the community as a whole outweigh the costs; and
- the objectives of the policy can only be achieved by restricting competition.

An independent body, such as the Australian Council for Competition Policy (see Recommendation 43), should be tasked with reporting on progress in reviewing government commercial policies and ensuring privatisation and other commercial processes incorporate competition principles.

14.2 THE CCA AND GOVERNMENT ACTIVITY

Under the National Competition Policy (NCP), governments agreed to extend the *Competition and Consumer Act 2010* (CCA, section 2B) so that it applied to the Crown insofar as it carried on a business, either directly or through an authority. The CCA states that the definition of a 'business' includes a business not carried on for profit.

While the CCA does not define what the term 'carrying on a business' means, section 2C sets out some activities that are *excluded* (or do not amount to carrying on a business):

- imposing or collecting taxes, levies or licence fees;
- granting or varying licences; and
- a transaction involving only the Crown and/or non-commercial authorities.

There is also considerable case law on the question of what constitutes 'carrying on a business'.

Further, section 51 in Part IV sets out a process by which governments (the Australian Government and state and territory governments) may, by legislation, authorise conduct (other than mergers) that would otherwise contravene Part IV.

There are many circumstances in which the Crown (whether as a department or an authority) participates in markets, sometimes with a substantial presence, but may not necessarily carry on a business for the purposes of the CCA. This is particularly true in the area of procurement —whether for the delivery of large infrastructure projects, or the regular requirements of the health or education systems.

The BCA says:

> … more than 20 years after the Hilmer Report, it remains the case that a great deal of economic and potentially competitive activity remains beyond the reach of competition law in the hands of local, state and territory, and Commonwealth governments. Extending the competition law to these areas could be partly achieved by expanding the definition of 'carrying on a business', but would also require positive reform of legislation and regulations by the various levels of government.
>
> There are real opportunities to expose government activities to greater market disciplines so as to generate better outcomes for consumers, users of subsidised services, and for taxpayers. (sub, Main Report, page 40)

The ACCC argues that, although the NCP reforms extended the CCA to apply to the Crown insofar as the Crown 'carries on a business', the reform 'was intended to ensure that the public sector, where it acts as an ordinary economic player in a market, is subject to the same competition law provisions as the private sector'(DR sub, page 31). Also, since the 1990s, Australian governments have increasingly participated in markets in ways that do not amount to 'carrying on a business' for the purpose of the competition law.

> Market-based mechanisms are used by governments to finance, manage and provide government goods and services (described as 'contractualised governance' for the delivery of public services). Such mechanisms have the potential to significantly improve efficiency but also have the potential to harm competition — for example, by incorporating, in the contract, provisions that are likely to have the purpose or effect of restricting competition. (DR sub, page 31)

The NCP reforms could be taken a step further, so the Crown is subject to competition law insofar as it undertakes activity in trade or commerce. Extending the application of the CCA would place government bodies engaging in commercial activities on the same footing as private parties.

In both New Zealand and the UK, government commercial activities are subject to competition law (See Box 14.1). The New Zealand Commerce Act 1986 covers the Crown 'insofar as it engages in trade'. In the UK, the Competition Act 1998 applies to government activities where the body is an 'undertaking' for the purposes of the law and where its activities are commercial in nature.

The ACCC argues that ensuring that a government body, when it enters into a commercial transaction, is subject to the competition law:

> … is a logical extension of the NCP reforms. It:
>
> - places the government body in the same position as the private party entering into the contract (as the private party is subject to Part IV of the CCA, whereas the government body is currently immune unless it is carrying on a business);
> - treats government acquisitions of goods or services in the same way as private sector acquisitions of goods or services — provisions in Part IV explicitly acknowledge that anti-competitive conduct can arise in both supply and acquisition situations; and
> - is consistent with the principles developed for UNCTAD [United Nations Conference on Trade and Development] on the application of the CCA to government … (DR sub, page 32)

A number of other submitters also support extending the competition provisions of the CCA to the Crown insofar as it undertakes activities in trade or commerce.[429] For example, Law Council of Australia — SME Committee says:

> The current tests for determining jurisdiction in relation to government activities are too complex. This recommendation will reduce this complexity. (DR sub, page 12)

Box 14.1 Applying competition law to government activities in other jurisdictions

New Zealand

The New Zealand Commerce Act 1986 has a broader application to the Crown than the Australian law. If the Crown is engaged in trade, it is subject to the Commerce Act in relation to those activities. The Crown is regarded as including all government and quasi-government bodies.

The New Zealand Commerce Act defines 'trade' as any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services, or to the disposition or acquisition of any interest in land. The courts have interpreted the phrase 'engaged in trade' to have the meaning 'carrying on trade'. This means the Crown must be doing more than just carrying out activities that affect trade to invoke the application of the New Zealand Commerce Act.

429 See, for example: Australian Chamber of Commerce and Industry, DR sub, page 18; Australia Industry Group, DR sub, page 19; Business Council of Australia, DR sub, page 45; Business SA, DR sub, page 3; Independent Contractors Australia, DR sub, page 10; Master Builders Association, DR sub, page 14; and Spier Consulting Legal, DR sub, page 8.

Box 14.1 Applying competition law to government activities in other jurisdictions *(continued)*

The trading functions of the Crown are subject to the New Zealand Commerce Act, but its administrative and regulatory functions are not. Often Crown Corporations carry out the trading activities of the Crown. Unlike the Crown itself, when a Crown Corporation is engaged in trade, its whole sphere of activity becomes subject to the Commerce Act, not just its trading activities.

The Crown is subject to almost all the same penalties as private sector organisations, including third-party damages actions and other court orders. The only penalty to which the Crown is not subject is a pecuniary penalty payable to itself.

Interconnected bodies corporate are not subject to the prohibition against anti-competitive mergers or agreements, where arrangements are solely between subsidiaries and/or the parent company. Amendments in New Zealand have:

- following the electricity reforms, ensured agreements between bodies corporate owned by the Crown are subject to the Commerce Act as if they were arrangements between independent companies; and
- subsequently reversed this for Crown-owned health trading enterprises, with the result that a public hospital merger is treated as a re-organisation within an interconnected body corporate rather than as a merger between two independent entities.

United Kingdom

The *Competition Act 1998* (UK) applies to government activities where the body is an 'undertaking' for the purposes of the law and where its activities are commercial in nature.

In determining whether a public body is acting as an undertaking in relation to the purchase of goods or services in a market, the economic or non-economic nature of that purchasing activity depends on the end use to which the public body puts the goods or services bought.

A public body is likely to be engaging in economic activity if it is supplying a good or service and that supply is of a commercial nature. Conduct will not amount to economic activity if it is of a wholly social nature.

In 2012, the UK Parliament passed the *Health and Social Care Act 2012* (UK), which specifically applies the competition law merger controls in the *Enterprise Act 2002* (UK) to NHS Foundation Trust hospital mergers.

However, a number of concerns are raised by state and local governments. For example, the New South Wales Government says:

- the broad application of competition laws to government commercial activities risks compromising the policy functions of government — potentially an independent regulator, such as the ACCC, or the courts could be adjudicating government policy decisions and weighing up competition and public benefit objectives (providing an example from the UK, where the Competition Commission ruled against a proposed merger of the Royal Bournemouth and Christchurch Hospitals and the Poole Hospital Trust);
- governments undertake commercial activities in markets where full competition may not be necessary, or in some cases appropriate, to achieve the greatest public benefit — while increased competition and contestability can bring service improvement, imposing the disciplines of the CCA may constrain a government's ability to design reforms to achieve the greatest public benefit and create disproportionate regulatory costs for government;

- the broad application of the CCA to government activities is likely to create significant ambiguity around how competition laws apply to particular activities and this will inevitably impose significant costs, since:
    - : the legal test of 'in trade or commerce' is not necessarily easy to apply in a government context; and
    - : legal complexities arise from the Australian Federation, for example, there will be constitutional limitations on the Commonwealth's ability to amend the CCA to purport to apply to state government activities, in the absence of referral laws by the States; and
- introducing uncertainty into current procurement processes may have unintended consequences (noting current asset recycling and infrastructure reinvestment commitments in New South Wales). (DR sub, pages 11-12)

Arguments put by local government associations are that:

- Applying competition law to commercial government activities needs to be tempered by the reality that a range of local government trading/commerce activities are delivered on a 'provider of last resort' basis, particularly in remote/rural areas.
- The change could create additional procurement practice compliance requirements.
- Many local governments do not have the skill sets in-house to adhere to more stringent competition policy requirements in procurement.[430]

The ACCC also acknowledges that governments balance competing considerations and that acting in ways that limit competition can sometimes be in the public interest. However, 'including anti-competitive provisions in confidential private contracts is not the preferable way to achieve this outcome' (DR sub, page 32).

As the ACCC notes, authorisation under Part VII of the CCA provides a specific mechanism for exempting conduct that restricts competition in order to address market failure. Exemptions have been part of national reforms; for example, derogations under the National Energy Law.

In addition, as the ACCC puts it, section 51 combined with cost-benefit analysis, 'would make public the cost to competition from the government's policy decision, and invite scrutiny as to whether restrictions on competition are in fact the best way to achieve the desired policy goal' (DR sub, page 32).

A number of submitters seek greater clarity on what would be 'in scope' if the CCA were to be amended to apply to the Crown insofar as it undertakes activity in trade or commerce.[431]

In the Panel's view, 'activity in trade or commerce' is not intended to cover all government activity. Rather, the intention is that it would cover the supply of goods or services by a government business (currently covered by 'carrying on a business') and all other commercial transactions undertaken by government bodies (such as procurement and leasing of government-owned infrastructure). Section 2C of the CCA, which sets out activities that are excluded (taxes, levies or licence fees,

430 See, for example: Local Government Association of Queensland, DR sub, page 4; and Western Australian Local Government Association, DR sub, page 8.

431 See, for example: ACCC, DR sub, page 33; Department of Communications, DR sub, page 9; and NSW Government, DR sub, page 13.

granting or varying licences and transactions involving only the Crown and/or non-commercial authorities), would remain, clarified to define a 'licence' as meaning a licence, permission, authority or right granted under an enactment that allows the licensee to supply goods or services.

The way competition law is applied in other countries also provides some guidance. In New Zealand, as long as the Crown's decision is an exercise of the administrative or regulatory function of government, as opposed to trading, the decision is outside the jurisdiction of New Zealand's Commerce Act.

The term 'engages in trade' was examined by the courts in *Glaxo New Zealand Limited v Attorney General* [1991] 3 NZLR 129. The question in that case was whether the Minister of Health was engaging in trade in deciding, under powers conferred by law, in what circumstances sale of a certain drug should be subsidised by the Department of Health . On delivering the judgement of the Court of Appeal, Justice Casey stated:

> It is clear that the Minister was not engaged in trade as such, or in any business, industry, profession, or occupation. Nor … could her decision-making process be described as 'an activity of commerce'.[432]

In the Panel's discussion with the New Zealand Commerce Commission about the scope of New Zealand's Commerce Act, the example was cited of a national parks agency that restricts the number of concessions given to passengers paying for transport to offshore Nature Reserves. If the decision to restrict concessions is an administrative decision made by the Department on environmental conservation grounds, the Commerce Act does not apply. However, if concessions are restricted on the basis of maximising revenue, the Commerce Act does apply.

The Panel's view

Through its commercial transactions entered into with market participants, the Crown (whether in right of the Commonwealth or the States and Territories, including local government) has the potential to harm competition. The Panel considers that the NCP reforms should be carried a step further and that the Crown should be subject to the competition laws insofar as it undertakes activity in trade or commerce.

Implementation

Amendments to the CCA so that competition provisions apply to the Crown insofar as it undertakes activity in trade or commerce should be undertaken at the same time as the Panel's other proposed changes to the CCA.

Recommendation 24 — Application of the law to government activities

Sections 2A, 2B and 2BA of the CCA should be amended so that the competition law provisions apply to the Crown in right of the Commonwealth and the States and Territories (including local government) insofar as they undertake activity in trade or commerce.

This recommendation is reflected in the model legislative provisions in Appendix A.

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432 Cited in Chapman, M. 1997, 'How the Act applies to local and central government', *Compliance*, Commerce Commission, page 2.

15 Key Retail Markets

Competition in the grocery and fuel retailing markets in Australia has been an area of considerable public, media and political interest and concern over many years, particularly because these products are frequently purchased, largely non-discretionary for most consumers and account for a significant proportion of consumer spending.

Some of these markets are also relatively concentrated, raising the possibility of competition concerns arising if certain other factors are also present, including most importantly barriers to entry.

However, the mere fact that some markets in Australia are relatively concentrated is neither surprising nor necessarily a cause for concern. In markets with high fixed costs, economies of scale are important. Australia has a relatively small population and 'significant economies of scale tend to increase the need for the leading firms to account for a large market share and simultaneously help them achieve such shares'.[433]

Provided there is strong competition from rivals to ensure that a large part of these gains is passed through to consumers, consumers will also benefit, notwithstanding the fact that the market will be more concentrated than some others.

Competition policy and law have a crucial role to play in concentrated markets in ensuring that: mergers to achieve scale do not unduly harm competition; and large firms continue to face competitive constraints and are prevented from misusing their market power or engaging in unconscionable conduct. These issues are discussed in detail in Part 4 of this Report.

15.1 Supermarkets

A number of small businesses, supermarkets and their representatives, consumers and other stakeholders raise concerns in submissions about the major supermarket chains, Woolworths and Coles. For example, Master Grocers Australia states:

> ... the market dominance of two major retailers is seriously affecting the ability of smaller independent retailers to compete effectively in Australia. (sub, page 6)

Other stakeholders, including Woolworths (sub, page 7) and Coles (sub, page 4), submit to the contrary that the grocery industry is highly competitive and has become more so in recent years.

Australia's grocery market is concentrated, but not uniquely so (see Box 15.1). Although concentration is relevant, it is not determinative of the level of competition in a market. A concentrated market with significant barriers to entry may be conducive to weak competition, but competition between supermarkets in Australia appears to have intensified in recent years following Wesfarmers' acquisition of Coles and the expansion of ALDI and Costco. Consequently, few concerns have been raised about prices charged to consumers by supermarkets.

433 OECD 1999, Committee on Competition Law and Policy, *Roundtable on Oligopolies*, Paris, page 22.

Box 15.1: Market concentration

Choice of measure affects outcome

Estimates of market share and international comparisons are fraught. There is no single 'true' measure. Each may be useful depending on the question being asked.

The ACCC's 2008 grocery inquiry report devoted more than 20 pages to measures of market share in Australia and overseas, concluding, 'the sector is concentrated. However, the level of concentration in the sector, and in particular the positions of Coles and Woolworths, does not represent a level which, of itself, requires market reform'; other factors must be assessed before drawing any conclusions about the degree of competition in the market.[434]

The ACCC reported a number of market share figures published by overseas supermarket investigations (generally by competition agencies). The Panel has supplemented these figures with other published estimates to produce the table below:

Estimated grocery market shares (%) by country

Largest 4 firms	Australia*	NZ*	UK*	Canada*	Ireland*	Austria*	USA^	Switzerland~
1	30+	56	27.6	29	20-25	N/A	25	32
2	≈25	44	14.1	22	15-20	N/A	17	24
3	IGA, 15-17 (a)	N/A	13.8	14	15	N/A	8	N/A
4	ALDI, 6 (a)	N/A	9.9	11	10	N/A	5	N/A
Top 4 total	**75-80**	**100**	**65.4**	**76**	**60-70**	**N/A**	**55**	**N/A**
Top 2 total	**55-60**	**100**	**41.7**	**51**	**35-45**	**65-70**	**42**	**56**

Sources: *ACCC 2008, Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries, pages 45-67, ^*www.theconversation.com* *'2013 Fact check on Grocery Market Concentration'* (note this measure is 'share of food retail sector'), ~*www.euromonitor.com* *'Grocery Retailers in Switzerland'*.

(a) These figures are not calculated on the same basis as those shown for the largest two firms.

By way of comparison, the Statement of Agreed Facts in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 (22 December 2014) states at paragraph 9 of Appendix 1 that '[from about 1 April 2011 to about 31 December 2011] Coles supplied approximately 30% of the grocery products supplied for retail sale to customers in Australia. Together with Woolworths, Coles supplied approximately 60% to 70% of the grocery products supplied for retail sale to customers in Australia.'

Some submitters argue that the market share figures reported above understate the true level of concentration in Australia's grocery market. For example, AURL FoodWorks submits, 'with regards to Australia, the figures do not represent the supermarket industry. Rather it is a representation of the much wider food industry, and in our opinion incorrectly includes specialty retailers such as bakeries, butchers and convenience stores. This clearly diminishes and misrepresents the actual market share held by Coles and Woolworths in the supermarket industry'. (DR sub, page 5)

Although the Panel accepts that there are different ways of calculating market shares in grocery markets and that some produce higher estimates of market concentration (and higher market shares for Woolworths and Coles in particular), these figures were drawn from the ACCC's 2008 grocery

434 Australian Competition and Consumer Commission 2008, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, Canberra, page 49.

inquiry and were the ACCC's best estimate of market share for 'retail grocery sales' at that time. Notwithstanding differences over exactly which figures should be used, they show that grocery markets are relatively concentrated in Australia, as they are in a number of other developed countries.

Yet the important issue for competition is not whether the market is concentrated but whether some businesses engage in anti-competitive conduct. Other important factors include barriers to entry and the ability to switch to other suppliers, products or customers.

Stakeholders raise a number of concerns about what might broadly be categorised as competition issues (including issues concerning the competition law) in relation to supermarkets. These include:

- concerns that the pricing and other behaviour of major supermarket chains, including that 'predatory capacity', drives out independent retailers and the *Competition and Consumer Act 2010* (CCA) is powerless to prevent this;
- the prices the majors pay to suppliers are too low, disadvantaging both suppliers and other retailers;
- their treatment of suppliers is unfair; and
- their fuel discount shopper dockets unfairly disadvantage independent supermarkets and fuel retailers.

For example, Business SA submits:

> Smaller, independent retailers are not worried about competing with the larger retailers, but are concerned about being pushed out of the market with tactics which will eventually result in a duopoly or monopoly market. This is not only at a supermarket level, but also at an individual brand level. (sub, page 6)

Another category of concern is that increasing use of private brands is reducing shelf-space for branded products. Lynden Griggs and Jane Nielsen comment on the rise of supermarket private labels, noting:

> In the short term they may well see reduced prices, but long term, potentially, a reduction in choice and a reduction in innovation as small suppliers to the supermarket giants are removed from the market. (sub, page 1)

The CCA has a range of provisions designed to address anti-competitive conduct, in particular provisions that relate to the misuse of market power and unconscionable conduct. The Panel cannot adjudicate whether a breach of the CCA has occurred in particular cases.

However, the Panel reaffirms that these provisions should only prohibit conduct that harms competition, not individual competitors. In particular, the CCA does not, and should not, seek to restrain a competitor because it is big or because its scale or scope of operations enables it to innovate and thus provide benefits for consumers. The Panel recommends strengthening the misuse of market power provisions (see Recommendation 30).

The Panel notes that, in December 2014 the Federal Court, by consent, made declarations that Coles engaged in unconscionable conduct in 2011 in its dealings with certain suppliers in contravention of

the Australian Consumer Law.[435] The Court ordered Coles to pay combined pecuniary penalties of $10 million and costs. Coles also gave a court enforceable undertaking to the ACCC to establish a formal process to provide options for redress for more than 200 suppliers referred to in the proceedings.[436]

Introducing a properly designed and effective industry code should assist in ensuring that suppliers are able to contract fairly and efficiently. However, any such code should not lead to agreements that benefit retailers and suppliers at the expense of consumers.

The Panel notes that consultation on a draft Food and Grocery Code of Conduct took place in 2014.[437] The Panel received a number of submissions from independent supermarkets and their representatives emphasising the importance of ensuring that any such code is enforceable. The Australian Government has announced that the Code was prescribed on 26 February 2015, covering grocery suppliers and binding those retailers and wholesalers that agree to sign on to the Code.[438]

A number of submissions comment on the Draft Recommendation for further deregulation of trading hours. These are discussed in detail in Section 10.5. Other submissions argue for and against the proposition that supermarkets should be permitted to sell alcohol. This is currently permitted in some jurisdictions but not others. See Liquor and Gambling in Section 10.4 for further discussion on this issue.

The Panel considers that, in general, consumers and small businesses operating in the retail sector can benefit from introducing more competition through eliminating barriers to entry. This can include lifting restrictions on trading hours and on the types of goods that can be sold in supermarkets and service stations.

The Panel recommendation on planning and zoning regulation is in Recommendation 9. The ACCC's 2008 grocery inquiry noted that planning and zoning laws act as a barrier to establishing new supermarkets. It noted that independent supermarkets were particularly concerned with impediments to new developments given the difficulties they have in obtaining access to existing sites.[439] ALDI also indicates that these laws are a barrier to expansion (sub, page 1).

Submissions also raise concerns about the range of retail outlets now operated as part of the corporate structures of Woolworths and Wesfarmers. For example, Vito Alfio Palermo notes that one or both of Woolworths or Wesfarmers are involved in '… groceries, liquor, hotels, hardware, electronics, apparel and homeware, office supplies …' (sub, page 1). Such expansion may generate some efficiencies for these firms, and competition is generally unlikely to be harmed by the expansion of a firm from one sector to another; indeed, in some instances it is likely to be increased. However, the Panel notes that concerns may arise if market power were to be leveraged from one sector into another. As noted above, the Panel's recommendations to strengthen the misuse of market power provisions of the CCA are set out in Recommendation 30.

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435 *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405 (22 December 2014).

436 Australian Competition and Consumer Commission 2014, *Court finds Coles engaged in unconscionable conduct and orders Coles pay $10 million* penalties, media release 22 December, Canberra.

437 Treasury, August 2014, Improving Commercial Relationships in the Food and Grocery Sector, Consultation Paper, Canberra.

438 Billson, B (Minister for Small Business) 2015, Grocery Code to improve relationships between retailers, wholesalers and suppliers, media release 2 March, Canberra.

439 Australian Competition and Consumer Commission2008, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, Canberra, page xix.

The move of the large supermarket chains into regional areas has also raised concerns about a loss of amenity and changes to the community. For example, Drakes Supermarkets submits:

> It is my view that [Coles and Woolworths] are land banking in many parts of [SA] where … competition already exists. They are applying for re-zoning of industrial and or commercial land usually outside existing shopping zones with the intent to shift the market away from existing zones. They have created major problems in the Riverland, South East and Adelaide Hills by locating outside traditional main streets. (sub, page 2)

Structural changes such as these raise reasonable concerns for individuals about how their amenity will be affected. Changes that affect the level of activity occurring on the main street or in other traditional retail modes, or that result in some small, long-term or family-run businesses closing, can have real impacts on the local community.

These issues, raised in numerous submissions, are clearly of concern to consumers and small business. The Panel is grateful to the small businesses and individuals who have been prepared to share their views. However, the Panel has also heard of small businesses opening up in new retail centres to take advantage of the customers attracted by the introduction of Coles or Woolworths. The Panel has also heard members of local communities who intend to continue to patronise the small, family-run businesses they have traditionally supported. In this context, the Panel notes the 2015 Westpac Australia Day report, which found that '9 in 10 Australians (92 per cent) feel loyal to at least one small business in their community'.[440]

The Panel considers that these concerns are not matters to be addressed by the competition law. They reflect broader economic and social changes that are often the outcome of competition. Undoubtedly these changes have the potential to damage individual businesses. However, consumer preferences and choice should be the ultimate determinants of which businesses succeed and prosper in a market.

440 Westpac 2015, *Aussies support Australian by shopping local*, media release 23 January.

The Panel's view

Australia's grocery market is concentrated, but not uniquely so. Competition appears to have intensified in recent years, with Wesfarmers' acquisition of Coles and the expansion of ALDI and Costco; consequently, few concerns have been raised about prices.

Small supermarkets allege that the major supermarkets misuse their market power, including through 'predatory capacity' and targeting particular retailers. Suppliers raise concerns about misuse of market power and unconscionable conduct by the major supermarket chains.

The Panel cannot adjudicate whether a breach of the CCA has occurred in particular cases but reaffirms that the competition laws should only prohibit conduct that harms competition, not individual competitors. The Panel recommends strengthening the misuse of market power provisions at Recommendation 30 of this Report.

The Panel notes the recent Federal Court ruling that Coles engaged in unconscionable conduct in its dealings with certain suppliers in 2011. The Panel also notes that a code was prescribed on 26 February 2015 covering grocery suppliers and binding those retailers and wholesalers that agree to sign on to the Code.

Removing regulatory barriers to entry would strengthen competition in the supermarket sector. Planning and zoning restrictions are limiting the growth of ALDI and, as the ACCC has identified, more broadly affect the ability of independent supermarkets to compete.

Trading hours' restrictions and restrictions preventing supermarkets from selling liquor also impede competition.

Supermarket operation has undergone a number of structural changes, including: greater vertical integration and use of private labels; an increase in the range and categories of goods sold within supermarkets; and greater participation by supermarket operators in other sectors. Like all structural changes, these can result in dislocation and other costs that affect the wellbeing of others.

The move of larger supermarket chains into regional areas can also raise concerns about a loss of amenity and changes to the community. While the Panel is sensitive to these concerns, they do not of themselves raise competition policy or law issues.

15.2 Fuel Retailing

The fuel retailing sector has been the subject of numerous reviews. Most notably, in 2007 the ACCC conducted an inquiry into the price of unleaded petrol.[441] It found that wholesaling was dominated by four large players (Shell, BP, Caltex and Mobil) and identified options to improve competition but did not identify serious market failures warranting government intervention.

In particular, the ACCC identified a need to ensure that access to fuel terminals did not act as an impediment to independent wholesalers importing fuel. The ACCC's 2013 fuel monitoring work shows that independent imports have increased in recent years.[442]

441 Australian Competition and Consumer Commission 2007, *Report of the ACCC inquiry into the price of unleaded petrol*, Canberra, Foreword.

442 Australian Competition and Consumer Commission 2013, *Report of the ACCC into the prices, costs and profits of unleaded petrol in Australia*, Canberra, page xiii.

Fuel retailing was found to have far more competitors, and the petrol operations of the supermarkets were an important presence alongside the operations of independent retailers.

NRMA raises concerns about concentration in Australia's fuel market (sub, page 2). It commends the ACCC for having opposed some acquisitions in the fuel retail sector but considers that prices are still higher than they should be, particularly in regional areas where competition is more limited (sub, pages 2-3). More specifically, Colac Otway Shire (DR sub, page 1) is concerned that fuel prices in Colac are higher than in nearby Geelong.

On the information before it, the Panel does not consider that differences in pricing between regions are explained by any clear shortcoming in the competition law or policy. The Panel notes the Direction from the Minister for Small Business to the ACCC issued under the prices surveillance provisions of the CCA to monitor 'prices, costs and profits relating to the supply of unleaded petroleum products in the petroleum industry in Australia for three years', with effect from 17 December 2014.[443] This will provide further information to assist in assessing the weight of any competition concerns in the sector.

Three academics submit that there is a case to reconsider whether to introduce a national version of Western Australia's Fuelwatch scheme, under which fuel retailers must set their prices for the next day in advance and cannot change them for a 24-hour period (Byrne, De Roos, Beaton Wells, DR sub, page 7). They report their findings that, before Fuelwatch, prices rose more quickly than they fell, but that Fuelwatch has reduced this asymmetry and consumers are better able (and more likely) to make purchases on days where market-wide prices tend to be lower.

The Panel welcomes this research but also notes the concerns raised when a national Fuelwatch scheme was proposed in 2008, including that 'the scheme will reduce competition and market flexibility, increase compliance costs, and has more potential to increase prices.'[444] Accordingly, the Panel considers that further evidence, both of a problem needing to be addressed and of the benefits and cost of Fuelwatch in WA, would be needed before any decision on introducing a national scheme.

Some submitters raise concerns that discount fuel shopper dockets constitute a misuse of market power.[445] Following an investigation, the ACCC accepted court-enforceable undertakings from Woolworths and Coles limiting the extent of fuel discounts to four cents per litre.[446] This appears to have addressed the concerns of these submitters for the time being. The Panel notes reports suggesting that funds supermarkets previously spent on fuel discounts have been redirected to discount items sold in supermarkets.[447]

Woolworths submits that there is no clear evidence to support the limiting of these discounts (DR sub, page 6). The Panel notes that, although Woolworths did not accept that its conduct had

443 Direction under section 95ZE, *Competition and Consumer Act 2010* — Monitoring of the Prices, Costs and Profits Relating to the Supply of Unleaded Petroleum Products in the Petroleum Industry in Australia, 9 December 2014.

444 ABC television Lateline 2008, 'Four departments advised Govt against Fuelwatch scheme', broadcast 28 May.

445 See, for example: Australian Automobile Association, sub, pages 5-6; and Drakes Supermarkets, sub, page 2.

446 Australian Competition and Consumer Commission 2013, *Coles and Woolworths undertake to cease supermarket subsidised fuel discounts*, media release 6 December, Canberra.

447 Jander, M 2014, 'Supermarkets shift discount war from fuel to groceries', 28 January, ABC News citing a report by Commonwealth Bank analyst Andrew McLennan.

adversely affected competition, it offered the undertaking voluntarily to address the ACCC's concerns about funding certain fuel discounts.[448]

Should larger discounts reappear once the undertakings expire, the ACCC could pursue court action under the CCA if it formed the view that such conduct constituted a breach of the CCA. In this context, the Panel notes its proposed changes to the misuse of market power provisions of the CCA in Recommendation 30.

The Panel is not persuaded that consumers are made worse off by the availability of fuel discounts at their current levels. However, shopper dockets can constitute a form of third-line forcing and loss-leader pricing, which has the potential to damage competition if sustained at high levels.

The Australian Automobile Association (sub, pages 4-5) raises the issue of petrol price boards and proposes a national standard be developed. Presently, in most of Australia, price boards are permitted to show the discounted 'shopper docket' price, but the Australian Automobile Association is concerned that this may mislead consumers and unfairly advantage firms offering such discounts. New South Wales, South Australia and parts of Western Australia have regulations in place preventing this practice. NRMA supports the New South Wales regulation (DR sub, page 4), but Woolworths submits that such regulation is unnecessary (DR sub, page 8).

The ACCC has not taken court action in response to such conduct to date, but the Panel notes that the CCA contains provisions dealing with misleading and deceptive conduct. Ministers for consumer affairs have indicated their intention to revisit this issue in future.[449] The Panel notes that the differences in regulations between jurisdictions creates a 'natural experiment' that will provide evidence to assist Ministers in determining whether these regulations have had any effect on competition and whether they are in the public interest.

National Seniors Australia draws attention to the relevance of price signalling provisions, which presently apply only to banking, to the fuel retailing market:

> National Seniors questions whether competition law is working effectively to ensure genuine price competition in automotive fuel retailing, where weekly price movements posted by the major distribution companies appear to move in tandem. The Review should consider whether price signalling provisions … should be extended to fuel suppliers and other sectors. (sub, page 8)

The Panel's views on the CCA's price signalling provisions are set out in Section 20.2. The Panel also notes the current litigation in which the ACCC alleges that the Informed Sources service, which shares pricing information between fuel retailers, and participating petrol retailers have breached section 45 of the CCA, which prohibits contracts, arrangements and understandings that have the purpose, effect or likely effect of substantially lessening competition.

The Australasian Convenience and Petroleum Marketers Association has made public comments emphasising the importance of terminal access to facilitate wholesaling competition.[450]

The availability of a timely and effective scheme to allow access, where appropriate, to natural monopoly infrastructure provides a possible avenue should independent wholesalers be frustrated in

448 Undertaking to the ACCC given for the purposes of section 87B by Woolworths Limited, page 1.

449 Legislative and Governance Forum on Consumer Affairs 2014, Joint Communique, Meeting of Ministers for Consumer Affairs, 13 June.

450 Moulis, N (ACAPMA CEO) 2014, 'Fuel industry: Not drowning, waving', media release 9 April.

their attempts to gain access through commercial negotiations. The Panel's views on the access regime under the CCA are set out in Chapter 24. The Panel has not seen evidence that would justify industry-specific intervention to facilitate such access for fuel terminals.

As noted in relation to other sectors, the Panel notes the importance of planning and zoning regulations being required to take competition issues into account. To the extent that they allow only one service station serving a given area and discourage multiple service stations from opening in close proximity, such restrictions may reduce the likelihood of close competition that allows and encourages price comparison by consumers.

The ACCC submits that the New South Wales government mandate requiring that a certain proportion of petrol sold in the State should contain ethanol is an example of regulation that limits competition and imposes costs on society (sub 1, page 40). The ACCC submits that the mandate has not only failed to achieve its industry assistance goals, but also diminished consumer choice and leading to consumers paying higher prices as they switch to premium fuels to avoid ethanol.

Woolworths also submits that the New South Wales ethanol mandate should be repealed. In addition to its general concern with the mandate, Woolworths is particularly concerned that exempting retailers operating 20 or fewer service stations in New South Wales from the mandate is highly anti-competitive and inappropriate (DR sub, pages 7-8).

The Panel considers that this mandate should be reviewed as part of the proposed new round of regulation review (see Recommendation 8) and repealed, 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 policy can only be achieved by restricting competition.

The Panel's view

Shopper dockets were a source of considerable concern, particularly for small competitors. These were up to 45 cents per litre but are now limited to 4 cents per litre through undertakings to the ACCC.

The Panel is not persuaded that consumers are made worse off by the availability of discounts at their current levels. The Panel notes the undertakings accepted by the ACCC and the availability of the CCA's misuse of market power provisions should future competition concerns emerge in this context.

Stakeholders express concerns that prices are higher in certain regional areas, but the Panel does not consider that this is explained by any clear shortcoming in the law or policy. The Panel notes the 17 December 2014 Direction from the Minister for Small Business to the ACCC issued under the prices surveillance provisions of the CCA to monitor 'prices, costs and profits relating to the supply of unleaded petroleum products in the petroleum industry in Australia for three years'. This will provide further information to assist in assessing the weight of any competition concerns in the sector.

The Panel expresses no view as to the effect the Informed Sources pricing information sharing service has on competition. The Panel's views on the CCA's price signalling provisions are set out in Section 20.2.

The New South Wales ethanol mandate should be reviewed, as part of a new round of regulatory reviews against the public interest test set out in Recommendation 8, and repealed, 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 policy can only be achieved by restricting competition.

In relation to the regulation of petrol price display boards, the Panel considers that the case for wider regulation to require only the undiscounted price to be displayed has not been made out. The Panel notes that differences in regulations across jurisdictions create a 'natural experiment' that will provide evidence to assist Ministers in determining whether these regulations have any effect on competition and whether they are in the public interest.

In relation to proposals to introduce a national scheme based on Fuelwatch in Western Australia, the Panel considers that further evidence, both of a problem needing to be addressed and of the benefits and cost of addressing it in this way, would be necessary before any decision to proceed.

16 INFORMED CHOICE

Globalisation, competition and technological innovation have expanded the range of businesses from which Australian consumers can choose to purchase goods and services. Just over 20 years ago Australian consumers did not have a choice of electricity, gas or telecommunications provider; today, because of competition reforms, most can choose among several competing providers. The Panel also recommends that user choice be placed at the heart of human services delivery, and that governments further their efforts to encourage a diversity of providers (Chapter 12).

Although these developments have improved, and will continue to improve, choice for consumers, greater choice can also mean greater complexity. Consumers' ability to navigate growing complexity potentially compromises the improvement in their wellbeing that wider diversity and choice offer.

16.1 THE 'RIGHT' INFORMATION IS VITAL

Greater choice can act as a powerful force to drive innovation in markets for goods and services, but it also means that consumers need to know more about market offerings if they are to secure the best deals.

In human services, such as publicly funded hospital, disability and aged care, because users do not always pay directly for the services they receive, choice is often based on other factors, such as reputation, quality difference and convenience —not price. As such, an important prerequisite for introducing choice in human services markets is ensuring that consumers have access to relevant information about alternative providers to enable them to make informed choices.

The Panel believes that markets work best when consumers are informed and engaged, empowering them to make good purchasing decisions. Empowering consumers requires that they have access to accurate, easily understood information about products and services on offer.

However, just providing information is not enough to guarantee good choices by consumers. It is also important that:

- the 'right' type of information be provided and is accessible;
- consumers can assess the available offers; and
- consumers can (and want to) act on the available information and analysis to purchase the goods and services that offer the best value.[451]

As noted by the UK Office of Fair Trading (now part of the Competition and Markets Authority), 'when any of these three elements of the consumer decision-making process breaks down, consumers' ability to drive effective competition can be harmed'.[452]

On providing the 'right' information, CHOICE provides the following examples:

> Many of us are familiar with the range of factors that we take into consideration when contemplating the purchase of a new car. Although we may give different weight to fuel efficiency, acceleration speed, passenger capacity and boot-space, they are all

451 Office of Fair Trading 2010, *What does Behavioural Economics mean for Competition Policy?*, pages 10-11.

452 Ibid., page 11.

> meaningful, comparable, and comprehensible. However, few of us are equally familiar with, or confident in our judgement of, the factors which we might take into consideration when choosing an educational institution, or a brain surgeon. Data on class sizes in the case of the former, or mortality rates in the case of the latter, certainly constitute information, but information which might lead to very different conclusions depending on other factors, such as the number of auxiliary and support staff, or the relative severity of the surgeon's cases …
>
> The more complex, and less tangible, that the service provided is, the more difficult it is for consumers to evaluate the choices available to them. (sub, page 26)

KPMG notes that information released by governments is not always useful:

> In an effort to demonstrate openness and accountability, governments can often deluge the public with information that is not always particularly useful. This can create information overload or lead to a focus on information that is not crucial. The release of hospital waiting list data is a good example. While data is now becoming increasingly available to the public, it is not presented in a user friendly way and there is no evidence to suggest that consumers are using the data to inform their choice of hospital or doctor. (DR sub, page 13)

A UK report on *Better Choices: Better Deals* also comments:

> The challenge for consumers is often in knowing what is relevant information and what is not; knowing what is accurate and what is not; and what can be trusted and what cannot.[453]

The internet has increased the amount of information available to consumers and created new ways to compare deals. As Google Australia says:

> The Internet empowers consumers by putting essential information at their fingertips, which encourages businesses of all types to be more consumer-centric. Ultimately, this helps consumers make more informed choices, between a greater variety of goods and services, at lower prices. (sub, page 1)

However, too much information can also affect consumers' decisions. For example, consumers can find it difficult to compare differently structured offers.

Review websites can help consumers decide what products and services represent best value; for example, TripAdvisor, Urbanspoon (people provide comments on hotels and restaurants) and eBay's Feedback System (registered buyers and sellers leave feedback about transactions).

Standardised performance measures and comparator websites can also save consumers time and help them make more informed choices about competing deals.[454] As Byrne, de Roos and Beaton-Wells say:

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453 UK Department for Business Innovations & Skills and Cabinet Office Behavioural Insights Team 2011, *Better Choices: Better Deals, Consumers Powering Growth*, page 10.

454 Nielsen Australia 2013 Research found that respondents that used online comparison services said the services had saved them time, money and effort and helped them find a product that better suited their needs compared with shopping around, either online or through traditional offline methods, such as 'bricks and mortar' branches or retail stores. Cited in iSelect Limited 2013, page 29.

> Internet-based price comparison websites, which have become increasingly popular in recent years, represent a technological innovation that reduces search costs. Indeed, websites that present retail price distributions and identify lowest-cost retailers to consumers correspond closely to the *clearinghouses* in theoretical models of consumer search. (DR sub, page 8)

A wide range of comparator websites are available in Australia, including:

- the Australian Energy Regulator's energymadeeasy.gov.au, which allows customers to compare electricity and gas offers in a common format;[455]
- myschool.edu.au, which enables parents and carers to search profiles of Australian schools (see Box 12.6); and
- iSelect.com.au, which compares price and product features of private health insurance and car insurance products, and household utilities and financial products.

A recent Australian Competition and Consumer Commission (ACCC) report found that use of comparator websites in Australia is growing (in most cases), with a range of benefits for consumers. Comparator websites can:

- assist consumers by simplifying complex information and helping them to make informed choices in situations where they would otherwise experience information overload and make no decision (or poor decisions);
- assist consumers to break down complex plans by attempting to standardise retail plans that make it difficult to compare like-for-like;
- place downward pressure on prices and foster product innovation; and
- reduce search costs, thereby potentially making the process of researching and choosing products easier.[456]

The ACCC also found that comparator websites can benefit competition by effectively reducing barriers to entry and making it easier for new entrants to enter the market.

However, it is important that comparator websites serve as accurate decision-making tools and that consumers trust their operation. A number of submissions raise concerns about comparator websites (see Box 16.1).

455 The National Energy Retail Law requires that the Australian Energy Regulator maintain a website price comparator, as well as legislating certain requirements for the provision of information in standard format by retailers to energy consumers.

456 Australian Competition and Consumer Commission 2014, *The comparator website industry in Australia, An Australian Competition and Consumer Commission report*, Canberra, page 2.

Box 16.1: Submitters report that comparing deal offerings can be 'tricky'

CHOICE

> CHOICE's research has shown for the last two years running, rising electricity costs were the number one cost of living concern for Australian households. Despite this high level of anxiety, our 2012 nationally representative survey of electricity consumers found that:[457]
>
> - One third of respondents who recently joined their electricity retailer said they had tried to compare providers but had found it was too hard to work out the best choice;
> - Only about half of those who recently joined their electricity retailer were confident they had made the best choice; and
> - 29 per cent said they didn't bother comparing providers as they are all about the same in terms of what they offer. (sub, page 23)

Australian Dental Association Inc

> PHIs [Private Health Insurers] deliberately pitch advertising and various levels of cover to make it difficult for policy holders to compare the levels of cover on offer. It is not possible to make direct comparison of levels of cover on offer by the 34 PHI funds in Australia. The larger PHI funds engage in massive advertising campaigns using minor aspects of their business such as gym memberships or 'join now claim now' campaigns to make them attractive but give sparse details about the fine print of eligible services or full cost of premiums. Rather the cheap option is used as 'bait advertising' with the aim of having the consumer make direct contact in order to 'up sell' the level of cover.
>
> In an ideal market for dental care, choice of provider would be simple and effective. It would enhance competition. (sub, page 13)

Medibank Private

> Internet aggregators allow consumers to compare participating private health insurance policies across pre-determined criteria, such as price and excess levels. This gives consumers easy access to certain information on competing products, and has reduced barriers to entry by reducing the power of existing brands.
>
> Aggregators now account for almost 20 per cent of all sales, and over 60 per cent of consumers consult aggregators prior to making a purchasing decision. On the one hand this drives greater competition, but on the other hand this largely unregulated segment of the industry presents issues for consumers.
>
> When they convert searches into a sale, aggregators receive commissions of between 30-50 per cent of the annual premium. Because commissions received by aggregators vary across insurers, there is an incentive to promote policies that will generate higher revenue rather than meet the needs of consumers. (sub, page 15)

The ACCC notes that some industry participants can undermine the benefits of comparator websites and mislead consumers. The ACCC's concerns centre on a lack of transparency in respect of the:

- nature or extent of the comparison service, including market coverage;

457 CHOICE 2013, 'Energy retailers' marketing tactics, Sydney.

- savings achieved by using the comparison service;
- comparison services being unbiased, impartial or independent;
- value rankings;
- undisclosed commercial relationships affecting recommendations to consumers; and
- content and quality assurance of product information.[458]

In early 2015, the ACCC plans to release best-practice guidelines to assist comparator website operators and businesses to comply with Australia's competition and consumer protection laws.[459]

Other technological innovations, such as advances in metering technologies, also offer consumers better information about their consumption patterns, which can assist them to compare deals on offer. The ACCC says:

> … advanced metering with communication capability (smart meters) are capable of recording consumption on a near real time basis, and differentiating consumption at different times of the day. This can provide consumers with better information about their consumption and more control over how they manage their use. In so doing, advanced metering can support greater consumer participation and choice in the market. Better consumption information can also help consumers weigh up competing retail price offers. (sub 1, page 21)

16.2 Acting on information

Consumers often stay with current providers, despite better deals being available. The ACCC observes that this leads to sub-optimal outcomes for competition:

> The ACCC's work in the energy, telecommunications and private health insurance sectors has shown the complexity of these products and the difficulties that consumers have in comparing them. As choice can appear too difficult, consumers remain with their current provider leading to sub-optimal results for competition and Australian economic welfare. (DR sub, page 27)

Even when consumers can identify the best deal for them, there can be real or perceived costs of changing providers. Switching costs include contract termination fees and the need to adjust to a new product, such as a new mobile phone. In some markets, users can also find it difficult to move between providers. For example, an aged care resident (or his or her family) may need to be extremely dissatisfied with care provided by an aged care provider to consider moving to another care facility.

Insights from psychology and behavioural economics suggest that consumers can have behavioural traits that prevent them from making good use of even well-presented information (see Box 16.2).[460] For example, the way a choice is presented (or 'framed') can affect consumers' ability to make an

458 Australian Competition and Consumer Commission 2014, *The comparator website industry in Australia, An Australian Competition and Consumer Commission report*, Canberra, page 2.

459 Australian Competition and Consumer Commission 2014, Comparing apples with apples — ACCC report on the comparator website industry in Australia, Canberra, 28 November.

460 See also: Lunn, P 2014, *Regulatory Policy and Behavioural Economics,* OECD Publishing; and Productivity Commission 2007, *Behavioural Economics and Public Policy, Roundtable Proceedings*, Canberra.

optimal choice.[461] Consumers have also been shown to exhibit 'present bias' (preferring to maintain the status quo) and to have a tendency to focus excessively on short-term benefits and costs, with such traits often leading to poor choices and dulled competition.[462]

Other reasons why consumers may not choose to act on a better deal include:

- a lack of motivation — consumers are more likely to change providers where the consequence of not changing will have a significant impact on their lives;
- a lack of capabilities; and
- geographic or supply side constraints.[463]

The community and policymakers can harness these behavioural traits to strengthen competition and improve outcomes for consumers. However, some businesses could also take advantage of these traits in ways that may not be in the best interests of consumers, including using consumer confusion or inertia to increase sales.[464]

Where customers are prevented from choosing their preferred product because the right information is difficult to obtain or process, Fatas and Lyons argue that firms should be required to highlight such information up-front in a clear and transparent manner. Also:

> The aim is to help consumers act more closely in line with the rational ideal that makes a competitive market attractive — consumers get the product they want and at a price that reflects cost. Remedies that require clearer provision of information to final consumers may increase costs a little, but they are unlikely to have additional consequences that are harmful.[465]

Education strategies can help to build consumer confidence about using products and providers that are new to a market and about switching arrangements. Insights about behavioural biases can be useful when designing and applying competition policy and law (see Box 16.2). The UK Office of Fair Trading noted:

> Behavioural economics … shows us the importance of making use of 'smarter information' — thinking carefully about its framing, the context in which information is read, and the ability of consumers to understand it.[466]

461 UK Financial Conduct Authority 2013, *Applying behavioural economics at the Financial Conduct Authority*, Occasional Paper No 1, page 6.

462 Office of Fair Trading 2010, *What does Behavioural Economics mean for Competition Policy?*

463 Office of Fair Trading 2010, *Choice and Competition in Public Services, A guide for policy makers*, page 10.

464 Gans, J 2005, Real Consumers and Telco Choice: *The Road to Confusopoly*, Australian Telecommunications Summit, Sydney.

465 Fatas E and Lyons B 2013, 'Consumer Behaviour and Market Competition', *Behavioural Economics in Competition and Consumer Policy*, Economic & Social Research Council Centre for Competition Policy, University of East Anglia, page 35. Fatas and Lyon note that while policy that takes into account behavioural insights has a role to play in obtaining better market outcomes, it needs very careful design because some interventions can do more harm than good, page 29.

466 Office of Fair Trading 2010, *What does Behavioural Economics mean for Competition Policy?*, page 37.

Box 16.2: Behavioural Economics

Behavioural economics, a relatively new field of economics, draws on psychology and the behavioural sciences to gain insights into how individuals make economic decisions in practice. More specifically, behavioural economics assesses how preferences and choices are affected by cognitive, social and emotional factors.[467]

Behavioural economists use observations of consumer behaviour, as well as repeated experiments in controlled environments, to assess how people behave in certain situations and induce principles of economic behaviour. As Lunn said:

> This *inductive* approach contrasts with the traditional *deductive* approach to economics, which deduces theories based on assumptions about what constitutes rational behaviour.[468]

Insights from behavioural economics suggest that consumers' choices can depend on context or situation (including the way information is displayed or 'framed'). In addition, consumers can: exhibit present or status quo bias; focus excessively on short-term benefits and costs; be concerned about outcomes for others as well as themselves (i.e., they can be concerned about fairness, trust and reciprocation); and rely on 'rules of thumb' when making choices.

For example, people tend to stick with the 'default option' even when it is not their best option.

Evidence also suggests that people's decision making is adversely affected when they face multiple or complex choices. They can fail to select the best option when more than a few options are available and can be unwilling to make a choice at all when faced with a more complex decision.[469]

An important component of behaviourally informed policies centres on simplifying how information is presented to limit the number or complexity of options available within a choice-set.[470]

Governments and regulators around the world are making increasing use of behavioural economics, most notably in the UK and the US.[471] The UK Government, for example, has a Behavioural Insights Team that acts like an internal consultancy for UK policy makers.[472]

The New South Wales Government has set up a Behavioural Insights Unit, following the success of the UK Behavioural Insights Team. The Unit is examining factors that influence patients' decisions about whether to be admitted to hospital as a public or a private patient.[473]

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467 Department of Finance and Deregulation, Influencing Consumer Behaviour: Improving Regulatory Design, page 15.

468 Lunn, P, 2014, *Regulatory Policy and Behavioural Economics*, OECD Publishing, page 9.

469 Ibid., page 40.

470 Ibid., page 39.

471 OECD, *Behavioural economics*, OECD viewed 4 February 2015, www.oecd.org/gov/regulatory-policy/behavioural-economics.htm.

472 Behavioural Insights Ltd 2014, *The Behavioural Insights Team*, NSW Government viewed 4 February 2015, www.behaviouralinsights.co.uk/about-us.

473 NSW Government 2014, *Understanding People, Better Outcomes, Behavioural Insights in NSW*, Sydney, pages 6-7.

The World Bank, in a report titled *World Development Report 2015: Mind, Society, and Behaviour*, also recently said:

> Since every choice set is presented in one way or another, making the crucial aspects of the choice salient and making it cognitively less costly to arrive at the right decision (such as choosing the lowest-cost loan product, following a medical regimen, or investing for retirement) can help people make better decisions.[474]

The Panel considers that governments, both in their own dealings with consumers and in any regulation of the information that businesses must provide to consumers, should draw on lessons from behavioural research to present information and choices in ways that allow consumers to access, assess and act on it.

Less confident and vulnerable consumers

Not everyone is a confident, engaged and capable consumer. Some Australians do not have access to the internet. Personal attributes and circumstances can affect consumer vulnerability, for example, intellectual disability or living in a remote location. As the Joint Councils of Social Service Network put it:

> … the work of the COSS [Councils of Social Service] network across Australia shows that people value choice if they have appropriate information about what services are available *and* power in deciding how a service is delivered and resources used. …However, some people experiencing poverty and inequality are placed at a significant disadvantage in exercising choice in market-based mechanisms. Factors influencing this disadvantage include mental or chronic illness, unemployment, insecure housing or homelessness, and income inadequacy or insecurity. (DR sub, page 9)

The Productivity Commission (PC) suggests that greater product complexity and demographic changes may be increasing the pool of vulnerable consumers:

> As a result of better education and access to the Internet, many consumers are now more confident and informed. But greater product complexity, and demographic changes — such as population ageing — may have simultaneously increased the pool of vulnerable consumers. So too may have the increasing market participation of young people.[475]

The Joint Research Centre of the European Commission, looking at the socio-economic aspects of consumer empowerment, found in general terms that:

- males are more empowered than females;
- younger people are more empowered than older people;
- retired and unemployed people are less empowered;
- people with lower levels of education are less empowered; and
- internet use is associated with empowerment.[476]

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474 World Bank Group 2015, *World Development Report 2015: Mind, Society and Behaviour*, Washington, DC, World Bank, page 38.

475 Productivity Commission 2008, Review of Australia's Consumer Policy Framework, Volume 1 — Summary, Canberra, page 6.

476 Nardo, M, Loi, M, Rosati, R and Manca, A 2011, *The Consumer Empowerment Index: measure of skills, awareness and engagement of European consumers*, European Commission, Luxembourg, pages 12-13.

But it is not only personal characteristics that can affect consumer vulnerability. An important factor influencing whether someone is able to make an informed choice is the characteristics of the market, product or transaction. Asymmetric information is an important feature of markets for human services, such as complex medical procedures and legal services. Decisions about human services may also need to be made quickly. As the PC notes:

> … choosing a health care service provider to treat an acute medical condition is often made quickly in a stressful situation, and consumers may be unable to make choices that are in their best interests. (sub, page 6)

Intermediaries can play an important role in assisting to address information gaps by providing expert advice and helping users navigate complex systems, such as the health, aged care and civil justice systems. Intermediaries are particularly important when users are making one-off decisions (where they have not gained experience through repeated transactions) and where there are potentially significant consequences from making a wrong decision (for example, a decision about selecting a specialist to undertake a medical procedure).[477]

However, the incentives of intermediaries must be aligned with those of the user (see Section 12.3).

16.3 Calls for access to more information

Businesses are collecting more and more data, notably through transaction records and customer loyalty cards, to better understand their customers. A number of submitters argue that allowing consumers access to their usage data would empower consumers and facilitate competition. The ACCC says:

> … initiatives to allow consumers to effectively use their information, such as that underway in the UK and USA, have the potential to assist consumers to make better choices and drive competition. (DR sub, page 27)

Similarly, CHOICE argues:

> Providing consumers with relevant, accessible information about the products they consume and the way in which they do so would improve both the individual consumer experience and the overall competitiveness of the marketplace. Coupling the release of this information with the development of user-friendly comparator tools would reduce consumer confusion and simplify the ways in which individuals engage with the market. (DR sub, page 42)

The UK's midata initiative aims to provide consumers with access to data that businesses collect about their transactions and consumption. Midata is a voluntary program between the UK Government, businesses, consumer groups, regulators and trade bodies. The UK Government points to two main benefits from midata:

> **Helping consumers make better choices**: with access to their transaction data in an easy to use format, consumers will be able to make better informed decisions, often with the help of a third party. Being able to base decisions on their previous behaviour will mean individuals can choose products and services which better reflect their needs and offer them the best value. This in turn will reward firms offering the best value products in

477 Office of Fair Trading 2010, *Choice and Competition in Public Services, A guide for policy makers*, page 39.

> particular markets, allowing them to win more customers and profits and resources. This will drive competition in the economy.
>
> **As a platform for innovation**: midata will lead to the creation of new businesses which will help people to interact with their consumption data in many innovative ways.[478]

The applications of midata are described as 'potentially limitless':

> They might enable you to identify which of the 12 million mobile phone contracts is the best for you (based on your past 12 months usage); to understand what the average fat content of the food you purchase from supermarkets is; or to find out whether there might be better ways of saving your money or using your credit and debit cards.[479]

CHOICE argues that implementing a scheme in Australia based on midata would benefit competition by:

> (a) Supporting robust demand-side competition by enabling consumers to make better informed decisions based on their personal preferences, consumption habits and needs; and
>
> (b) Encouraging innovation and the development of a broader range of more useful products for consumers, as third parties analyse available open data and identify possibilities for new products and services. (DR sub, page 42)

The US Government has also established a 'Smart Disclosure' agenda to drive the release of public and private sector data to help consumers make better choices about services in energy, healthcare and finance.[480] Specific initiatives include:

- Green Button — an energy-specific program that gives customers access to their electricity data in a portable and shareable format;[481]
- Blue Button — that gives patients access to their health data, which consumers can use to compile their personal medical history, switch health insurance companies and set health goals;[482]
- a MyStudentData Download Button — that gives students access to their financial aid data.[483]

Australian consumers already have the right, under the *Privacy Act 1988*, to request access to their personal data held by businesses. But, as the ACCC notes:

> … the Privacy Act does not specify how the information is to be provided to consumers other than that it must be in a manner requested by the individual if it is reasonable and practicable to do. (DR sub, page 28)

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478 UK Department for Business Innovation & Skills 2012, *Government Response to 2012 consultation*, London, page 9.

479 UK Department for Business Innovation & Skills 2011, *Better Choices: Better Deals, Consumers Powering Growth*, London, page 6.

480 US Government, Smart Disclosure Policy, Data.Gov, viewed 8 February, www.data.gov/consumer/smart-disclosure-policy.

481 US Department of Energy, Green Button, Energy.Gov, viewed 8 February, http://energy.gov/data/green-button.

482 US Government, Health and Human Service, 2013, About Blue Button, HealthIT.gov, viewed 8 February, www.healthit.gov/patients-families/blue-button/about-blue-button.

483 Federal Student Aid, MyStudentData Download, Federal Student Aid, viewed 8 February 2015, https://studentaid.ed.gov/resources/mystudentdata-download.

Also, based on the UK experience:

> … further developments would need to take place in Australia for consumers to have access to their information in an electronic, portable and secure format, which might in turn support the market conditions for the creation of innovative technologies to aid consumers to easily compare prices and analyse their purchasing behaviours. (ACCC DR sub, page 28)

CHOICE recommends that governments should work with industry, consumer groups and privacy and security experts to develop a consumer data scheme similar to that in the UK. CHOICE also notes that the US 'smart disclosure' policy memorandum provides guidelines to ensure that data are released in a format that aids the ability of consumers to make informed decisions.

The characteristics of smart disclosure include:

- accessibility;
- machine readability;
- standardisation;
- timeliness;
- interoperability; and
- privacy protection (DR sub, pages 7 and 43).

Ensuring privacy and confidentiality and creating suitable and innovative platforms for sharing data will be key to making progress in this area.

The ACCC argues that the UK's approach to engaging with businesses on a voluntary basis is 'conducive to establishing the necessary market conditions for the creation of innovative technologies to help consumers analyse their data' (DR sub, page 28).

Following public consultation on the midata program, the UK Government announced that it would use the law, if necessary, to compel businesses to release consumers' electronic personal data if they did not do it voluntarily.[484] The power to do this was approved through the *Enterprise and Regulatory Reform Act 2013*.

However, following a review of the midata voluntary program, the UK Government concluded that, for now at least, there is not a strong case for using legislative power to compel companies to release personal data.[485]

The Panel considers that not only businesses but also consumers should be able to benefit from information collected on individuals. Information that provides consumers with insights into their own consumption has the potential to lead to changes in behaviour with implications for competition and innovation. However, for information to be of value to consumers, it should be accessible in a useable format.

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484 UK Government, Department for Business Innovation & Skills, midata: Government response to 2012 consultation, London, pages 14 and 16.

485 UK Government 2015, Providing better information and protection for consumer, UK Government, viewed 30 January 2015 www.gov.uk/government/policies/providing-better-information-and-protection-for-consumers/supporting-pages/personal-data.

Rather than developing websites themselves, another option is for governments to make available data for private businesses to develop into consumer information systems. For example, a number of apps were developed following Transport for NSW's 'Train App Hot House' competition[486] to encourage developers to produce the best real-time app products.

The competition was launched in response to customer feedback showing that customers were looking for real-time information while travelling on public transport. Six app developers were selected to have access to real-time train and bus data. The new apps — Arrivo Sydney, TransitTimes+, TripGo, Triptastic and TripView — provide real-time information for trains and buses, and enable customers to view:

- the location of the train and bus in real time;
- train service updates such as cancellations and delays;
- lift and elevator status for selected train stations;
- bus stops and routes nearby using GPS; and
- estimated bus arrival times.[487]

The Panel's view

Markets work best when consumers are engaged, empowering them to make informed decisions.

The Panel sees scope for Australian consumers to improve their access to data to better inform their decisions.

Implementation

The Panel considers that the Australian Government and state and territory governments, together with businesses, consumers groups and privacy experts, should establish an agenda for developing a partnership agreement that facilitates new markets for personal information services and allows individuals to access their own data for their own purposes.

The proposed Australian Council for Competition Policy (see Recommendation 43) should set up a working group to develop a partnership agreement and innovative platforms for data sharing. The working group should draw on experiences and lessons learnt from initiatives currently being developed in the UK and the US to enable consumers to use their information.

486 Berejiklian, G (NSW Minister for Transport) 2013, *All Aboard for Real Time Train Apps*, media release, Sydney, 1 February 2013.

487 NSW Government 5 December 2013, *Real time train apps now available*, Transport for NSW, viewed 8 February 2015, www.transport.nsw.gov.au/news/real-time-train-apps-available.

Recommendation 21 — Informed choice

Governments should work with industry, consumer groups and privacy experts to allow consumers to access information in an efficient format to improve informed consumer choice.

The proposed Australian Council for Competition Policy (see Recommendation 43) should establish a working group to develop a partnership agreement that both allows people to access and use their own data for their own purposes and enables new markets for personal information services. This partnership should draw on the lessons learned from similar initiatives in the US and UK.

Further, governments, both in their own dealings with consumers and in any regulation of the information that businesses must provide to consumers, should draw on lessons from behavioural economics to present information and choices in ways that allow consumers to access, assess and act on them.

PART 4 — COMPETITION LAWS

17 INTRODUCTION TO COMPETITION LAW ISSUES

In this Part, we examine Australia's competition laws, which are contained in Part IV of the *Competition and Consumer Act 2010* (CCA), to assess whether they remain fit for purpose in light of consumer and business experience with the laws and developments in the Australian economy and abroad.

Part 1 of this Report sets out a number of principles that guide the Panel's review of Australia's competition laws. An important principle is that competition policy should foster choice and increased responsiveness to consumers. This is reflected in the objective of the CCA, 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.[488]

The CCA (and competition policy more generally) is not designed to support a particular number of participants in a market or to protect individual competitors; instead, it is designed to prevent competitors' behaviour from damaging the competitive process to the detriment of consumers.

The robust competitive process supported by Part IV of the CCA may inevitably lead to some market participants being damaged or leaving the market completely. Those adversely affected by competition may feel aggrieved by this damage, but the CCA is neither intended nor designed to protect individual competitors or classes of competitors from such outcomes.

Another guiding principle is that the law should be simple, predictable and reliable. Those objectives can be met if:

- the law prohibits specific categories of anti-competitive conduct, with economy-wide application;
- conduct is only prohibited per se[489] if it is anti-competitive in most circumstances— other conduct is only prohibited where it can be shown that it has the purpose, effect or likely effect, of substantially lessening competition;
- contraventions of the law are adjudicated by a court, with proceedings able to be initiated by a public regulatory authority or through private suit; and
- there is facility for business to seek exemption from the law in individual cases on public benefit grounds.

Furthermore, the law must balance two principles:

- that its scope not over-reach (by prohibiting pro-competitive conduct) or under-reach (by failing to prohibit anti-competitive conduct); and
- that the language of the law be clear to market participants and enforceable by regulators and the courts.

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488 *Competition and Consumer Act 2010*, section 2.

489 That is, regardless of the purpose or effect of the conduct.

Competition laws that under-reach or over-reach will fail to secure the welfare of Australians, especially consumers. Laws that are unclear create business and regulatory uncertainty, which imposes costs on the economy.

Our laws should also keep pace with international best practice. International best practice provides an important point of comparison to assess whether the scope of our laws is correct and whether the language and approach used are as simple as possible. Appendix B provides an overview comparison of the main areas of the law examined in this Report.

Another guiding principle is that policies and systems be adaptable to changing economic circumstances. The more complex and specific the provisions of a law, the less it is able to adapt readily to change.

17.1 SIMPLIFICATION

Broadly speaking, submissions to the Review support Australia's current legislative framework.[490] Some submissions identify improvements that could simplify drafting, improve clarity for users and better adhere to key economic underpinnings. However, submissions also note difficulties in simplifying the law, including where simpler drafting may lead to increased uncertainty (for example, ACCC, DR sub, page 29).

Some of the complexity in the law has arisen from amendments and additions made in response to calls for more 'effective' regulation (for example, following judicial interpretation of the words of section 46 of the CCA) or where there has been a perceived shortfall or over-reach resulting from a court judgment. The certainty provided by specific drafting must be balanced against the complexity that arises from attempts to address all possible contingencies.

The current law also duplicates provisions unnecessarily. For example, separate prohibitions have been enacted to address contracts that substantially lessen competition (section 45) and covenants that substantially lessen competition (sections 45B and 45C); exclusive dealing provisions contained in leases and licences of land are addressed separately from exclusive dealing provisions in agreements for the acquisition or supply of all other goods or services (section 47). Such unnecessary duplication could be reduced by inserting a definition to the effect that, for the purposes of the CCA, a contract includes a covenant and a lease or licence of land or buildings.

The Panel considers that the current competition law provisions of the CCA, including the provisions regulating the granting of exemptions, are unnecessarily complex. Australia's competition laws would benefit from simplification while retaining their underlying policy intent.

17.2 SPECIFIC REFORMS

Specific instances where the law could be improved are explored in the remainder of this Part. The Panel has been guided by the Review's Terms of Reference and issues brought to our attention in submissions and consultations.

The discussion is organised according to the separate topics indicated in the diagram below.

490 See, for example: Australian Motor Industry Federation, DR sub, page 8; Australian National Retailers Association, DR sub, page 11; Australian Newsagents' Federation, DR sub, page 8; Baker & McKenzie, DR sub, page 1; BHP Billiton, DR sub, page 4; Business Council of Australia, DR sub, page 11; Retail Guild of Australia, DR sub, page 5; and South Australian Government, DR sub, page 18.

Under each topic, the Panel discusses and recommends legislative reform to improve the effectiveness of Australia's competition laws.

17.3 Model legislative provisions

Appendix A to this Report contains model legislative provisions reflecting many of the CCA reforms recommended by the Panel.

The purpose of preparing the model legislative provisions is to communicate the Panel's proposals with greater clarity and precision. The Panel hopes that the model provisions will assist governments in considering each proposal. The model provisions also reflect the Panel's views on simplifying Part IV.

It was not practical to prepare model provisions in respect of every recommendation made by the Panel. Where model provisions illustrate particular recommendations, this is indicated in the body of the Report.

The Panel's view

Competition laws that are fit for purpose support an adaptable economy by protecting the competitive process, so that a diversity of producers can respond to the changing needs and preferences of consumers.

The concepts, prohibitions and structure of the CCA are sound. However, some provisions are unnecessarily complex, contributing to business and regulatory uncertainty and imposing costs on business and the economy. Such provisions can also inhibit the adaptability of the CCA to changing circumstances.

The Panel considers that the competition laws could be simplified while maintaining their current policy intent. Business and consumers would benefit from simplification of the law. The Panel recommends that this task be undertaken in conjunction with the recommended reforms set out below.

The Panel specifically recommends removing unnecessary or now redundant competition law provisions including:

- subsection 45(1) concerning contracts made before 1977; and
- sections 45B and 45C concerning covenants.

17.4 IMPLEMENTATION

Implementing the Panel's proposed legislative reform of the CCA will require amending legislation to be prepared by the Australian Government. The Panel considers that preparing this amending legislation would benefit from the assistance of an expert legal panel comprising representatives from the Treasury, the Australian Competition and Consumer Commission (ACCC) and private sector legal experts. Simplifying Part IV could be carried out concurrently with work done to progress agreed reforms in specific areas.

Enactment of amending legislation is also subject to the requirements of the intergovernmental Conduct Code Agreement 1995, which obliges the Australian Government to consult with, and seek the approval of, the States and Territories on proposed changes to Part IV of the CCA.[491] Importantly, this agreement provides for the seamless coverage of the competition law provisions across all jurisdictions and its application to bodies beyond the constitutional reach of the Australian Government.

Section 29.3 sets out proposed timing for implementing the changes to the CCA. Exposure draft legislation should be prepared within 12 months of accepting the recommendations in consultation with States and Territories. Finalised amendments should be put to the States and Territories for their approval within two years.

Recommendation 22 — Competition law concepts

The central concepts, prohibitions and structure enshrined in the current competition law should be retained, since they are appropriate to serve the current and projected needs of the Australian economy.

491 *Conduct Code Agreement 1995*, clauses 6 and 7.

Recommendation 23 — Competition law simplification

The competition law provisions of the CCA should be simplified, including by removing overly specified provisions and redundant provisions.

The process of simplifying the CCA should involve public consultation.

Provisions that should be removed include:

- subsection 45(1) concerning contracts made before 1977; and
- sections 45B and 45C concerning covenants.

18 MERGERS

Section 50 of the *Competition and Consumer Act 2010* (CCA) prohibits mergers that would, or would be likely to, substantially lessen competition in any market. The Australian Competition and Consumer Commission (ACCC) is empowered to bring proceedings in court to prevent, or break apart, a merger that contravenes the law, or to seek a penalty. Third parties may also bring proceedings in court to break apart a merger that contravenes the law, or to seek damages.

Anti-competitive mergers can cause harm to efficiency and consumers and can bring about adverse long-term changes to markets. However, most mergers do not unduly harm competition; indeed, mergers can deliver substantial economic benefits to business and consumers, including through creating economies of scale and transferring assets to more efficient managers.

Australia's merger laws make provision for a merger to be authorised (that is, exempted from the merger prohibition) if it is likely to result in public benefits that outweigh the likely harm to competition.

Parties seeking approval before they merge to avoid the risk of court action[492] have three separate processes available to them, as set out in the diagram below. Merger parties can choose any of the three processes, taking into account whatever factors they think relevant, such as the legal test, decision-maker, onus of proof, timing, level of transparency and certainty, and legal costs.

Parties need only obtain one clearance or authorisation from one process to proceed with a transaction, and it is open to them to pursue more than one. For example, in early 2014, AGL sought informal clearance from the ACCC for its proposed acquisition of Macquarie Generation. When this was not granted, AGL applied successfully to the Australian Competition Tribunal (the Tribunal) for merger authorisation.

Currently, it is not compulsory to notify or seek approval before proceeding with a merger. Some submissions argue that mandatory pre-notification of mergers should be required for firms with a substantial degree of market power (for example, Retail Guild, DR sub, page 10). However, despite the lack of a legal obligation to do so, firms proposing to engage in mergers that may affect competition generally choose one or more of the available processes.

Although this involves some time and expense, it can avoid the risk that the ACCC or a third party may ask a court to unwind a completed transaction (through a court-ordered divestiture) and/or impose penalties if it is found to breach the CCA.[493] The Panel considers that these sanctions provide sufficient incentive for parties to notify the ACCC of mergers without the need for mandatory notification.

492 Informal clearance from the ACCC, unlike formal clearance or merger authorisation, does not provide legal protection against third-party legal action, only an indication from the ACCC that it will not take action.

493 As noted above, informal clearance from the ACCC does not provide legal protection against third party legal action.

Merger clearance and authorisation processes

Process	Informal merger clearance	Formal merger clearance	Merger authorisation
Decision maker	ACCC	ACCC	Tribunal
Test	Substantial lessening of competition	Substantial lessening of competition	Public benefit
Clearance	Parties may seek confidential or public clearance	Public only	Public only
Process and information gathering	No set information requirements or forms. Submissions not published. May be a public Statement of Issues. May be a Public Competition Assessment.*	Set information requirements Statutory forms All non-confidential submissions public	Set information requirements Statutory forms All non-confidential submissions public
Timing	Indicative timeline only	Statutory timeline of 40 business days With possible 20 business day extension	Statutory timeline of three months with possible three month extension
Nature of decision	Indicative view but no formal decision. If the ACCC opposes a merger but the parties wish to proceed, the parties may seek a declaration from the Federal Court. The ACCC may seek an injunction from the Federal Court to block the merger.	Formal decision by the ACCC	Formal decision by the Tribunal
Appeal body	Injunction or declaration may be appealed to the Full Federal Court	Merits review by the Tribunal	Administrative review by the Federal Court
Other features	No immunity from third party action. The ACCC can accept undertakings to address competition concerns	Immunity from third party action. The ACCC can accept undertakings to address competition concerns	Immunity from third party action. The Tribunal can impose conditions on the transaction
Fees	No fees	$25,000 fee	$25,000 fee

* Public documents such as Statements of Issues and Public Competition Assessments do not contain confidential information.

Past reviews of Australia's competition laws have generated debate about the appropriate legal test for mergers. In 1992, the law was altered from a 'dominance test' to a 'substantial lessening of competition' test.[494] Submissions offer near-universal support for the substantial lessening of competition test.

Submissions to the Issues Paper raise the following matters with respect to the merger law:

- the market definition applied in the assessment of mergers, particularly when merging firms compete in global markets;
- creeping acquisitions;
- whether merger review under the CCA should be aligned with other approval processes, such as those associated with the Foreign Investment Review Board; and
- the timeliness and transparency of merger approval processes.

Submissions to the Draft Report raise further concerns with the way the current test is applied (including whether too few mergers are being opposed by the ACCC) and the rights of third parties to be heard when they are affected by mergers. Submissions also respond to the Draft Recommendations regarding changes to the definition of 'competition', consultation by the ACCC on ways to improve its informal merger review process and changes to the formal merger clearance and authorisation processes.

18.1 Market definition and global competition

The Panel received submissions from a number of parties, including the Business Council of Australia (BCA) (sub, Summary Report, page 16), Australian Dairy Farmers (sub, page 4), Foxtel (sub, page 3), Woolworths (sub, page 14) and Wesfarmers (sub, page 9), on how a 'market' is defined in the CCA and/or by the ACCC, and whether market definition and merger review more broadly take full account of globalisation and competition (including the threat of competition) from overseas firms.

For example, the BCA emphasises the need for a 'commercially realistic' market definition, expressing concern that 'The administrative approach to market definition can be at times unduly narrow' (sub, Summary Report, page 16).

Some submissions argue that the Draft Report focuses on the concerns of parties who consider that too many mergers are blocked, either due to excessively narrow market definition or incorrect application of the law by the ACCC, when the greater problem is that the ACCC opposes too few mergers.[495]

The concept of a market is central to the application of competition law, including the merger law. It is an economic concept that focuses attention on the relevant sources of competition that constrain the parties to a merger.

The meaning of the term 'market' under Australian law has been very stable. It was explained in 1976 by the former Trade Practices Tribunal (now the Australian Competition Tribunal) in the context of a merger authorisation in the following terms:

494 *Trade Practices Legislation Amendment Act 1992*.

495 See, for example: Australian Motor Industry Federation, DR sub, page 12; Retail Guild of Australia, DR sub, page 31; and AURL FoodWorks, DR sub, page 14.

> A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them … Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.[496]

This explanation has stood the test of time and has been approved by the High Court. In *Queensland Wire*,[497] Mason CJ, Wilson J[498] and Toohey J[499] agreed with the above passage. Deane J used the same language and said '"market" should, in the context of the Act, be understood in the sense of an area of potential close competition in particular goods and/or services and their substitutes'.[500] To the same effect, Dawson J stated, 'A market is an area in which the exchange of goods or services between buyer and seller is negotiated'.[501]

Similarly, in *Boral*,[502] McHugh J said:

> ... a market describes the transactions between sellers and buyers in respect of particular products that buyers see as close or reasonable substitutes for each other given the respective prices and conditions of sale of those products.[503]

Assessing the likely effect of a merger on competition, including identifying markets that are relevant to such an assessment, involves judgment. Differences of opinion can and do emerge. Very few mergers are opposed by the ACCC. For example, the ACCC publicly opposed six out of 277 mergers reviewed on a non-confidential basis in 2012-13, or around two per cent.[504] This suggests that the concerns raised with the Panel emanate from a small number of high profile, contentious cases.

It is not the Panel's role to adjudicate whether the ACCC has been right or wrong in its interpretation of the law in individual cases. When the ACCC and merger parties differ about whether a merger breaches the CCA, it is the place of the Tribunal or the courts to decide the outcome. The Panel is directed to assess whether the legal framework within which mergers are assessed is appropriate.

Submissions raise the specific question of whether Australia's merger laws give proper consideration to global markets within which many Australian businesses compete. Concerns have been expressed that the term 'market' in the CCA is defined as a market 'in Australia' and that this causes the competition analysis to be focussed too narrowly. Similar concerns about market definition and

496 *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited (QCMA)* (1976) 8 ALR 481 at 518.

497 *Queensland Wire v BHP* (1989) 167 CLR 177.

498 Ibid., at 188.

499 Ibid., at 210.

500 Ibid., at 195.

501 Ibid., at 199.

502 *Boral Besser Masonry v ACCC* (2003) 215 CLR 374.

503 Ibid., at 248.

504 Australian Competition and Consumer Commission and the Australian Energy Regulator 2013, *Annual Report 2012-13*, Canberra, page 41.

global competition have arisen overseas[505] and also arose in submissions to the Dawson Review, which did not recommend changing the way markets are defined.[506]

The Panel considers that it is necessary and appropriate for the term 'market' to be defined as a market in Australia. This is because the CCA is concerned with the economic welfare of Australians, not citizens of other countries. The law is intended to protect competition in Australian markets for the benefit of Australian consumers. If this aspect of the CCA were to be changed, and competition were to be assessed by reference to global markets, Australian competition law would be at risk of failing in its central objective.

However, this should not mean the CCA ignore forces of competition that arise outside Australia but which bear upon Australian markets. The objective of the CCA is to protect and promote competition in Australian markets, but frequently the sources of competition in Australian markets are global in origin, especially as increasing numbers of Australian consumers purchase goods and services online from overseas suppliers.

The CCA has been framed to take account of all sources of competition that affect markets in Australia. The term 'competition' in section 4 of the CCA is defined to include competition from imported goods and services.

The geographic boundaries of many markets extend beyond Australia. In those circumstances, a corporation that competes for the supply of goods or services in Australia does so in the broader geographic market. Any assessment of competition under the CCA must take account of those market realities. This has been recognised in decisions of the courts and the Tribunal.

In *Re Fortescue Metals Group*, the Tribunal concluded that the relevant concept of a market for the purposes of the competition law:

> ... consists of groups of buyers and groups of sellers in a geographic region who seek each other out as a source of supply of, or as customers for, products. The interaction of the buyers and sellers determines the price for the products.[507]

The Tribunal described the process of defining the relevant market as 'the identification of the participating firms, a description of the products exchanged and the borders within which the exchange occurs'.[508]

Although the CCA is concerned with the wellbeing of Australian consumers, it takes account of all sellers that compete to supply products in Australia, wherever they may be located.

This is also acknowledged by the ACCC, which states:

> The CCA … recognises that Australia operates in a global economy and provides a framework for such matters to be taken into account. For example when assessing the likely competitive effect of a proposed merger, the potential for competitive constraint to be provided by suppliers located outside Australia is taken into account by considering import competition. (sub 1, page 126)

505 See, for example: Jenny, F 2000, *Competition Policy Analysis,* edited by Hope, E, Routledge, London, page 31.

506 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act* (the Dawson Review), Canprint Communications, Canberra, pages 50 and 59.

507 *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [1011].

508 Ibid., at [1014].

Nevertheless, given the importance of ensuring that global sources of competition are considered where relevant, the Panel recommends strengthening the current definition of 'competition' in the CCA so there can be no doubt that it includes competition from *potential* imports of goods and services and not just *actual* imports.

The Panel does not intend that this change would expand market definitions in competition law to include every product and service that could conceivably be imported into Australia, only to clarify that the credible threat of import competition is a relevant component of a competition analysis.

This proposal is supported by a number of submissions to the Draft Report,[509] including both the SME Committee (DR sub, page 12) and the Competition and Consumer Committee (DR sub, page 8) of the Law Council of Australia. The Australian National Retailers Association also agrees that such a change would permit the CCA to consider all sources of competition that affect markets in Australia (DR sub, page 21).

However, in the ACCC's view, the current definition of 'competition' in the CCA already includes competition from actual and potential imports into Australia. The ACCC does not support changing the definition given the adverse impact this would have on the simplicity of the CCA and potential implications for enforcement (DR sub, pages 33-34).

Although the BCA agrees with the Panel's proposal concerning the definition of 'competition' in the CCA, it submits that 'competitive analysis under the CCA can be characterised by the adoption of unduly narrow and static market definitions and an overreliance on existing market concentration' (DR sub, page 11). The BCA notes that market definition is a tool in competitive analysis but should not determine the limits of competitive activity to be taken into account. The BCA also notes that, in some cases, market definition may not be required at all since competitive effects can be measured directly (DR sub, page 12).

The Panel agrees that the importance of market definition and market concentration should not be overstated. However, the Panel does not consider that legislative guidance to this effect is necessary. The courts are able to use market definition as one of a number of analytical tools to assist them in determining the likely effects of a merger on competition.

Some submissions also question whether the ACCC's application of the CCA is constraining Australian businesses from achieving sufficient economies of scale to become globally competitive. For example:

> Competition Policy [is] frustrating mergers of companies in the global traded goods sector in the name of competition in the domestic market, but in the process denies a producer the extent of the market required for an operation to be internationally competitive … It is recommended priority be given to mergers which favour the formation of a strong group which can compete in international markets rather than having weak fragmented entities. (The Industry Group, sub, page 12)

In order to compete effectively, businesses must continuously pursue economic efficiency. In many industries, efficiency requires scale. Businesses may pursue mergers in order to achieve efficient scale to compete more effectively in global markets.

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509 See, for example: Australian Automobile Aftermarket Association, DR sub, page 3; Australian Chamber of Commerce and Industry, DR sub, page 18; Australian Industry Group, DR sub, pages 19-20; Coles Group, DR sub, pages 7-8; Foxtel, DR sub, page 1; SA Independent Retailers, DR sub, page 3; Spier Consulting Legal, DR sub, page 8; and Woolworth Limited, DR sub, pages 31-32.

In many markets in Australia, mergers aimed at achieving efficient scale will not substantially lessen competition because of the constraining influence of imports. Such mergers are allowed under the CCA.

However, in some markets, the opposite will be the case: the influence of imports may be weak and unable to constrain the resulting market power of the merged businesses. When that occurs, conflicting interests arise: the gain to the businesses that wish to merge through achieving greater efficiency against the potential detriment to Australian consumers on account of the reduction in competition.

From time to time, there are calls for competition policy to be changed to allow the formation of 'national champions' — national firms that are large enough to compete globally. Geoff Ball submits that the Draft Report leaves the impression 'that somehow the formation of 'National Champions' must disadvantage suppliers and consumers in the Australian market' (DR sub, page 1), while the National Farmers' Federation submits that, to take advantage of the numerous export opportunities available to Australian farmers and agribusinesses, scale and capacity are important to improve efficiencies, lower costs and build lasting commercial relationships (DR sub, page 13).

While the Panel agrees that the pursuit of scale efficiencies is a desirable economic objective, it is less clear whether, and in what circumstances, suspending competition laws to allow the creation of national champions is desirable from either an economic or consumer perspective. As the National Farmers' Federation submits, while the legislative approach to mergers should take the benefits of scale into consideration, it should 'equally ensure there is no negative impact on the supply chain from any imbalances in market power' (DR sub, page 13).

Porter[510] and others note that the best preparation for overseas competition is not insulation from domestic competition but exposure to intense domestic competition. Further, the purpose of the competition law is to enhance consumer welfare, including through ensuring that Australian consumers can access competitively priced goods and services. Allowing mergers to create a national champion may benefit the shareholders of the merged businesses but could diminish the welfare of Australian consumers.

Box 18.1 provides a discussion of recent calls to support the creation of national champions in Australian agriculture, with specific reference to New Zealand dairy co-operative, Fonterra.

Box 18.1: Fonterra and calls for national champions in Australian agriculture

The Fonterra co-operative is New Zealand's dominant dairy company. It was formed from the 2001 merger of the two largest co-operatives, New Zealand Dairy Group and Kiwi Co-operative Dairies, together with the New Zealand Dairy Board. Some recent commentary suggests that Australia should seek to emulate the formation of Fonterra and our competition policy and laws should be amended to facilitate this outcome.

The Panel considers that important differences between the circumstances surrounding Fonterra's formation and those applying in Australia mean that this conclusion is not soundly based.

510 Porter, M E 1990, *Competitive Advantage of Nations*, Harvard Business Review, New York, page 86.

Box 18.1: Fonterra and calls for national champions in Australian agriculture *(continued)*

Before Fonterra was formed, the New Zealand dairy market was highly regulated, with the New Zealand Dairy Board having a legislated export monopoly. The merger to create Fonterra was not permitted under New Zealand's competition laws but was instead facilitated through special legislation. The legislation included provisions and obligations on Fonterra designed to provide for domestic competition and prevent harm to consumers and farmers as a result of the merger.

Concerns were raised that the farm-gate price would be depressed due to Fonterra's dominance as a buyer. These were addressed through a combination of regulation and incentives. Ongoing price monitoring, as well as Fonterra's obligations to allow its farmer-shareholders open entry and exit at a 'fair' price, and to supply milk to competing processors, provide competitive pressure and an incentive for competitive pricing. To achieve domestic competition in the sale of milk products, Fonterra had to divest several brands to competitors and is obligated to supply them on competitive terms.

'Sometimes they think in Australia that we've got a monopoly and it works, but we don't and having one doesn't,' New Zealand's Deputy Prime Minister and Minister of Finance, Bill English, has observed.[511]

The Panel considers that issues concerning the creation of national champions can be addressed under the existing CCA authorisation framework. It is appropriate that a competition regulator, whether the ACCC or the Tribunal, adjudicate such issues as they arise from time to time.

The merger authorisation process (as set out in Box 18.2) applies a public benefit test that covers all potential benefits and detriments of a merger, including economies of scale. In this way, the current law recognises there may be occasions where it is in the public interest to allow a particular merger to achieve efficient scale to compete globally, notwithstanding that the merger adversely affects competition in Australia.

511 Binsted, T and Malpass, L 2014, 'Tough cheese: Australia's Dairy Conundrum', *Australian Financial Review*, 2 August, Melbourne.

Box 18.2: Authorisation and the public benefit test

Parties may seek authorisation for an acquisition. This process allows mergers even if they result in a substantial lessening of competition, but only if they meet a public benefit test. Applications have been rare (only two since the Tribunal became the first-instance decision-maker in 2007).

The test applied by the Tribunal in assessing applications is that authorisation must *not* be granted unless it is satisfied that the acquisition is likely to result in such benefit to the public that it should be allowed. The Tribunal *must* consider as benefits:

- a significant increase in the real value of exports;
- a significant substitution of domestic products for imported goods; and
- all other relevant matters that relate to the international competitiveness of any Australian industry.

Other factors may also be considered.[512]

The non-exhaustive list of factors that must be taken into account enables merger parties to argue that their proposed merger will result in public benefit through improving the business's ability to expand exports or compete against imports.

The factors that must be considered under the merger authorisation process have been criticised:

> Placing emphasis on these particular indicators is very likely to lead to sub-optimal outcomes. There is no *a priori* reason why growth in exports or the substitution of domestic production for imported products increases (or decreases) public welfare … Deeming benefit to lie with increased exports or import substitution has the potential to distort production, waste scarce resources, and ultimately reduce community incomes.[513]

The Panel agrees that this list provides a narrow view of public benefit. However, it is a non-exhaustive list, and the Tribunal has interpreted public benefit to have a broad meaning.[514] Given that the Tribunal is already able to take into account whatever factors it deems appropriate, a change in the law may have limited utility.

As noted elsewhere in this Report, the Panel recommends some procedural changes to the merger approval process (see Recommendation 35) and a change to the governance structure of the ACCC to ensure that broader business, consumer and economic perspectives can be brought to the work of the ACCC (see Recommendation 51).

512 *Competition and Consumer Act 2010*, section 95AZH.

513 Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Dairy Product Manufacturing*, Canberra, page 123.

514 *Victorian Newsagency* (1994) ATPR 41–357 at 42, 677.

The Panel's view

The Panel considers that it is necessary and appropriate for the term 'market' to be defined as a market in Australia. This is because the CCA is concerned with the economic welfare of Australians, not citizens of other countries.

Although the objective of the CCA is to protect and promote competition in Australian markets, frequently the sources of competition in Australian markets originate globally. The CCA has been framed to take account of all sources of competition that affect markets in Australia. However, the current definition of 'competition' in the CCA could be strengthened so there can be no doubt that it includes competition from *potential* imports of goods and services and not just *actual* imports.

In many markets in Australia, achieving efficient scale will not substantially lessen competition because of the constraining influence of imports. Such mergers are allowed under the CCA.

If achieving efficient scale through a merger will also substantially lessen competition in Australia, conflicting interests arise: the gain to the businesses that wish to merge to achieve greater efficiency against the potential detriment to Australian consumers due to reduced competition.

The Panel considers that such issues can be addressed under the existing CCA framework. It is appropriate that a competition regulator, whether the ACCC or the Tribunal, adjudicate such issues as they arise from time to time.

As noted elsewhere in this Report, the Panel recommends some procedural changes to the merger approval process and a change to the governance structure of the ACCC to ensure that broader business, consumer and economic perspectives can be brought to the work of the ACCC.

Recommendation 25 — Definition of market and competition

The current definition of 'market' in section 4E of the CCA should be retained but the current definition of 'competition' in section 4 should be amended to ensure that competition in Australian markets includes competition from goods imported or capable of being imported, or from services rendered or capable of being rendered, by persons not resident or not carrying on business in Australia.

This recommendation is reflected in the model legislative provisions in Appendix A.

18.2 Creeping acquisitions

Concerns about 'creeping acquisitions' typically arise where a business with a substantial degree of power in a market acquires many small competitors over time.

The merger provisions of the CCA focus on the effect or likely effect on competition of a particular merger or acquisition. In 2008 and 2009 government discussion papers considered possible changes to deal with 'creeping acquisitions', which the 2008 paper described as:

> ... conduct that comprises the accumulated effect of a number of small individual transactions which, when considered in isolation at the time that each transaction occurred, would not breach section 50. That is, while each transaction considered at the time it occurred may have a limited impact on competition, and would therefore not fall

> within the scope of section 50, over a longer period a series of such transactions may have the cumulative effect of substantially lessening competition in a market.[515]

Prior to the 2008 and 2009 discussion papers, creeping acquisitions had already been the subject of much consideration, including by the Parliamentary Joint Select Committee on the Retailing Sector (Baird Committee) in its 1999 report *Fair Market or Market Failure?*, the Dawson Review, and the Senate Economics References Committee in its 2004 report on *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*.

In 1999, the Baird Committee noted its concerns that section 50 was unlikely to be breached by small but repeated acquisitions of independent grocery retailers.[516] It also noted that there was a 'degree of equivocation' among those giving evidence as to whether legislative amendments were required in relation to creeping acquisitions.[517] However, concerns were raised that, in some instances, the ACCC is unaware that an acquisition has even taken place until after the fact due to the lack of notification requirements.

In 2003, the Dawson Review considered and rejected a range of measures to deal with creeping acquisitions,[518] including:

- market share caps — rejected on the basis that they would inefficiently restrict competition, would be unworkable in the retail sector, and would adversely affect rural consumers in particular;
- a declaration process, whereby industries declared by the government to be highly concentrated would have to notify the ACCC of any intended acquisitions — rejected because it would lead to large market participants establishing new facilities rather than buying existing stores from smaller rivals willing to sell; and
- a proposal to amend subsection 50(3) to include a reference to creeping acquisitions as a relevant concern in assessments of mergers and acquisitions under section 50 — rejected because the ACCC could consider creeping acquisitions under the existing law.

In 2004, the Senate Economics Reference Committee noted that 'as a matter of logic' creeping acquisitions in concentrated markets must over time substantially lessen competition. The Committee was of the view that section 50 was unable to deal with the issue of creeping acquisitions. It recommended that section 50 be revised to enable the ACCC to prevent creeping acquisitions that would lead to a substantial lessening of competition in an Australian market.[519]

Following the 2008 and 2009 discussion papers, in 2011 the CCA was amended so that it now prohibits mergers likely to result in a substantial lessening of competition in 'any' market, instead of applying only to a 'substantial' market. Despite this change, many submitters consider that creeping acquisitions remain a problem.

For example, NRMA (sub, page 3), Retail Guild of Australia (DR sub, page 70), COSBOA (sub, page 3), Friends of Hawker Village (sub, page 1), Metcash (sub, page 3) and AURL FoodWorks (sub, page 17)

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515 The Treasury 2008, *Discussion Paper — Creeping Acquisitions*, Canberra, pages 3-4.

516 Joint Select Committee on the Retailing Sector 1999, *Fair Market or Market Failure?*, Canberra, page 54.

517 Ibid., page 56.

518 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act* (the Dawson Review), Canprint Communications, Canberra, pages 66-68.

519 Senate Economics References Committee 2004, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, Canberra, page 64.

all call for changes to address creeping acquisitions. These calls are mainly in the context of concerns about the size and expansion of Woolworths and Coles in the supermarket and fuel retailing sectors.

Other submissions, including those from Woolworths (sub, page 80), Wesfarmers (sub, page 17) and the Law Council of Australia — Competition and Consumer Committee (sub, page 10) argue that no such change is warranted.

The ACCC's position in its 2008 grocery inquiry was that, although amendments to deal with creeping acquisitions would be desirable, 'such acquisitions do not appear to be a significant current concern in the supermarket retail sector'.[520] Rather, the expansion of Woolworths and Coles had occurred up to that time mainly via organic growth, not acquisition.

As a matter of concept, competition law should assess the overall effect of business conduct and not be narrowly focused on individual transactions. Various areas of competition law assess the anti-competitive effect of a commercial arrangement by reference to the aggregate effect of similar arrangements (specifically, section 45 that prohibits anti-competitive arrangements and section 47 that prohibits anti-competitive exclusive dealing).

A legitimate question therefore arises whether section 50, which addresses anti-competitive mergers, should be applied so that the anti-competitive effect of an individual merger is assessed by reference to the aggregate effect of other mergers undertaken by the same corporation (or group of corporations) within a stated period (for example, the prior three years).

There would be complexities in introducing a concept of 'merger aggregation' into the CCA. Mergers rarely occur at the same time; they occur over time. Therefore, it is necessary to choose an appropriate period of time over which to aggregate the competitive effect of mergers undertaken by the corporation.

The complicating factor is that market conditions may have altered materially over the period chosen, with competition having increased or decreased.

In those circumstances, assessing the aggregate effect on competition of mergers that have occurred over a period becomes a difficult exercise. The longer the period chosen, the more difficult the task becomes. Any such change to the law would affect every corporation that undertook a merger. Assessing each merger would involve considering previous mergers undertaken by the corporation over the stated time period. This would impose additional costs and potentially increase the time required for merger review.

On balance, in the absence of evidence of harmful acquisitions proceeding because of a gap in the law on creeping acquisitions, the Panel does not consider that a sufficiently strong case for change has been made.

520 Australian Competition and Consumer Commission 2008, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, Canberra, page xxi.

18.3 SHOULD MERGER REVIEW UNDER THE CCA BE ALIGNED WITH OTHER APPROVAL PROCESSES?

Some submissions, including one from Australian Dairy Farmers (sub, page 4), raise concerns about co-ordination of the timing of the various merger approval processes that exist under Australian law. Beyond the CCA, various other approval processes may apply to certain mergers and acquisitions, such as foreign investment, media diversity and financial regulator approvals.

Australian Dairy Farmers' particular concern arises from the bidding process for Warrnambool Cheese and Butter Factory Company Holdings Limited in 2013. One bidder, Murray Goulburn Co-operative Co Limited, was a competitor of Warrnambool Cheese and Butter for the acquisition of milk and made its bid conditional upon obtaining ACCC or Tribunal approval. Another bidder, the Canadian firm Saputo Inc., had no activities in Australia and decided not to seek ACCC or Tribunal approval, although it did seek and obtain approval from the Treasurer under the *Foreign Acquisitions and Takeovers Act 1975,* since it is a foreign investor.

The Treasurer provided Saputo with approval on 12 November 2013, while Murray Goulburn did not lodge its application for merger authorisation until 29 November 2013. Saputo's bid was accepted by the majority of Warrnambool Cheese and Butter shareholders before the Tribunal could rule on Murray Goulburn's application, which was then withdrawn.

Australian Dairy Farmers suggests that the Treasurer's decision on Saputo's bid should have been delayed until the merger authorisation process for Murray Goulburn's bid had concluded (DR sub, page 16). Since any given merger may be subject to numerous approval processes, the logical extension of this proposal is that all approvals for all competing bids should be delivered simultaneously.

The Panel does not support this proposal. The various approval processes are not related. Although it is desirable that decision-makers be cognisant of other processes, to require that each decision-maker delay its decision until all approval processes have been completed for all bidders would impose an unwarranted burden on bidders and sellers. Bidders and sellers are aware of the various approvals that may be required under various Australian laws and have some understanding of the time that could be taken. Sellers have incentives to maximise competition among potential bidders in any sales process.

18.4 ENFORCEMENT OF THE MERGER LAW

The merger law in section 50 is able to be enforced through court proceedings taken, by either the ACCC or by private parties opposed to the merger, in similar manner to all other competition provisions in Part IV.[521] Only the ACCC is able to seek injunctive relief from the court to prevent the merger proceeding. However, private parties can seek an order requiring the acquiring party to divest the business that was acquired or an order for damages caused to the private party by the merger.

The Retail Guild of Australia submits that it is not only merger parties who are affected by mergers; third parties can also be adversely affected. Although third parties can seek to persuade the ACCC to oppose a merger and/or to take their own private legal action, the Retail Guild submits that, in many situations, the costs and risks of private action are too great, making it impractical for private parties

521 Criminal cartel provision in Division 1 of Part IV, are enforced by the Commonwealth Director of Public Prosecutions.

to challenge mergers. The Retail Guild calls for changes to limit the costs to which third parties may be exposed when taking private action to challenge a merger (DR sub, page 49). The Consumer Action Law Centre also submits that it is important to have merger processes that allow consumer perspectives to be taken into account (DR sub, page 24).

The Panel agrees that it is important to ensure that legal rights and remedies under the CCA are not undermined by being too costly, slow or uncertain to be of practical assistance. However, there is a balance to be struck; it is also important to ensure certainty and timeliness in merger decisions and that business is not burdened by unwarranted legal proceedings. The impediments to private enforcement of competition laws are discussed in more detail in Section 23.2. However, the Panel does not support any change to the law that would immunise private parties from the risk of an adverse costs order in connection with merger proceedings.

The Panel also agrees that consumer perspectives are important to decisions about mergers and considers that the proposed new merger authorisation process (discussed below) will provide improved opportunities for third parties, including consumers and their representatives, to be heard.

18.5 Merger approval processes

As noted earlier, parties wishing to seek approval before they merge to avoid the risk of court action have three separate processes available to them: informal clearance by the ACCC; formal clearance by the ACCC; and authorisation by the Tribunal. Many submissions are directed to these processes, with various proposals for change. The Panel has weighed these various proposals carefully.

ACCC's informal merger clearance process

The informal clearance process is the most commonly used of the merger clearance options, with the ACCC considering 289 transactions on this basis in 2012-13.[522]

Under the informal merger clearance process, the ACCC considers information provided by the merger parties and other parties, conducts its own analysis and forms a view as to the likely competition effects of the proposed transaction. Informal clearance by the ACCC does not provide statutory protection from legal action under section 50; it provides the ACCC's view on whether an acquisition is likely to breach the CCA. Similarly, ACCC opposition to a merger does not legally prohibit the merger; only a court can do that.

The vast majority of submissions support the informal clearance process because of its flexibility and relatively low cost. The fact that the process leads to the ACCC forming a view, rather than a decision of a court, means that it is not necessary for parties to provide legally admissible evidence. This reduces the complexity and expense associated with the process.

Changes to the informal process following the Dawson Review have generally been welcomed:

> These reforms include Statements of Issues, Public Competition Assessments and letters to the merger parties often referred to as 'transparency letters'. The ACCC should be commended for its efforts to improve the level of accountability and transparency in its informal merger review process. (Herbert Smith Freehills, sub, page 2)

522 Australian Competition and Consumer Commission and the Australian Energy Regulator 2013, *Annual Report 2012-13*, Canberra, page 41.

However, for more complex matters, some submissions express the view that the informal process can be slow and/or unpredictable in timing. Foxtel suggests that there should be a strict timetable for completion of merger clearances (sub, page 7) rather than the current system where the ACCC can change its indicative timetable (for example, at the request of the merger parties or to allow it to gather more information in order to form a concluded view).

The Law Council of Australia — SME Committee does not agree that timelines for merger review in Australia are too long:

> The SME Committee also believes that the Harper Review would benefit from giving more detailed consideration to the processes which apply overseas, which generally have much longer timelines than exist in Australia. (DR sub, page 19)

Some submissions, such as that of the Law Council of Australia — Competition and Consumer Committee, consider that the informal process does not go far enough in providing transparency to merger parties (sub, page 67). In its view, merger parties should generally have access to third-party submissions about the merger, not just the ACCC's summary of these concerns (sometimes referred to as a 'transparency letter').

The BCA goes further, proposing that the ACCC's decision on whether or not to oppose a merger should be subject to 'an internal review' by 'a panel of Associate Commissioners with expertise in competition law and economics', with the merger parties making submissions. The BCA's suggestions include that the ACCC could allow this panel of Associate Commissioners to overturn the ACCC's original decision and make a new decision (BCA, sub, Main Report page 99).

Telstra submits that, given the risk that the Panel's proposed changes to the formal clearance and authorisation provisions may not proceed, the Panel should make some recommendations 'in the alternative' relating to concerns that the informal clearance process lacks transparency, timeliness and appropriate review mechanisms (DR sub, page 9).

The Panel agrees that, without an effective formal clearance mechanism, any problems with the informal process become more critical. However, as the Dawson Review noted, 'The strengths of the current informal clearance process [including its speed and efficiency] stem from its informal nature, as do its weaknesses.'[523]

Attempts to further formalise the informal merger clearance process would reduce its flexibility and inevitably have timing and resourcing implications. There do not appear to be any examples of merger regimes overseas that offer a high level of transparency without also imposing stricter information requirements and longer timelines than the Australian system.

The Panel considers that it is not sensible to attempt to regulate an informal process which, by definition, operates outside any formal legal framework. The flexibility of the informal process is widely recognised as being beneficial.

Nevertheless, the public interest is served by timely merger decisions and by transparency in the public administration of the merger law. The Panel sees scope for further consultation between the ACCC and business representatives with the objective of developing an informal review process that delivers more timely decisions.

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523 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act* (the Dawson Review), Canprint Communications, Canberra, page 60.

The Panel considers that the identified concerns about merger clearance should also be addressed through streamlining the formal approval process.

A number of submissions call for ex-post evaluation of ACCC merger decisions and/or monitoring of market outcomes.[524] An evaluation process of this kind would assess the validity and effectiveness of past merger decisions; specifically, whether mergers that were allowed to proceed subsequently resulted in substantial damage to competition and whether the assessment of markets and entry barriers, on the basis of which mergers were prevented, subsequently proved to be erroneous. The object of such evaluations would be to improve future decision-making processes and decisions.

The Panel considers that such evaluations would be beneficial and could be performed by the proposed Australian Council for Competition Policy (ACCP). This is discussed in more detail in Section 25.7.

Formal merger processes — clearance and authorisation

Since 2007, following recommendations made by the Dawson Review, the ACCC has been empowered under the CCA to grant a formal clearance to merger parties if it is satisfied that the merger would not substantially lessen competition. ACCC decisions are subject to review by the Tribunal. Also since 2007, the Tribunal has been empowered to grant authorisation to merger parties if it is satisfied that the public benefits resulting from the merger outweigh the anti-competitive detriment. Prior to 2007, no formal clearance mechanism existed and the power to grant merger authorisations was vested in the ACCC, with decisions subject to review by the Tribunal.

The formal clearance process has not been used since its introduction in 2007. Submissions have indicated that, although improvements to the ACCC's informal process partly explain this, unattractive features of the formal process also deter merger parties from using it.

> The availability of this alternative to the informal process, particularly in potentially contentious cases, is desirable and should be retained. However, the formal merger clearance process has not been used, in part because it is unduly complicated by strict technical formal requirements for a compliant application, including for example, the detailed and prescriptive standard form application … which is onerous and inflexible. (BCA, sub, Main Report page 63)

Herbert Smith Freehills submits that the onus on merger parties to establish that the merger does not breach the CCA and the requirement for Tribunal review of merger clearance decisions to be 'on the record' contributes to its lack of use (sub, page 9). The Law Council of Australia — Competition and Consumer Committee and Herbert Smith Freehills both call for the formal process to be amended or repealed.

The Law Council of Australia — Competition and Consumer Committee advocates replacing it with a new formal process to be triggered at a point in the informal process (sub, page 69), while Herbert Smith Freehills prefers a new system of notification (sub, page 10). The BCA considers that the formal process should be retained and improved via a review to be conducted by the Treasury, in consultation with business, competition law practitioners and the ACCC (sub, Summary Report page 18).

524 See, for example: BCA, DR sub, Appendix 2 page 37; Retail Guild, DR sub, page 41; and Australian Automobile Association, DR sub, page 3.

The Panel considers that the existence of a formal merger clearance option serves a useful purpose, even if it is seldom used, since it provides a time-limited, accessible alternative to the ACCC's informal clearance process. Feedback from submissions and the fact that the process has never been used support the view that the process needs reform to remove unnecessary restrictions and requirements that may have acted as a deterrent to its use. Reform should be considered in conjunction with the authorisation process, addressing the question whether two separate merger approval processes are needed in addition to the informal merger clearance process.

The merger authorisation process was not commonly used when it was administered by the ACCC (with appeal to the Tribunal). Since 2007, when administration was transferred to the Tribunal, it has been used even more rarely. The process has now been used twice: by Murray Goulburn in 2013 (whose application was withdrawn for commercial reasons) and by AGL in 2014. In AGL's case, the authorisation was obtained in three months from application. However, the application followed a period of three months in which AGL sought informal clearance from the ACCC.

The Law Council of Australia — Competition and Consumer Committee notes that its members have 'mixed views as to the efficacy of the current authorisation process contained within the Act, and the extent to which improvements could or should be made …' (sub, page 72). In its submission to the Issues Paper, it suggests some immediate changes that could be made if the current process were retained, including the Tribunal appointing a Counsel Assisting to allow for smoother running of matters (sub, page 72).

Further, the Competition and Consumer Committee offers suggestions about how the authorisation and formal merger review processes might be combined if the Panel were to recommend such a change, including information requirements and the option for some parties to continue to apply directly to the Tribunal, bypassing the ACCC (DR sub, page 22).

The ACCC submits that, although the Tribunal is a highly regarded and experienced merits review body, it is not well suited to the role of first-instance decision-maker and nor is the ACCC's dual role under the current merger authorisation process satisfactory.

In particular, the ACCC is required both to act as an investigative body and to assist the Tribunal. The former role involves conducting market inquiries and gathering information from market participants. The latter involves: preparing a report on matters specified by the President of the Tribunal and any matter the ACCC considers relevant; calling witnesses; reporting on statements of fact; examining and cross-examining witnesses; and making submissions on issues relevant to the application. The ACCC also raises concerns about the lack of a merits review process under the present merger authorisation process, which is inconsistent with the process for all other (non-merger) authorisations (sub 1, pages 83-86).

The Panel considers that an efficient and effective formal merger approval process is important for the economy. Although the informal approval process has been shown to work effectively for the majority of mergers, parties to complex and contested mergers should have an alternative merger review process available to them that delivers transparent and timely decision making, consistent with international best practice.

The Panel considers that the current dual processes for formal merger clearance have features that are sub-optimal. It agrees with the BCA that a formal approval process should be retained and improved with the specific features settled in consultation with business, competition law practitioners and the ACCC.

Notwithstanding, the Panel considers that the general framework should contain the following elements:

- It would be preferable for the ACCC to be the first-instance decision-maker, rather than the Tribunal. Having regard to its composition and powers, the ACCC is better suited to investigation and first-instance decision making in the administration of the competition law, including mergers; while the Tribunal is better suited to an appellate or review role.
- The ACCC should be empowered to approve a merger if it is satisfied that the merger does not substantially lessen competition or that the merger results in public benefits that outweigh any detriments. Empowering the ACCC to apply both tests would enable merger parties to make a single application for approval that addresses both the anti-competitive effects of the merger and any public benefits that arise.
- The formal process should not be subject to prescriptive information requirements. As the merger parties will have the onus to satisfy the ACCC of the competitive consequences, or public benefits, of the merger, they will have sufficient incentive to place relevant information before the ACCC (or face the risk that the ACCC will not be so satisfied). However, the ACCC should be empowered to require the production of business and market information to test the arguments advanced by the merger parties.
- The formal process should be subject to strict timelines that cannot be extended, except with the consent of the merger parties.
- Decisions of the ACCC should be subject to merits review by the Tribunal.

The Panel notes that this change could be implemented without increasing the current maximum statutory time period of six months for the determination of a merger authorisation, by allowing the ACCC and the Tribunal each a maximum of three months to make their respective determinations.

Submissions in response to the recommendations in the Draft Report almost universally agree that the current formal merger clearance process is unsatisfactory and should be reformed. However, views differ about aspects of the Panel's proposals for reform:

- some submissions express concern about losing the ability to apply directly to the Tribunal for merger authorisation, bypassing the ACCC;
- views differ about the form of Tribunal review under the proposed merger authorisation process (full merits review or limited review based on the information that was before the ACCC); and
- the ACCC expresses concern that, if merger parties were not required to provide specified information to the ACCC, this would delay assessments, and parties would have no incentive to provide unfavourable information (DR sub, page 60).

These concerns and the Panel's views are discussed in detail below.

Loss of ability to apply directly to the Tribunal for authorisation

A number of submissions raise concerns about the proposal that applications for merger authorisation be considered by the ACCC at first instance (with a right of merits review by the

Tribunal), rather than the present system whereby applications are made directly to the Tribunal.[525] For example, AGL Energy Limited submits:

> It is critical to maintain the avenue of direct merger authorisation by the Tribunal so that a party challenging the ACCC's view can introduce new evidence to the Tribunal, as well as test the ACCC's evidence through cross-examination under oath. If the Tribunal became a review-only body, such as is being proposed, the Tribunal would only be able to consider those documents already created and previously submitted to the ACCC.
>
> However, AGL's experience in merger clearances is that the ACCC does not always provide the applicant with complete information regarding the evidence it is relying upon or the issues that it considers may result in a competitive detriment. The current process does not compel the ACCC to provide such transparency. (DR sub, page 4)

Other submitters[526] agree with the Draft Recommendation that applications for merger authorisation be heard by the ACCC in the first instance, with a right of review by the Tribunal. For example, the Consumer Action Law Centre submits:

> We support the proposal ... that the ACCC (rather than the Australian Competition Tribunal) be the decision maker at first instance regarding mergers ... [W]e consider the formality of the Tribunal process discourages consumers and consumer advocates from participating in merger decisions. (DR sub, page 16)
>
> … we were involved in the Tribunal's consideration of the merger between AGL and Macquarie Generation. Our experience in this matter was, again, that the Tribunal is not open to consumer perspectives for two reasons:
>
> - the tribunal received several submissions from consumer advocacy organisations, but none appeared to attract any real attention from the Tribunal; and
> - despite not being bound by the rules of evidence, the Tribunal's processes are very formal and court-like, which makes it difficult for individuals or even consumer organisations to participate. (DR sub, page 24)

The Panel remains of the view that, having regard to its composition and powers, the ACCC is better suited to investigation and first-instance decision-making. The concern expressed by AGL Energy Limited, cited above, ought to be addressed through the design of the formal merger approval process.

Under a formal process, appropriate requirements regarding information transparency can be mandated, giving merger parties the opportunity to bring forward all relevant evidence to assist the ACCC in making its decision. Further, as discussed below, the Panel believes the Tribunal review process can be designed to ensure that any unfairness to a merger party arising during the ACCC's decision making can be remedied.

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525 See, for example: AGL Energy Limited, DR sub, page 4; Baker & McKenzie, DR sub, page 3; Business Council of Australia, DR sub, page 4; Energy Supply Association of Australia, DR sub, page 1; Daryl Guppy, DR sub, page 9; Law Council of Australia — Competition and Consumer Committee, DR sub, page 20; and George Raitt, DR Sub, page 2.

526 See, for example: Julie Clarke, DR sub, page 5; Consumer Action Law Centre, DR sub, page 15; and ACCC, DR sub, page 59.

Merits review

Submissions differ on whether the Tribunal's review of an ACCC decision not to grant merger authorisation should be: a full rehearing with the right to adduce further evidence and information; a limited review, based only on the material before the ACCC; or a hybrid process that empowers the Tribunal to allow further evidence or information and to examine witnesses in certain circumstances.

AGL Energy Limited (DR sub, page 4) and the BCA (DR sub, page 37) both emphasise the importance of being able to introduce new evidence to the Tribunal, as well as to test the ACCC's evidence through cross-examination under oath.

The ACCC submits that the Tribunal should be limited to the information that was before the ACCC, but to ensure that 'truly new information' is available to the Tribunal, provision could be made for the Tribunal to be allowed to consider new information that was previously not available. (DR sub, page 62).

The Panel believes that a hybrid process is preferable. A full rehearing with an unfettered ability for parties to put new material before the Tribunal would likely dampen the incentive to put all relevant material to the ACCC in the first instance and may lead to delays if the Tribunal has to deal with large amounts of new evidence.

On the other hand, circumstances may arise in which it is reasonable to allow new evidence to be provided to the Tribunal: the evidence may not have been available to the ACCC or the merging parties at the time of the ACCC decision; or the relevance of the information may not have been apparent at that time. The Tribunal may also consider that it would be assisted by hearing directly from witnesses relied on by the ACCC, through questioning by the parties and/or the Tribunal.

Accordingly, the Panel considers that the Tribunal's review of the ACCC's decision should be based upon the material before the ACCC, but that the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied there is sufficient reason.

Information requirements

In relation to the information requirements for formal merger approval, the ACCC submits that Australia should adopt a similar approach to that used in New Zealand, where a new, less prescriptive set of information requirements was recently introduced (DR sub, pages 60-61).

The Panel agrees the clearance application form published by the New Zealand Commerce Commission in June 2014 is a useful illustration of its proposed approach.[527]

The Panel maintains the view that it should not be necessary to burden merger approval processes with prescriptive information requirements. In a formal merger approval process, the burden will be upon the merging parties to satisfy the ACCC (and the Tribunal on review) that the merger would not substantially lessen competition in any market or would give rise to public benefits that outweigh any detriment. Provided the law contains penalties for providing false information to the ACCC, and the ACCC is empowered to seek additional information and documents from the merging parties, the process ought to ensure that relevant and accurate information is made available.

527 New Zealand Commerce Commission, *Application — Notice seeking clearance*, New Zealand Commerce Commission, Wellington, viewed 5 February 2015, <www.comcom.govt.nz/dmsdocument/11963>.

The Panel's view

The Panel's assessment is that overall the merger provisions of the CCA are working effectively. The Panel does not recommend any changes to the substantive law.

In relation to merger approval processes, the informal process works quickly and efficiently for a majority of mergers. Issues of transparency and timeliness arise with the informal process when dealing with more complex and contentious matters. Addressing those issues by changing the informal process could weaken it. Nevertheless, there should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal review process.

Merger review processes and analysis would also be improved by implementing a program of post-merger reviews, looking back on a number of past merger decisions to determine whether the ACCC's processes were effective and its assessments borne out by events. This function could be performed by the proposed Australian Council for Competition Policy (see Recommendation 44).

The formal merger approval mechanism, as an alternative to informal merger clearance, must be accessible and effective. Specifically, the Panel supports reforms to combine the two current formal merger exemption processes (that is, the formal merger clearance process and the merger authorisation process) and remove unnecessary restrictions and requirements that may have deterred their use. The Panel also considers that merger authorisation applications should not be taken directly to the Tribunal, bypassing the ACCC.

The Panel considers that the specific features of the improved formal approval process should be settled in consultation with business, competition law practitioners and the ACCC, subject to including specific elements as set out in Recommendation 35.

Recommendation 35 — Mergers

There should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal merger review process.

The formal merger exemption processes (that is, the formal merger clearance process and the merger authorisation process) should be combined and reformed to remove unnecessary restrictions and requirements that may have deterred their use. The specific features of the review process should be settled in consultation with business, competition law practitioners and the ACCC.

However, the general framework should contain the following elements:

- The ACCC should be the decision-maker at first instance.
- The ACCC should be empowered to authorise a merger if it is satisfied that the merger does not substantially lessen competition or that the merger would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.
- The formal process should not be subject to any prescriptive information requirements, but the ACCC should be empowered to require the production of business and market information.
- The formal process should be subject to strict timelines that cannot be extended except with the consent of the merger parties.
- Decisions of the ACCC should be subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines.
- The review by the Australian Competition Tribunal should be based upon the material that was before the ACCC, but the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the Tribunal is satisfied that there is sufficient reason.

Merger review processes and analysis would also be improved by implementing a program of post-merger evaluations, looking back on a number of past merger decisions to determine whether the ACCC's processes were effective and its assessments borne out by events. This function could be performed by the Australian Council for Competition Policy (see Recommendation 44).

19 Unilateral Conduct

Firms with a substantial degree of market power can engage in behaviour that damages the competitive process and thereby restricts the ability of other firms to compete effectively. Most industrialised countries have enacted competition laws with prohibitions against monopolisation or abuse of a dominant market position.[528]

Common to those laws is the principle that firms are entitled, and indeed are encouraged, to succeed through competition — by developing better products and becoming more efficient — even if they achieve a position of market dominance through their success. Those laws only prevent firms with substantial market power from engaging in conduct that damages competition.

Large firms may also enjoy strong bargaining power that can be abused in dealings with their suppliers and business customers. While imbalance in bargaining power is a normal feature of commercial transactions, policy concerns are raised when strong bargaining power is exploited through imposing unreasonable obligations on suppliers and business customers. Such exploitation can traverse beyond accepted norms of commercial behaviour and damage efficiency and investment in the affected market sectors, requiring the law to respond both as a matter of commercial morality and to protect efficient market outcomes.

Many jurisdictions have enacted prohibitions against unconscionable or unfair trading conduct between businesses (see Box 19.1). Those laws must strike a balance. On the one hand, the law should not intrude excessively into the bargaining process between businesses, as the bargaining process underpins the competitive market process that serves consumers and the welfare of Australians. On the other hand, on occasions, the bargaining process can be exploited by large or powerful firms in a manner that is inconsistent with commercial morality, requiring a response.

Box 19.1: Examples of overseas approaches to anti-competitive unilateral conduct

US: Prohibits monopolisation and attempted monopolisation by any firm (dominant or not) and requires an intent to monopolise and engage in predatory or anti-competitive conduct to prove a contravention (Sherman Act, section 2).

EU: Prohibits any abuse by an undertaking of a dominant position in a market. Abuse can include imposing unfair trading conditions, limiting production to the prejudice of consumers, or applying dissimilar conditions to equivalent transactions (Article 102, Treaty on the Functioning of the European Union (TFEU)).

Canada: Prohibits firms substantially or completely in control of a market from engaging in anti-competitive practices, which have the effect or likely effect of preventing or lessening competition substantially in a market (Competition Act, section 79).

New Zealand: Prohibits a person with a substantial degree of power in a market from taking advantage of that power, for the purpose of restricting entry into, preventing or deterring competitive conduct in, or eliminating a person from, that or any other market (Commerce Act, section 36).

In this chapter, the Panel considers the laws that regulate conduct by firms with substantial market or bargaining power, in light of the principles set out in Chapter 1.

528 OECD 1996, *Abuse of Dominance and Monopolisation*, OCDE/GD(96)131, Paris, page 35.

19.1 MISUSE OF MARKET POWER

Section 46 of the *Competition and Consumer Act 2010* (CCA) 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.[529]

Many submissions comment on section 46. As reflected in those submissions, opinions are divided on whether section 46 is framed in a manner that is effective in deterring anti-competitive behaviour by firms with substantial market power.

Those seeking reform of the law most commonly propose that the prohibition should be revised or expanded to include an 'effects' test — that is, a firm with substantial market power would be prohibited from taking advantage of that power if the effect is to cause anti-competitive harm. Two main arguments are advanced for the inclusion of an effects test:

- As a matter of policy, competition law ought to be directed to the effect of commercial conduct on competition, not the purpose of the conduct, because it is the anti-competitive effect of conduct that harms consumer welfare.
- As a matter of practicality, proving the purpose of commercial conduct is difficult because it involves a subjective enquiry; whereas, proving anti-competitive effect is less difficult because it involves an objective enquiry.

Those opposing reform are concerned that introducing an effects test would 'chill' competitive behaviour by firms in the market, which would be harmful to consumer welfare.

The debate around whether section 46 should be based solely on a 'purpose' test or should also (or alternatively) have an 'effects' test is one of the enduring controversies of competition policy in Australia. Section 46 has been the subject of a large number of independent reviews and parliamentary inquiries (see Box 19.2).

Box 19.2: History of proposals for an effects test[530]

Year	Review	Recommend effects test?	Reasons
1976	Trade Practices Act Review Committee (Swanson Committee)	No	The section should only prohibit abuses by a monopolist that involve a proscribed purpose.
1979	Trade Practices Consultative Committee (Blunt Review)	No	Would give the section too wide an application, bringing within its ambit much legitimate business conduct.
1984	Green Paper, The Trade Practices Act Proposals for Change	Yes	Difficulty in proving purpose.
1989	House of Representatives Standing Committee on Legal and Constitutional Affairs (Griffiths Committee)	No	Insufficient evidence to justify the introduction of an effects test into section 46.

529 Part IV is mirrored in the Competition Code in Schedule 1 of the CCA, which applies the anti-competitive conduct laws through application legislation in the States and Territories.

530 Adapted from Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act* (the Dawson Review), Canprint Communications, Canberra, Box 3.2 History of the effects test, page 83.

Box 19.2: History of proposals for an effects test *(continued)*

1991	Senate Standing Committee on Legal and Constitutional Affairs (Cooney Committee)	No	Might unduly broaden the scope of conduct captured by section 46 and challenge the competitive process itself.
1993	Independent Committee of Inquiry into Competition Policy in Australia (Hilmer Committee)	No	It would not adequately distinguish between socially detrimental and socially beneficial conduct.
1999	Joint Select Committee on the Retailing Sector (Baird Committee)	No	Such a far-reaching change to the law may create much uncertainty in issues dealing with misuse of market power.
2001	House of Representatives Standing Committee on Economics, Finance and Public Administration (Hawker Committee)	No	Await the outcome of further cases on section 46 before considering any change to the law.
2002	Senate Legal and Constitutional References Committee Inquiry into section 46 and section 50 of the *Trade Practices Act 1974*.	No	Referred consideration of section 46 to the Dawson Review.
2003	Trade Practices Act Review Committee (Dawson Review)	No	The addition of an effects test would increase the risk of regulatory error and render purpose ineffective as a means of distinguishing between pro-competitive and anti-competitive.
2004	Senate Economics References Committee Inquiry into the Effectiveness of the *Trade Practices Act 1974* in protecting Small Business	No	While sympathetic to some of the arguments for an effects test, the difficulties with introducing it meant that the Committee did not recommend the inclusion of an effects test.

The Panel considers that the long-running debate concerning 'purpose' and 'effect' in the context of section 46 has been somewhat unproductive. In one sense the concerns raised by both sides of the debate are correct.

Internationally, competition laws have been framed so as to examine the effects on competition of commercial conduct as well as the purpose of the conduct (see Appendix B). In Australia, section 45 (anti-competitive arrangements) and section 47 (exclusive dealing) apply if the purpose, effect or likely effect of the conduct is to substantially lessen competition; section 50 (mergers) applies if the effect or likely effect of the conduct is to substantially lessen competition.

Equally, competition laws have been framed (and interpreted) in a manner that is designed to minimise the risk that the law might chill competitive behaviour.

The challenge is to frame a law that captures anti-competitive unilateral behaviour but does not constrain vigorous competitive conduct. Such a law must be written in clear language and state a legal test that can be reliably applied by the courts to distinguish between competitive and anti-competitive conduct.

Difficulties with the current form of section 46

Section 46 only applies to firms that have a substantial degree of power in a market. The threshold test of substantial market power enjoys broad support, and the Panel did not receive any submissions making a case for change.

Section 46 defines conduct as a misuse of market power if it satisfies two legal tests:

- First, the conduct must have involved taking advantage of the firm's market power.
- Second, the conduct must have been undertaken 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.

Take advantage

Both the courts and the legislature have wrestled with the meaning of the expression 'take advantage' over many years. Its meaning is subtle and difficult to apply in practice. The ordinary meaning of the words 'take advantage' is to use to one's advantage. But when the words are coupled with market power, it is necessary to understand how a firm might use market power to its advantage and what constitutes a use of market power.

The difficulty with the expression lies in the fact that market power is not a physical asset (such as an airport) or a commercial instrument (such as a lease), the use of which can be observed. Market power is an economic concept, describing the state or condition of a market. A firm possesses market power when it has a degree of freedom from competitive constraint. Recognising that, the High Court concluded in *Queensland Wire*[531] that taking advantage of market power means engaging in conduct that would not be undertaken in a competitive market (because the firm would be constrained by competition).

In the years since the decision in *Queensland Wire,* the difficulties in interpreting and applying the 'take advantage' test and determining whether specific business conduct does or does not involve taking advantage of market power have become apparent. The following cases illustrate some of the difficulties.

- In *Melway*,[532] trial and appellate courts differed on whether refusing to supply Melway street directories to a particular retailer involved taking advantage of market power — the High Court ultimately concluded that it did not.
- In *Boral*,[533] trial and appellate courts differed on the circumstances required to show that selling products at low prices involved taking advantage of market power (and constituted predatory pricing). Following *Boral*, the Parliament amended section 46 in an attempt to capture predatory pricing conduct.[534] However, the amendments themselves are cast in language that is difficult to interpret and apply in practice (while the amendments seek to prohibit pricing below cost, the expression 'cost' is not defined and there are circumstances in which pricing below certain measures of cost might be an ordinary business strategy in a competitive market).

531 *Queensland Wire Industries v BHP* (1989) 167 CLR 177.

532 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13.

533 *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374.

534 *Competition and Consumer Act 2010,* subsections 46(1AAA) and (1AA).

- In *Rural Press*,[535] trial and appellate courts differed on whether a threat by one regional newspaper publisher to begin distributing its newspaper in a neighbouring region, in order to deter the neighbour from distributing its newspaper in the first publisher's region, involved taking advantage of market power — the High Court ultimately concluded that it did not. Following *Rural Press*, Parliament amended section 46 in an attempt to explain the meaning of 'take advantage'.[536] It is doubtful that the amendments assisted.
- Recently, in *Cement Australia*,[537] the meaning of the expression 'take advantage' was again a central matter of dispute in determining whether conduct, involving the acquisition of flyash (a by-product of coal-fired electricity generation, that can be used as a cementitious material in concrete), amounted to a misuse of market power. The Federal Court concluded that the conduct did not amount to a misuse of market power in contravention of section 46 but did have the likely effect of substantially lessening competition in contravention of section 45.

The important point is not whether the outcomes of those cases, on the facts before the court, were correct or incorrect from a competition policy perspective. The issue is whether the 'take advantage' limb of section 46 is sufficiently clear and predictable in interpretation and application to distinguish between anti-competitive and pro-competitive conduct.

A number of submissions also draw attention to an economic problem in using the 'take advantage' test to distinguish between lawful and unlawful business conduct. The economic premise of the test is that a firm with substantial market power should be permitted to engage in particular business conduct if firms without market power also engage in that conduct. However, as observed by Katharine Kemp, US jurisprudence recognises that particular conduct might be competitively benign when undertaken by a firm without market power but competitively harmful where a firm has market power.[538] Similarly, Professor Stephen Corones submits:

> … conduct engaged in by a firm with substantial market power will have a much greater propensity to have market-distorting foreclosure effect, than the same conduct engaged in by a firm without substantial market power. The need to examine the conduct of major business[es] more closely than those without market power has been recognised in both the United States and the EU. (DR sub, page 11)

RBB Economics submits:

> Since the same conduct can have different economic effects in different circumstances, it follows that conduct can be anti-competitive when it is pursued by a firm with market power even if it is unproblematic in situations where such power is absent. If one considers most of the categories of conduct that can give rise to anti-competitive outcomes — price discrimination, exclusive dealing, loyalty rebates, bundling, refusal to deal, etc. — it is evident that these are also commonly observed phenomena in many well-functioning competitive markets. (DR sub, page 4)

In the Panel's view, the 'take advantage' limb of section 46 is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct. The test has given rise to substantial difficulties of interpretation, revealed in the decided cases, undermining confidence in the effectiveness of the law.

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535 *Rural Press Limited v ACCC* [2003] HCA 75.

536 *Competition and Consumer Act 2010*, subsection 46(6A).

537 *ACCC v Cement Australia* [2013] FCA 909.

538 See also Katherine Kemp, DR sub, pages 9-12.

Further, and perhaps more significantly, the test is not best adapted to identifying misuse of market power. Business conduct should not be immunised merely because it is often undertaken by firms without market power. Conduct such as exclusive dealing, loss-leader pricing and cross-subsidisation may all be undertaken by firms without market power without raising competition concerns, while the same conduct undertaken by a firm with market power might raise competition concerns.

Purpose

The second legal test in section 46 is the 'purpose' test. As noted earlier, the purpose test has been the primary focus of debate concerning section 46. Compared to the 'take advantage' test, the meaning of the 'purpose' test in section 46 is at least clear and capable of reliable application by the courts.

The debate over whether section 46 should include a subjective purpose test or an objective effects test tends to obscure a more significant issue. Presently, the purpose test in section 46 focuses on harm to individual competitors — conduct will be prohibited if it has 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.

Ordinarily, competition law is not concerned with harm to individual competitors. Indeed, harm to competitors is an expected outcome of vigorous competition. Competition law is concerned with harm to competition itself — that is, the competitive process.

Given the existing focus of the purpose test in section 46, resistance to changing the word 'purpose' to 'effect' is understandable. It would not be sound policy to prohibit unilateral conduct that had the effect of damaging individual competitors. However, an important question arises whether section 46 ought to be directed at conduct that has the purpose of harming individual competitors (under the existing purpose test) or whether it ought to be directed at conduct that has the purpose or effect of harming the competitive process (consistent with the other main prohibitions in sections 45, 47 and 50 of the CCA).

Many submissions to the Draft Report express both strong support for[539] and strong opposition to[540] changes to the existing focus of section 46, viz, on 'purpose'. Other submissions canvass other

539 See, for example: Alinta Energy, DR sub, page 2; George Altman , DR sub, page 2; Australian Automotive Aftermarket Association, DR sub, pages 10-11; Australian Chamber of Commerce and Industry, DR sub, page 16; Australian Competition and Consumer Commission, DR sub, pages 48-54; Australian Dairy Farmers, DR sub, pages 5-7; Australian Food and Grocery Council, DR sub, pages 7-8; Australian Motor Industry Federation, DR sub, pages 9-10; Australian Retailers Association, DR sub, pages 5-6; AURL FoodWorks, DR sub, pages 9-11; Business SA, DR sub, page 11; Chamber of Commerce and Industry Queensland, DR sub, pages 4-5; CHOICE, DR sub, pages 26-27; Consumer Action Law Centre, DR sub, pages 15-17; Professor Stephen Corones, DR sub, pages 1-12; Growcom, DR sub, page 2; iiNet, DR sub, page 4; Minter Ellison, DR sub, page 5; National Farmers Federation, DR sub, pages 10-12; New Zealand Commerce Commission, DR sub, pages 1-9; Queensland Law Society, DR sub, pages 3-4; RBB Economics, DR sub, pages 1-5; Retail Guild, DR sub, page 19; Rykris Pty Ltd, DR sub, page 2; Santos Retail, DR sub, page 1; Small Business Development Corporation (WA), DR sub, pages 7-9; The Australian Chamber of Fruit and Vegetable Industries, DR sub, pages 3-5; and WA Independent Grocers, DR sub, page 2.

540 See, for example: AGL Energy Limited, DR sub, pages 3-4; Arnold Bloch Leibler, DR sub, pages 4-7; ASTRA Subscription Media Australia, DR sub, pages 6-7; Australian Industry Group, DR sub, pages 20-21; Australian Institute of Company Directors, DR sub, pages 1-6; Australian National Retailers Association, DR sub, pages 29-35; Baker & McKenzie, DR sub, pages 3-5; Boral Limited, DR sub, pages 3-9; Business Council of Australia, DR sub, pages 13-20; Cement Industry Federation, DR sub, page 5; Coles Group Limited, DR sub, pages 8-10; Energy Supply Association of Australia, DR sub, pages 5-6; Foxtel, DR sub, pages 9-10; Housing Industry Association, DR sub, page 2; Insurance Australia Group, DR sub, pages 1-2; Insurance Council of Australia, DR sub, pages 3-4; Law Council of Australia — Competition and Consumer Committee, DR sub, pages 12-19; Law Council of Australia — SME Committee, DR sub, pages 14-15;

options, including retaining the existing proscribed purposes in addition to introducing a reference to 'effect',[541] duplicating existing provisions regarding the misuse of market power in the telecommunications industry[542] and re-framing the test in terms of the 'rule of reason' approach adopted in the US.[543]

The current purpose test in section 46 is inconsistent with the focus of equivalent prohibitions in overseas jurisdictions:

- In respect of section 2 of the US Sherman Act, which prohibits monopolisation or attempts to monopolise in trade or commerce, the American Bar Association states that 'Modern U.S. decisions hold that it is not subjective intent but objective intent that is relevant, and that intent can be inferred from conduct and effect. The focus of the U.S. courts is on evidence of monopoly power and proof of exclusionary conduct' (American Bar Association, sub, page 7).
- In Canada, section 79 of the Competition Act prohibits anti-competitive conduct by a dominant firm that has the effect or likely effect of substantially lessening competition.
- In respect of Article 102 of the TFEU which prohibits abuse of a dominant position, the International Bar Association states '… in recent years the approach of both the EU Commission and the European courts (together with many Member State authorities) to Article 102 TFEU has moved towards an approach which focuses more on whether the conduct of dominant businesses has (or would have) adverse effects on competition (in particular focussing in principle, on exclusionary conduct which forecloses equally efficient competitors)' (International Bar Association, sub, page 17).

The Panel considers that the current form of section 46, prohibiting conduct if it has the purpose of harming competitors, is misdirected as a matter of policy and out of step with equivalent international approaches. The prohibition ought to be directed to conduct that has the purpose or effect of harming the competitive process.

Re-framing section 46

An effective provision to deal with unilateral anti-competitive conduct is a necessary part of competition law. This is particularly the case in Australia where the small size of the Australian economy frequently leads to concentrated markets. The Panel considers that section 46 can be re-framed in a manner that will improve its effectiveness in targeting anti-competitive unilateral conduct.

Accordingly, the Panel proposes that the primary prohibition in section 46 be re-framed to prohibit a corporation with a substantial degree of market power from engaging in conduct if the conduct has the purpose, effect or likely effect of substantially lessening competition in that or any other market.

The prohibition would make two significant amendments to the current law. First, it would remove the 'take advantage' element from the prohibition. Second, it would alter the 'purpose' test to the standard test in Australia's competition law: purpose, effect or likely effect of substantially lessening

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MasterCard, DR sub, pages 2-4; National Seniors Australia, DR sub, page 14; Origin Energy, DR sub, page 2; QBE Insurance Australia, DR sub, pages 3-4; Spier Consulting Legal, DR sub, pages 10-15; Ian Stewart, DR sub, pages 4-8; Telstra Corporation Limited, DR sub, pages 13-16; and Wesfarmers Limited, DR sub, page 3.

541 See, for example: Australian Newsagents' Federation, DR sub, page 13.

542 Vodafone Hutchison Australia, DR sub, page 14.

543 American Bar Association, DR sub, pages 3-6.

competition. The test of 'substantially lessening competition' would enable the courts to assess whether the conduct is harmful to the competitive process.

The proposed test of 'substantial lessening of competition' is the same as that found in section 45 (anti-competitive arrangements), section 47 (exclusive dealing) and section 50 (mergers) of the CCA, and the test is well accepted within those sections. As explained by the former Trade Practices Tribunal in *QCMA*, competition 'expresses itself as rivalrous market behaviour' and 'is a process rather than a situation'.[544]

Section 4G of the CCA defines 'lessening of competition' to include 'preventing or hindering competition'. The proper application of the 'substantial lessening of competition' test is to consider how the conduct in question affects the competitive process — in other words, whether the conduct prevents or hinders the process of rivalry between businesses seeking to satisfy consumer requirements.

The Panel's proposed changes to section 46 in the Draft Report drew both support and opposition in subsequent submissions. Much of the opposition focuses on the defence proposed in the Draft Report, which is discussed below.

A number of submissions express concern about introducing the 'substantial lessening of competition' test into section 46. They suggest the change would increase business cost and uncertainty because a business has relatively more information about the purposes for which it engages in conduct compared to the effect of its conduct on competitors (see for example, Business Council of Australia, DR sub, page 16).

The Panel's proposed reform to section 46 is an important change, which will (like all regulatory change) involve some transitional costs, as firms become familiar with the prohibition and as the courts develop jurisprudence on its application. In the Panel's view, the change is justified as transitional costs should not be excessive and will be outweighed by the benefits.

The Panel agrees with the Australian Competition and Consumer Commission (ACCC) that the uncertainty 'should not be unduly significant as the change is to an existing test with which businesses are already familiar' (DR sub, page 53) — that is, the substantial lessening of competition test used in other provisions of the CCA. This incorporates 'standards and concepts … at least well enough known as to be susceptible to practically workable *ex ante* analysis' (Minter Ellison, DR sub, page 5).

Indeed, framing the offence by reference to the impact on competition in a market enables major businesses to advance pro-competitive justifications for their conduct (Professor Stephen Corones, DR sub, page 3), in the absence of an anti-competitive purpose.

The Law Council of Australia — Competition and Consumer Committee supports retaining section 46 in its existing form. However, it also submits that, if the law were to be amended to a 'substantial lessening of competition' test, the purpose element should be deleted; in other words, conduct by a firm with substantial market power would be unlawful if it would have or be likely to have the effect of substantially lessening competition. This is the 'substantial lessening of competition' test used in section 50 of the CCA (mergers) and in the equivalent Canadian prohibition (referred to above). The Competition and Consumer Committee submits that a prohibition based on the competitive purpose of business conduct runs the risk of 'prohibiting statements of hostile (but aggressively competitive)

544 *Re Queensland Cooperative Milling Association* (1976) 8 ALR 481 at 515 and 516.

intent rather than only anticompetitive conduct, by firms with substantial market power' (DR sub, page 15).

The Panel acknowledges the force of this submission but considers that the Committee's concern is mitigated by altering the focus of the prohibition from a purpose of harming a competitor to a purpose of substantially lessening competition.

In recommending reform of section 46, the Panel wishes to minimise the risk of inadvertently capturing pro-competitive conduct, thereby damaging the interests of consumers. To neutralise concerns about over-capture, the Panel proposed a defence in the Draft Report. The defence provided that the prohibition would not apply if the conduct in question would be both:

- a rational business decision by a corporation that did not have a substantial degree of power in the market; and
- likely to have the effect of advancing the long-term interests of consumers.

The onus of proving that the defence applied would have fallen on the corporation engaging in the conduct.

This proposed defence is generally not supported by submissions. Many feel that the first limb leaves a number of questions unanswered, and replicates the problems with the existing 'take advantage' test:

> ... does it have to be a profit maximising strategy, or could a strategy aimed at increasing market share that was not profit maximising qualify? If the respondent gives reasons for the conduct and the court accepts those reasons as genuine, is the court then required to go behind the reasons, and decide whether the explanations were objectively valid in terms of economic theory or best business practice? (Professor Stephen Corones, DR sub, page 3)

> This is a reformulation of the 'take advantage' requirement that exists in the current section 46. It gives rise to the same problems that flow from the 'take advantage' test. It requires the application of a counterfactual test that inverts the traditional counterfactual test applied elsewhere in the Act … (Queensland Law Society, DR sub, page 3)

Other submissions comment that the first limb would shift the onus of proof to the respondent:

> Effectively moving a similar concept to the 'take advantage' element to a defence would also effectively shift the burden of proof from the ACCC to the respondent, imposing considerable costs on business. (Australian National Retailers Association, DR sub, page 33)

> ... it is inappropriate for the onus to be on the defendant to establish such a defence. Misuse of market power is a serious allegation and a person making such an allegation should, at minimum, have a proper factual and legal basis for that person's case in relation to the types of matters referred to in any such defence. (Arnold Bloch Leibler, DR sub, page 6)

> This reverse onus of proof means that, to avoid inadvertently breaching the law in developing new products and competitive strategies, businesses will have to undertake assessments of their current and proposed practices to establish how a hypothetical rational business would behave and operate … To do this effectively would require an extensive and high level undertaking that would be both time consuming and costly. (Insurance Australia Group, DR sub, page 2)

Concerns are also raised about the second limb of the defence:

> If a corporation can prove that its conduct is in fact in the long-term interests of consumers, that ought to be a sufficient defence … one way of satisfying such a defence would be to prove that the relevant conduct is efficient, and the Society recommends rephrasing the second limb of the defence to clarify that position. (Queensland Law Society, DR sub, page 4)

> The added requirement of the second limb to prove conduct in the long-term interests of consumers is too vague to serve as a defence. (Coles Group Limited, DR sub, page 9)

> ... the '*long-term interests of consumers*' … is a standard which isn't properly capable of practically workable *ex ante* application. Businesses are often not well equipped to assess the long term interests of consumers. They are usually more interested in more immediate buying preferences and buyer behaviour rather than considering how consumers' interests will be served over the long term. (Minter Ellison, DR sub, page 5)

Others argue that the proposed defence is unnecessary. They posit that a prohibition of misuse of market power based on the 'substantial lessening of competition' test is sufficiently certain given the jurisprudence developed under sections 45, 47 and 50 that use the same test. The ACCC submits:

> The risk of overreach, as raised in submissions to the Review Panel and in the media, reflects a misconception of the SLC [substantial lessening of competition] test and there appears to be a significant degree of misunderstanding regarding the conduct that is likely to be prohibited by an SLC test.
>
> Damage to competitors, even to the extent of competitors being forced out of business, is not necessarily evidence of a lessening of competition. … businesses 'competing' through offering better products or services or by undertaking a successful promotional campaign, undertaking research and development which results in better products or more efficient processes, or passing savings through to consumers will be enhancing competition, not lessening it. (DR sub, page 52)

Similarly, Minter Ellison submits:

> … the concepts of 'substantial degree of power', 'purpose', 'effect', and 'substantially lessening competition' are all well understood from past cases and therefore tractable for the purposes of allowing *ex ante* guidance for business conduct. (DR sub, page 5)

The New Zealand Commerce Commission notes:

> We recognise the Panel's desire to avoid capturing pro-competitive conduct. However, we consider that a defence that the conduct was pro-competitive can, and should, be captured within the main test as to whether the conduct had the effect, or likely effect of substantially lessening competition. This can occur, for example, through the recognition of actual or potential efficiency gains. (DR sub, page 5)

RBB Economics submits:

> Our query would be whether it is possible that the proposed prohibition itself, which confines itself to conduct that will or is likely to have the effect of substantially lessening competition, requires any additional defences. Pro-competitive conduct that harms competitors through the superior efficiency of the firm with market power should not in our view be categorised as creating an SLC [substantial lessening of competition] in the first place. Provided that was made clear in the framing and context of the law, the need for defences against false positives should not arise. (DR sub, page 5)

In light of arguments presented in submissions, the Panel accepts that the defence proposed in the Draft Report is not the best means of addressing potential concerns that the revised prohibition may inadvertently catch pro-competitive conduct.

As a number of submissions observe, conduct undertaken by a firm with substantial market power can have both pro-competitive and anti-competitive effects. For example, a firm with substantial market power may compete vigorously in a market through lower prices. If that is sustained through cross-subsidisation from another aspect of the firm's operation, it may limit the ability of other firms in that market to compete. The issue for the court, and for firms assessing their own conduct, is to weigh the pro-competitive and anti-competitive factors to decide if the cross-subsidisation involves a substantial lessening of competition.

Further, the inclusion of a defence to section 46 would be inconsistent with the approach taken in sections 45, 47 and 50 (where there is no express defence) and runs the risk of casting doubt on the established meaning of the 'substantial lessening of competition' test.

The approach adopted in comparable overseas jurisdictions is to empower the court to take into account the pro-competitive and anti-competitive aspects of business conduct. Professor Stephen Corones submits that 'under both EU competition law and US antitrust law, firms with substantial market power are provided with the opportunity of demonstrating pro-competitive efficiency justifications for their conduct' (DR sub, pages 4-5).

In respect of section 2 of the Sherman Act, the American Bar Association observes:

> In the U.S., a monopolist may rebut evidence of anticompetitive conduct by establishing that it had a valid justification for the conduct—that is, one related directly or indirectly to enhancing consumer welfare. For example, conduct may be important to preserve investment incentives or to generate cost savings that will be passed on to consumers. Or, the restraint may be necessary to bring a new product to the market. Assuming the monopolist shows it had a valid business justification, a plaintiff must then address whether the conduct is reasonably necessary to achieve those efficiencies and whether substantially the same efficiencies can be achieved by significantly less restrictive available alternatives. No legal distinction is typically made between short-term versus long-term effects. (DR sub, page 4)

The Law Council of Australia — Competition and Consumer Committee suggests that, instead of a defence, section 46 might require the court to have regard to whether the conduct is efficiency-enhancing or include a list of factors to be taken into account (such as those contained in subsection 50(3) in the context of mergers) (DR sub, pages 18 and 19).

The Panel considers that the preferable approach is to include in section 46 legislative guidance with respect to the section's intended operation. Specifically, 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.

These considerations would be mandatory, but non-exhaustive. The existing interpretative provisions in section 46, insofar as they are relevant to the proposed new test, would be retained (subsections 46(2) to 46(4)).

The legislative guidance would assist with the court's analysis and businesses' understanding of how the proposed prohibition should be applied. The proposed legislative factors would expressly direct the court to consider any pro-competitive aspects of the impugned conduct, in addition to the alleged anti-competitive aspects, in assessing whether the conduct has the overall purpose, effect or likely effect of substantially lessening competition.

The Panel considers that introducing this legislative guidance is preferable to the defence proposed in the Draft Report. It is consistent with the legislative approach adopted in other provisions of the CCA, notably subsection 50(3) (mergers) and Australian Consumer Law section 22 (unconscionable conduct). It also addresses concerns expressed about reversing the onus of proof in the proposed defence, while clarifying the object of the prohibition.

The proposed reform would allow section 46 to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing and amendments that attempt to explain the meaning of 'take advantage'.

Any residual concerns about business uncertainty can be further mitigated in two ways:

- first, as recommended below, authorisation should be available to exempt conduct from the prohibition in section 46; and
- second, the ACCC should issue guidelines on its approach to enforcing section 46, prepared in consultation with business stakeholders, legal experts and consumer groups, and issued in advance of the commencement of the revised prohibition.

The proposed amendment to section 46 and the availability of authorisation would also obviate the need for the telecommunications industry-specific anti-competitive conduct provisions (Division 2 of Part XIB) and exemption order regime (Subdivision B, Division 3 of Part XIB) of the CCA. Division 2 currently provides for an effects-based test in relation to the conduct of carriers or carriage service providers (within the meaning of the *Telecommunications Act 1997*) with a substantial degree of power in a telecommunications market. Division 3 allows applications to the ACCC for an order exempting specific conduct from the scope of that effects test, where the public benefit outweighs the anti-competitive detriment. In this context, the Panel notes the Australian Government has announced a review of Part XIB of the CCA during the second part of 2015,[545] in response to Recommendation 2 of the Statutory Review under section 152EOA of the CCA[546] that Part XIB should be reviewed to assess its continued utility and effectiveness.

Divestiture remedy to address market power concerns

A court may order a broad range of remedies following a finding that a firm has engaged in misuse of market power in contravention of section 46. These remedies include declarations, injunctions,

545 Australian Government 2014, *Telecommunications Regulatory and Structural Reform*, Commonwealth of Australia, Canberra, page 14.

546 Cost-Benefit Analysis and Review of Regulation 2014, *The Statutory Review under section 152EOA of the Competition and Consumer Act 2010*, Canberra, page 24.

damages and civil penalties.[547] However, neither the ACCC nor a private party is able to seek a divestiture order from the court to break up the firm found to have misused its market power.

The Panel notes that divestiture as a remedy is raised in submissions to the Agricultural Competitiveness Green Paper and in submissions to this Review. For example, Master Grocers Australia/Liquor Retailers Australia considers:

> Whilst the inclusion of divestiture in a mandatory code would be a useful and powerful deterrent to misuse of market power, the additional inclusion of divestiture as a sanction in Section 46 of the CCA would be an appropriate powerful measure, including a deterrent, in overcoming conduct of the kind that is currently destroying healthy competition in the Australian supermarket industry. (DR sub, pages 20-21)

The Hilmer[548] and Dawson[549] reviews considered proposals for a specific divestiture remedy (to be used in circumstances other than mergers) to address competition concerns about businesses with significant market power. Those reviews did not recommend its adoption because of the potentially broad nature of such a remedy and difficulties in targeting the conduct of concern. The Dawson Review noted that divestiture as a remedy in the case of acquisitions leading to a substantial lessening of competition is different to divestiture as a remedy for misuse of market power. Divestiture in the context of mergers involves the court 'unwinding' a transaction rather than splitting a firm that has expanded through organic growth.[550]

Providing a general divestiture provision within the CCA for Part IV offences could, if exercised, see matters of market conduct dealt with through a structural remedy. Although reducing the size of a firm may limit its ability to misuse its market power, divestiture is likely to have broader impacts on the firm's general efficiency. Such changes could also have negative flow-on effects to consumer welfare. It is also possible that divested parts of a business might be unviable.[551] Further, it would leave the redesign of a firm or industry in the hands of the court, which is generally not well positioned to make decisions about industry policy.

In the US, divestiture is available as a remedy for violations of section 2 of the Sherman Act (the anti-monopolisation provision). However, divestiture is ordered only rarely: the last major use of the divestiture remedy was the 1982 consent decree that broke the American Telephone and Telegraph Company into a number of smaller companies:[552]

> Structural remedies present a number of difficulties and normally are reserved for cases in which a conduct remedy is insufficient … The least common and most complex form of structural remedy is breaking the dominant firm into competing entities. This sort of

547 *Competition and Consumer Act 2010*, Part VI.

548 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page 163.

549 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act*, CanPrint Communications, Canberra, page 150.

550 Ibid., page 162.

551 See discussion in Senate Standing Committee on Legal and Constitutional Affairs 1991 (Cooney Committee) *Mergers Monopolies and Acquisitions — Adequacy of Existing Legislative Controls*, Canberra, pages 89-93.

552 Davey, A. 2012, *The introduction of a general divestiture provision under Australian competition law*, Sapare Research Group (Report prepared for Coles), Canberra, page 21. In June 2000, the United States District Court for the District of Columbia ordered a breakup of Microsoft, a decision later reversed on appeal by the D.C. Circuit Court of Appeals. The matter was ultimately settled in November 2001, imposing behavioural rather than structural sanctions.

> remedy has not been used in the United States in recent decades but was applied in the landmark *American Tobacco* and *Standard Oil* cases nearly a century ago.[553]

In light of the above, the Panel considers the existing range of remedies is sufficient to deter a firm from misusing its market power and to protect and compensate parties that have been harmed by such unlawful conduct. Where section 46 is breached, the court already has available to it a wide range of sanctions, including: pecuniary penalties that can greatly exceed the benefit the firm has obtained from the conduct; a range of remedial orders, such as compensation payments to parties who have suffered loss or damage; and injunctive relief.[554]

Ultimately, if circumstances were to arise where the public interest would be served by breaking up a firm or redesigning an industry, for competition or other policy purposes, it is open to the Parliament to legislate to bring about such reform. Such action would be expected to be rare and exceptional. Nevertheless, the Panel considers it preferable for any such action to be implemented by the Parliament rather than by the court as a remedy for breaches of competition law.

The Panel's view

The Panel considers that section 46 is deficient in its current form. The 'take advantage' limb of section 46 is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct. The 'purpose' limb, that prohibits conduct if it has the purpose of harming competitors, is misdirected as a matter of policy and out of step with equivalent international approaches.

The provision should be directed to conduct that has the purpose, or would have or be likely to have the effect, of substantially lessening competition, in a similar manner to the prohibitions in sections 45, 47 and 50. The provision should also include legislative guidance directing courts and firms to weigh the pro-competitive and anti-competitive impact of conduct.

As with any change to the law, amending section 46 will involve some uncertainty, but the proposal adopts the long-standing expressions 'substantial degree of power in a market' and 'substantial lessening of competition'.

Although uncertainty may lead to some cost, the Panel considers this is outweighed by the benefit of a more effective prohibition on unilateral anti-competitive conduct.

553 OECD 2006, *Remedies and Sanctions in Abuse of Dominance Cases*, US contribution to OECD Policy Roundtables, Paris, pages 175-176.

554 *Competition and Consumer Act 2010*, sections 76, 87 and 80 respectively.

Recommendation 30 — Misuse of market power

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.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of market power and anti-competitive purpose may be determined.

Authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision.

This recommendation is reflected in the model legislative provisions in Appendix A.

19.2 Misuse of market power in a trans-Tasman context

In the context of simplifying the CCA, the Draft Report recommends removing the provision concerning misuse of market power in a trans-Tasman market, section 46A (and the accompanying section 46B).

Section 46A was enacted in 1990 (with a reciprocal provision in New Zealand's Commerce Act) following the 1988 Australia/New Zealand Closer Economic Relations — Trade Agreement on Acceleration of Free Trade in Goods.[555] Importantly, that agreement abolished anti-dumping measures between Australia and New Zealand. The object of section 46A was to use competition law as a safeguard against dumping-type conduct (that is, predatory pricing across the Tasman).

Section 46A is in substantially the same form as section 46, save that it prohibits a firm taking advantage of substantial market power in a trans-Tasman market (a market in Australia, New Zealand or both) with the purpose of harming a competitor in an Australian market (other than a market for services, reflecting the dumping origins of the section).

Insofar as a corporation takes advantage of market power in an Australian market or a market that spans both Australia and New Zealand, section 46A overlaps with section 46 in the CCA and is redundant. The principal circumstance in which the section has potential additional operation is if a

555 Ray, R (Minister for Defence) 1990, Second reading speech: Trade Practices (Misuse of Trans-Tasman Market Power) Bill 1990, Canberra, 22 May.

firm with substantial market power in a New Zealand market (but not an Australian market) takes advantage of that power to harm a competitor in an Australian market involving the supply of goods.

The Panel questions the continued utility of the section because:

- First, since its enactment in 1990, the Panel is aware of only one case in which it has been invoked — an application for an interlocutory injunction, which was unsuccessful: *Berlaz Pty Ltd v Fine Leather Care Products Ltd* (1991) ATPR 41-118.
- Second, it is doubtful that the section is able to achieve its original aim — to prohibit predatory pricing in an Australian goods market by a firm with market power in New Zealand. This is because predatory pricing in those circumstances would typically require the predatory firm to possess market power in the Australian market, not a New Zealand market, since the predation could not be successful without market power in the Australian market.

Nevertheless, since section 46A was enacted as part of a package of reforms agreed between Australia and New Zealand relating to the trade in goods between the countries, its reconsideration should occur through consultations between both jurisdictions. Factors that might be considered during such consultations include:

- whether the reciprocal prohibitions in the CCA and New Zealand's Commerce Act have any significant operative effect;
- if section 46 of the CCA is reformed in line with the Panel's recommendation, whether the reciprocal prohibitions in both Acts ought to be reformed in like manner; and
- if the reciprocal provisions are retained, whether they should be extended to markets involving the supply of services.

The Panel's view

Reconsideration of section 46A should formally engage both jurisdictions to determine appropriate simplifications, amendments or removal of the provisions in each jurisdiction.

19.3 PRICE DISCRIMINATION

Price discrimination is the practice of charging different prices for the same or similar goods or services, where the price difference does not reflect differences in the cost of supply, for example, student, seniors and family discounts, 'early bird specials', and discounts for bulk purchases and group buying.

The effects of price discrimination will depend on the particular circumstances of the market. Pricing according to consumer willingness to pay can result in more consumers being able to obtain the good or service than if a common price were charged. In these circumstances, price discrimination can make goods or services more accessible and can enhance consumer choice.

Price discrimination was prohibited under the former *Trade Practices Act 1974* (TPA) until 1995, when the prohibition was removed (see Box 19.3). Nonetheless, awareness of price discrimination can irritate consumers who find themselves unable to purchase goods at the same price that others can.

Box 19.3: The former prohibition on price discrimination

Prior to 1995, the then TPA had a specific provision against certain types of price discrimination. The Hilmer Review found that this provision was contrary to the objective of economic efficiency and had not assisted small business. Further, instances where price discrimination may have an anti-competitive effect could be adequately dealt with by other parts of the law. The Hilmer Review concluded 'that a provision such as [section] 49 should form no part of a national competition policy'[556] and, in 1995, the former section 49 was repealed.

The Hilmer recommendations followed those of the Swanson (1976) and Blunt (1979) Committees, which had also proposed repealing the prohibition on price discrimination.[557] The issue was reconsidered in the Dawson Review in 2003. The Dawson Review found that empirical evidence did not indicate the need for further regulation of price discrimination.[558]

Some submissions call for reinstating a specific anti-competitive price discrimination provision, particularly in relation to the supply of goods to supermarkets.[559] For example, AURL FoodWorks states:

> The practice of suppliers selling to some customers at one price and to other comparable customers at a higher price is an on-going concern … Independent wholesalers are not able to obtain goods or services at prices comparable to those charged by suppliers to the major chain supermarkets. This is despite having central distribution warehouses of comparable size and capable of like performance to the major chains. (sub, pages 7-8)

Supporters of a price discrimination provision often argue that it would improve the ability of small businesses to compete, allowing them to be more responsive to consumer needs because it would remove the capacity of larger firms to price their product below the level charged by local, smaller retailers.[560] However, restricting pricing flexibility can be harmful to competition and thereby harm consumers, a view supported by many submissions to the Draft Report.[561]

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556 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page 80.

557 The Trade Practices Act Review Committee 1976, Report to the Minister for Business and Consumer Affairs noted that section 49 drew more criticism in submissions than any other and found that some suppliers took the law to mean that they were required to charge similar prices to all customers, which led to price rigidity and overall price increases.

The Trade Practices Consultative Committee 1979, Small business and the Trade Practices Act again called for the repeal of section 49. The Committee noted that the flexibility of pricing was impaired by the operation of section 49 and certain rigidities were introduced both by the section and the uncertainties of its application.

558 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act*, Canprint Communications, Canberra, page 97.

559 See, for example: Australian Motor Industry Federation, DR sub, page 10; Master Grocers Australia, DR sub, pages 21-22; Bi-Rite Roma, DR sub, pages 1-2; and WA Independent Grocers Association, DR sub, pages 1-2.

560 See generally submissions to the Senate Economics Committee, *Inquiry into the Trade Practices Amendment (Guaranteed Lowest Prices — Blacktown Amendment) Bill 2009*.

561 See, for example: Australian Information Industry Association, DR sub, pages 9-11; Alinta Energy, DR sub, page 3; Australasian Performing Right Association Limited & Australasian Mechanical Copyright Owners' Society, DR sub, page 5; Australian Automotive Aftermarket Association, DR sub, page 4; Australian Chamber of Commerce and Industry, DR sub, page 20; ACCC, DR sub, page 54; Australian Copyright Council, DR sub, pages 6-7; Communications Law Centre, UTS, DR sub, pages 3-4; Consumer Action Law Centre, DR sub, page 16; Electronic Frontiers Australia, DR sub, page 3; Daryl Guppy, DR sub, page 9; Law Council of Australia — Competition and Consumer Committee, DR sub,

Price discrimination should only be unlawful where it substantially lessens competition. The Panel agrees with the conclusions of previous reviews that anti-competitive price discrimination is best addressed under section 46. Some submissions to the Draft Report advise caution in relation to the reliance placed on section 46, and call for a more in-depth examination of the issue of price discrimination,[562] on the basis that some retailers are unable to buy products from their suppliers at a price that is lower than the retail prices being charged by their major competitors.

In the Panel's view, the proposal for reforming section 46 should assist in identifying and prohibiting such conduct (see Recommendation 30). That is, the reforms would catch conduct engaged in by the major competitor (a firm with a substantial degree of power in a market) with the purpose, effect or likely effect of substantially lessening competition. The court would consider whether the price differential is explained by efficiency, innovation or price competitiveness (such as that achieved through volume-based pricing from suppliers) and whether it prevents, restricts or deters competitive conduct or new entry in the market.

International price discrimination

International price discrimination occurs when a supplier charges different prices for goods or services according to the country in which the products are sold. It is a common practice for products that enjoy intellectual property (IP) protection, such as books, digital music and videos, and software. Both IP laws and technology provide the means to segment markets by country.

The Communications Law Centre, UTS states:

> … with respect to international price discrimination in relation to intellectual property products … copyright owners are entitled to:
>
> - segment markets by territory, and to enter into territorial licensing and distribution agreements;
> - discriminate as to price in different territories; and
> - use geoblocking measures to protect market segmentation. (DR sub, page 3)

The ACCC also notes:

> While such practices are not new, the rise of the digital economy has increased consumers access to global marketplaces and awareness of different (higher) prices that may be charged in their home country. (sub 1, page 117)

The Panel heard concerns about international price discrimination. For example, CHOICE points to evidence of price differences for music and movies from Apple's Australian and US iTunes stores. According to CHOICE, Australians can also pay up to 60 per cent more for clothing and up to 200 per cent more for cosmetics (sub, pages 13–15).

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page 34; National Seniors Australia, DR sub, pages 14-15; Queensland Law Society, DR sub, page 4; and Woolworths, DR sub, page 32.

562 See, for example: Australian Newsagents' Federation, DR sub, page 16; Law Council of Australia — SME Committee, DR sub, page 16; and Spier Consulting Legal, DR sub, page 15.

The Issues Paper notes that the Canadian Government has announced plans to introduce legislation to address country-specific price discrimination against Canadian consumers.[563] The Panel received submissions calling for a similar policy in Australia. Consumers SA states that it:

> ... encourages the review to explore the possibility of legislation to inhibit international price discrimination … (sub, page 3)

There are significant implementation difficulties associated with any attempt to prohibit international price discrimination. The American Bar Association notes:

> Regulation of international price differences is a risky endeavor. Even if regulation is limited to … 'unjustified' price discrimination, identifying such cases is extremely difficult given the complexity of the factors influencing pricing decisions in a given country … It could also create incentives for foreign suppliers to abandon or choose not to enter the Australian market, resulting in less choice for consumers and less interbrand competition in Australia. Likewise, Australian companies might opt out of overseas markets, or be constrained in their ability to compete in certain countries. (sub, page 3)

While technology, including geoblocking, can contribute to instances of international price discrimination, the growth of distribution channels, both physical and technological, can help consumers and businesses overcome price discrimination. For example:

- In markets for physical goods, mail-forwarding companies allow Australian consumers to buy goods in overseas jurisdictions and then have them forwarded to Australia.
- Product review websites and price monitoring and comparison sites can help consumers find the product or service that best meets their needs and at the best price (see further discussion in Chapter 16).

Some Australian consumers reportedly use virtual private networks to access digital content in overseas jurisdictions at the prices available in those jurisdictions.[564] These prices may be lower than those charged in Australia, or the content may not be available in Australia. The legality of these mechanisms is the subject of some debate and is likely to depend on the specific circumstances and the terms and conditions relating to the transaction. The Panel notes that the Australian Government has issued guidance pointing out that 'The Copyright Act does not make it illegal to use a [virtual private network] to access overseas content'.[565]

In its evidence to the House of Representatives Standing Committee Inquiry into IT pricing, the ACCC noted that mechanisms to circumvent international price discrimination can help to put competitive pressure on prices:

> If the methods start to become a big enough way in which consumers are circumventing the limitations … those methods can start to have … an impact in the market … An illustration of that is the response of some of the television networks to bring forward

563 On 9 December 2014 the Canadian Government tabled the Price Transparency Act, intended to give Canada's Commissioner of Competition the power to 'seek court orders to compel the production of evidence to expose discriminatory pricing practices that are not justified by higher costs in Canada and to publicly report to consumers on the findings'. See: <http://news.gc.ca/web/article-en.do?nid=913079>.

564 See, for example: Lobarto, R and Ewing, S 2014, *Australians embrace VPNs,* Swinburne University of Technology, 3 October, Melbourne, which notes that of 1,000 people surveyed about various aspects of their internet use, twenty per cent of respondents indicated they used a virtual private network, or web proxy, or both, to access the internet and download files at home.

565 Turnbull, M (Minister for Communications) 2014, *New Measures to tackle online copyright infringement*, media release, 10 December, Canberra.

> their broadcast of some of the popular overseas programming that would otherwise be made available through some of the illegal downloading sites.[566]

However, some submissions to the Draft Report strongly oppose actions that circumvent international price discrimination:

> Foxtel believes that the Panel's apparent desire to assist consumers to circumvent geo-blocks is misguided and dangerous … Furthermore, what the Panel does not appear to have appreciated is that any attempt to assist Australians to circumvent geo-blocks will have a real impact on the Australian businesses that invest in Australian content, create Australian jobs and pay tax in Australia. (Foxtel, DR sub, pages 11-12)
>
> ... geo-blocking exists as an important and internationally applied, if imperfect, tool for writers and publishers to trade and manage the supply of their electronic-format copyright works into other markets. (Australian Society of Authors, DR sub, page 7)

The Panel favours encouraging the use of market-based mechanisms to address international price discrimination rather than attempting to introduce a legislative solution.

The Panel notes the recommendations of the House of Representatives Standing Committee on Infrastructure and Communications in its July 2013 report into IT pricing in Australia.[567] The Committee recommends removing restrictions on parallel imports, consistent with Recommendation 13.

In addition, the Committee makes a number of recommendations (set out in Box 19.4) that the Panel endorses in principle as a means of encouraging market-based, consumer-driven solutions to concerns about international price discrimination. The Committee also makes a number of recommendations that could form part of the overarching review of IP the Panel proposes in Recommendation 6.

Box 19.4: Relevant recommendations of House of Representatives Standing Committee Report on IT pricing in Australia

House of Representatives Committee Recommendations that the Panel supports in principle include:

Recommendation 5

The Australian Government amend the Copyright Act's section 10(1) anti-circumvention provisions to clarify and secure consumers' rights to circumvent technological protection measures that control geographic market segmentation.

566 Bezzi, M (Executive General Manager ACCC) 2012, Official Committee Hansard, House of Representatives Standing Committee on Infrastructure and Communications, Information Technology Pricing, ACCC, 31 October, Canberra.

567 House of Representatives Standing Committee on Infrastructure and Communications 2013, *At what cost? IT pricing and the Australia tax,* Canberra.

Box 19.4: Relevant recommendations of House of Representatives Standing Committee Report on IT pricing in Australia *(continued)*

Recommendation 6

The Australian Government investigate options to educate Australian consumers and businesses as to:

- the extent to which they may circumvent geoblocking mechanisms in order to access cheaper legitimate goods;
- the tools and techniques which they may use to do so; and

the way in which their rights under the Australian Consumer Law may be affected should they choose to do so.

Recommendation 8

The Committee recommends the repeal of section 51(3) of the *Competition and Consumer Act 2010*.

House of Representatives Committee Recommendations that the Panel considers should form part of a review of IP laws:

Recommendation 7

The Committee recommends that the Australian Government, in conjunction with relevant agencies, consider the creation of a 'right of resale' in relation to digitally distributed content, and clarification of 'fair use' rights for consumers, businesses, and educational institutions, including restrictions on vendors' ability to 'lock' digital content into a particular ecosystem.

Recommendation 9

The Committee recommends that the Australian Government consider enacting a ban on geoblocking as an option of last resort, should persistent market failure exist in spite of the changes to the Competition and Consumer Act and the Copyright Act recommended in this report.

Recommendation 10

That the Australian Government investigate the feasibility of amending the Competition and Consumer Act so that contracts or terms of service which seek to enforce geoblocking are considered void.

The Panel's view

Price discrimination can be beneficial to consumers. Accordingly, re-introducing specific provisions to the CCA that prohibit anti-competitive price discrimination could ultimately reduce consumer choice by discouraging flexible and innovative pricing.

Anti-competitive price discrimination can be adequately dealt with by the existing provisions of the law, particularly section 46 (and especially if amended as proposed in Recommendation 30).

Attempting to legislate against international price discrimination could result in significant implementation and enforcement difficulties and risks negative unintended consequences.

Instead, the Panel supports moves to address international price discrimination through market solutions that empower consumers. These include removing restrictions on parallel imports and ensuring that consumers are able to take legal steps to circumvent attempts to block their access to cheaper legitimate goods.

Recommendation 31 — Price discrimination

A specific prohibition on price discrimination should not be reintroduced into the CCA. Where price discrimination has an anti-competitive impact on markets, it can be dealt with by the existing provisions of the law (including through the Panel's recommended revisions to section 46 (see Recommendation 30)).

Attempts to prohibit international price discrimination should not be introduced into the CCA on account of significant implementation and enforcement complexities and the risk of negative unintended consequences. Instead, the Panel supports moves to address international price discrimination through market solutions that empower consumers. These include removing restrictions on parallel imports (see Recommendation 13) and ensuring that consumers are able to take lawful steps to circumvent attempts to prevent their access to cheaper legitimate goods.

19.4 UNFAIR AND UNCONSCIONABLE CONDUCT IN BUSINESS TRANSACTIONS

The Terms of Reference task the Review with examining provisions of the Australian Consumer Law (ACL) that deal with unfair and unconscionable conduct, but only insofar as they relate to small business.

As noted earlier in this section, a firm that enjoys a strong bargaining position because of its size and importance in a market has the potential to abuse that strength in dealings with suppliers and business customers. Such conduct may not contravene section 46 — it may not materially harm a competitor. However, it may so offend accepted standards of business behaviour that it is unconscionable.

Statutory protection against unconscionable conduct, which recognises the disparity in bargaining power between buyers and sellers,[568] was first introduced into the law in 1986 as a consumer protection measure.[569] Since then, the effectiveness of the CCA's unconscionable conduct provisions has been reviewed a number of times, leading to an expansion of their scope to cover certain business transactions,[570] the unification of consumer and business unconscionable conduct provisions,[571] and the introduction of interpretive guidance for the provisions.[572] The introduction of

568 Trade Practices Act Review Committee 1976, Report to the Minister for Business and Consumer Affairs, at 9.56-9.62.

569 *Trade Practices Revision Act 1986.*

570 For example, former section 51AA of the then *Trade Practices Act 1974*, inserted by the *Trade Practices Legislation Amendment Act 1992*; and section 51AC of the then *Trade Practices Act 1974*, inserted by the *Trade Practices Amendment (Fair Trading) Act 1998.* For background see Report to the Hon Dr Craig Emerson MP Minister for Small Business, Independent Contractors and the Service Economy, Minister for Competition Policy and Consumer Affairs 2010, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*.

571 *Competition and Consumer Legislation Amendment Act 2011.*

572 Ibid. See section 22 of the Australian Consumer Law (ACL) and Part 2-2 of the ACL more generally.

the business unconscionable conduct provision was intended to 'improve business conduct in the Australian economy and provide a more efficient and equitable basis upon which the forces of competition can operate'.[573]

As discussed in Part 1, the CCA is not directed at protecting competitors but rather competition. This requires competition law to balance preventing anti-competitive behaviour that undermines competition against not inhibiting behaviour that is part of normal vigorous competition.

A separate but parallel principle is that the business and wider community expect business to be conducted according to a minimum standard of fair dealing. There are sound economic and social reasons for enshrining minimum standards within the law. Because it is difficult to prescribe such minimum standards, the law prohibits unconscionable conduct, leaving it to the courts to determine in a given case whether the conduct fails to conform to the dictates of good conscience. Unconscionable conduct is assessed by reference to the particular circumstances in which the conduct occurs and often (but not always) includes a pattern of behaviour which, when taken together, constitutes unconscionability.

A number of submissions, particularly from agricultural producers, raise concerns that the unconscionable conduct provisions are deficient because of the lack of specific definition or the difficulty in proving that the conduct meets the standard of judicially-defined unconscionable conduct.[574]

The Panel notes that, in December 2014, the Federal Court by consent made declarations that Coles Supermarkets Australia Pty Ltd engaged in unconscionable conduct in 2011 in its dealings with certain suppliers. The Court also ordered Coles to pay combined pecuniary penalties of $10 million, and Coles agreed to enter a court enforceable undertaking with the ACCC to provide redress to more than 200 of its suppliers referred to in the proceedings.[575]

This successful conclusion to a case of business-to-business unconscionable conduct indicates that the current unconscionable conduct provisions appear to be working as intended. However, active and ongoing review of these provisions should occur as other matters arise.

Issues relating to whether small business, in particular, can access justice in a time-efficient and low-cost way are addressed in Chapter 23.

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573 See Reith, P (Minister for Workplace Relations and Small Business) 1997, Second reading speech: Trade Practices Amendment (Fair Trading) Bill 1997, Canberra, 30 September. Prohibitions against unfair contract terms are also aimed at addressing unequal bargaining power. These provisions were introduced as part of the ACL reforms in 2010 to protect consumers from unfair terms in standard form contracts and reflect concerns that consumers have little or no opportunity to negotiate with businesses about such contracts — see Emerson, C (Minister for Competition and Consumer Affairs) 2009, Second reading speech: Trade Practices Amendment (Australian Consumer Law) Bill 2010, Canberra, 24 June. The Australian Government announced prior to the 2013 election that it would seek to extend the ACL protections dealing with unfair contract terms to small business. — see <www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms>.

574 See, for example: AgForce Queensland, sub, page 2; Australian Chicken Growers' Council Limited, sub, pages 7-8; Australian Dairy Farmers Limited, sub, pages 9-10; Australian Newsagents' Federation, sub, page 11; and National Farmers' Federation, sub, page 7.

575 See Australian Competition and Consumer Commission 2014, Court finds Coles engaged in unconscionable conduct and orders Coles pay $10 million penalties, media release, 22 December, Canberra.

The Panel's view

The Panel has heard concerns expressed by small businesses and suppliers in respect of behaviours of larger businesses in their supply chains. The business unconscionable conduct provisions were introduced specifically to address such concerns.

The Panel believes that the current unconscionable conduct provisions are working as intended to meet their policy goals.

Enforcing business-to-business unconscionable conduct provisions is an important function of the ACCC. The Panel notes the ACCC's recent actions in the supermarket sector against unconscionable conduct in dealings with suppliers.

Active and ongoing review of these provisions should occur as matters progress through the courts to ensure the provisions meet their policy goals. If deficiencies become evident, they should be remedied promptly.

19.5 CODES OF CONDUCT

An industry code is 'a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry'.[576] Codes are intended to influence or control commercial behaviour within a particular industry. Codes may also contain a dispute resolution framework for those covered by the code.

In the context of the CCA, there are two types of codes: mandatory prescribed codes and voluntary opt-in prescribed codes. Outside the CCA, industries can also develop their own voluntary codes.[577] Most submissions referring to codes of conduct support their use,[578] with the Australian Automotive Aftermarket Association noting that industry codes are often seen as a substitute for government regulation (DR sub, page 5). The Central Markets of Australia Association states, that when developing industry codes, they:

> … should be to promote good commercial practice, and/or prohibit other specific practices unique to an industry sector. Codes should not, however, exist to restrict competition, reduce commercial feasibility and/or establish an unintended commercial bias against one part of an industry (when justified). (DR Sub, page 3)

A number of the parties who have sought to rely on the protection of prescribed or voluntary codes express concerns about their coverage and/or the effectiveness of dispute resolution processes.[579]

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576 *Competition and Consumer Act 2010*, subsection 51ACA(1).

577 The language used in the CCA is confusing, as voluntary codes may be created by legislation or ministerial order. The paradox of this is noted by Freiberg who states 'There are thousands of voluntary codes of conduct or practice that operate independently of government. However, and possibly oxymoronically 'voluntary codes' may be recognised or created by legislation or ministerial order.' Freiberg, A 2010, *The Tools of Regulation*, The Federation Press, Sydney, page 192.

578 See, for example: Australian Newsagent's Federation, sub, pages 12-13; Coles Group Limited, sub, page 12; Insurance Australia Group, sub, pages 15-16; Office of the Australian Small Business Commissioner, sub, pages 5-6; Master Grocers Australia, sub, page 53; Metcash, sub, page 9; and Woolworths Limited, sub, pages 78-79.

579 See, for example: AgForce Queensland, sub, page 2; Australian Automotive Dealer Association, sub, pages 7-8; Australian Dairy Farmers Limited, sub, page 12; Australian Food and Grocery Council, sub, pages 29-30; Australian Forest Products Association, sub, page 2; Australian National Retailers Association, sub, pages 48-49; CHOICE, sub, pages 36-43; Consumer Action Law Centre, sub, pages 21-24; Insurance Australia Group, sub, page 16; Master Grocers Australia, sub, pages 53-57; and National Farmers' Federation, sub, pages 10-11.

Submissions also support improving the effectiveness of the Horticulture Code of Conduct[580] and the Grocery Industry (Unit Pricing) Code of Conduct.[581]

A number of submissions also call for a supermarket code. These are discussed further in Chapter 15.

The Panel notes that, on 24 September 2014, the CCA was amended to give the ACCC additional powers to issue infringement notices for alleged breaches of industry codes.[582] These new powers, which apply from 1 January 2015, also allow the court to impose penalties on businesses that breach prescribed industry codes incorporating these new penalties.

The first code to incorporate the new civil penalties is the Franchising Code of Conduct, which took effect on 1 January 2015. A breach of the Franchising Code exposes a franchisor or franchisee to an infringement notice penalty of $8,500 issued by the ACCC or a pecuniary penalty of up to $51,000 imposed by the court.

The new remedies and powers are a significant development. However, experience with administering the new provisions is needed before determining whether they should apply more broadly.

The Panel's view

Codes of conduct play an important role under the CCA by providing a flexible regulatory framework to set norms of behaviour that generally apply to relationships between businesses within a particular industry.

The Panel has heard from parties who believe that particular codes lack meaningful enforcement sanctions and the capacity for public enforcement.

Introducing civil penalties and infringement notices for breaches of codes strengthens the CCA enforcement options.

Having these options available for CCA codes is a significant development. Proponents of new CCA codes could consider whether penalties should be included for non-compliance.

580 Central Markets of Australia Association, DR sub, page 3.

581 Queensland Consumers Association, DR sub, page 1.

582 By the *Competition and Consumer Amendment (Industry Code Penalties) Act 2014*.

20 Anti-competitive Agreements, Arrangements and Understandings

The *Competition and Consumer Act 2010* (CCA) prohibits certain types of provisions within agreements, arrangements and understandings between competitors. These types of arrangements are commonly called horizontal arrangements because they occur between competitors trading at the **same** level of the supply chain. Cartel provisions and exclusionary provisions (where competitors agree not to supply or acquire from particular persons or classes of persons) are prohibited per se. Other provisions are prohibited if they have the purpose, effect or likely effect of substantially lessening competition.

The CCA also prohibits certain types of conditions that are imposed as part of trading arrangements between suppliers and their customers. These types of arrangements are commonly called vertical arrangements because they occur between firms that trade at **different** levels of the supply chain. Resale price maintenance (where a supplier requires a retailer to price its products at no less than a minimum retail price specified by the supplier) is prohibited per se. Third-line forcing (where a supplier requires its customer to acquire another product from another supplier) is also prohibited per se. Exclusive dealing (where suppliers restrict the freedom of their customers to deal with other suppliers or within particular geographic areas, and likewise for acquirers) and other conditions are prohibited if the condition has the purpose, effect or likely effect of substantially lessening competition.

20.1 Cartel conduct

Prior to 2009, price fixing provisions and exclusionary provisions were prohibited per se and were subject to civil penalty sanctions.

The Dawson Review recommended introducing criminal sanctions for cartel conduct.[583] That recommendation was implemented in 2009 by the enactment of Division 1 of Part IV of the CCA, which introduced criminal and civil prohibitions of cartel conduct. In line with overseas practice and Organisation for Economic Co-operation and Development (OECD) recommendations,[584] the CCA now prohibits arrangements between competitors that fix prices, restrict outputs in production and supply chains, divide markets by allocating customers, suppliers or territories, or rig bids.

Despite the introduction of the cartel prohibitions, the prohibition of exclusionary provisions remains in the CCA.

Submissions express broad support for serious cartel conduct being prohibited per se and for imposing criminal sanctions for that conduct.[585] However, a range of submissions criticise the form and scope of the cartel prohibitions. Two principal concerns are raised:[586]

583 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act*, CanPrint Communications, Canberra.

584 OECD 1998, Recommendation of the Council concerning Effective Action Against Hard Core Cartels, Paris.

585 See, for example: BHP Billiton, sub, page 41; and Ian Stewart, sub, page 13.

586 See, for example: Arnold Bloch Leibler, sub, page 2; Baker & McKenzie, sub, page 1; Caron Beaton-Wells and Brent Fisse, sub, page 9; and Law Council of Australia — Competition and Consumer Committee, sub, pages 50-52.

- The provisions are unnecessarily complex, making the law difficult to understand and comply with.
- The provisions have been framed too broadly and criminalise commercial conduct that ought not be characterised as cartel conduct, including joint venture activity and vertical arrangements between suppliers and their customers.

Complex drafting

The Panel agrees that the cartel provisions are complex. One explanation for their complexity is that laws that impose criminal sanctions must take account of the requirements of the Commonwealth *Criminal Code Act 1995*. The Criminal Code provides that criminal offences consist of physical elements and fault elements. The Australian Competition and Consumer Commission (ACCC) notes:

> The process of prescribing the cartel offences with the necessary degree of specificity required of a criminal offence has resulted in drafting that is complex and which may not provide adequate certainty. (sub 1, page 93)

Since serious cartel conduct can cause significant damage to the competitive process, the Panel supports using criminal sanctions to punish and deter cartel behaviour. While drafting criminal conduct provisions must necessarily involve a degree of specificity, the Panel considers that the cartel provisions in their current form are overly complex and do not provide businesses with sufficient clarity and certainty.

The New Zealand Parliament is considering amendments to that country's competition laws to introduce criminal sanctions for cartel conduct. The proposed amendments are contained in the Commerce (Cartels and Other Matters) Amendments Bill 2014. The proposed cartel provisions are similar in many respects to the Australian cartel law, but are in a shorter and simpler form. The Panel considers that the proposed approach in New Zealand provides a useful illustration of how the law might be simplified in Australia. Simplification of the cartel provisions is broadly supported in submissions.[587]

However, both the ACCC and the Commonwealth Director of Public Prosecutions (CDPP) raise concerns about moves to simplify the cartel offences. The ACCC considers that the suggested changes would go beyond mere simplification, reducing the scope of the cartel provisions (DR sub, pages 36-40). The CDPP notes 'the almost inevitable tension between the laudable goals of clarity and flexibility in … legislative drafting' and questions the justification for amending the legislation before it has been tested in court (DR sub, page 3).

The Panel considers that the complex definitions used to describe cartel conduct can and should be simplified. The separate elements for 'purpose condition', 'purpose/effect condition' and 'competition condition' can be written more directly and simply into the definitions for the cartel provisions to be covered by the law, without giving rise to the concerns raised by the ACCC or the CDPP. The Panel's model legislative provisions in Appendix A preserve the essential elements of each

587 See, for example: AGL Energy Limited, DR sub, page 5; Arnold Bloch Leibler, DR sub, page 1; ASTRA Subscription Media Australia, DR sub, page 7; Australian Corporate Lawyers Association, DR sub, page 3; Australian Newsagents' Federation, DR sub, page 10; Australian Recording Industry Association, DR sub, pages 3-4; BHP Billiton, DR sub, page 4; Coles Group Limited, DR sub, page 7; Consult Australia, DR sub, page 3; Julie Clarke, DR sub, page 2; Law Council of Australia — Competition and Consumer Committee, DR sub, pages 9-10; Law Council of Australia — SME Committee, DR sub, page 13; Master Builders Association, DR sub, page 15; MasterCard, DR sub, page 2; Origin Energy, DR sub, pages 1-2; Queensland Law Society, DR sub, page 2; and Retail Guild of Australia, DR sub, page 6.

of the cartel prohibitions — price fixing, restricting output, market allocation and bid rigging — but express them in a simpler form.

The Panel also considers that the prohibition of exclusionary provisions, separately from cartel conduct, is unnecessary and increases the complexity of the law. The definition of exclusionary provisions overlaps substantially with the definition of market sharing, a form of cartel conduct. Many submissions agree, supporting the removal of section 4D of the CCA.[588]

The ACCC submits that, although overlap exists between the cartel provisions and the definition of exclusionary provisions, there are some gaps. The ACCC does not support removing section 4D unless its full scope is carried across to the cartel provisions (DR sub, page 42). The Panel recommends that the separate prohibition of exclusionary provisions be removed from the CCA, with adjustments made to the cartel provisions to cover any resulting gaps in the law. The Panel's recommendation is reflected in the model legislative provisions at Appendix A.

Modifying the scope of the cartel prohibitions

As noted earlier, competition laws must achieve the correct balance between prohibiting anti-competitive conduct and not prohibiting pro-competitive conduct. This is particularly important in the context of the cartel law, which prohibits conduct per se and imposes criminal sanctions.

Submissions raise concerns that the existing cartel law captures conduct that ought not to be prohibited, either because the prohibitions are too broad or the current exemptions are too narrow. Specific problems with the current law have been raised:

- The cartel law is not limited to conduct that harms competition in markets in Australia.
- The 'competition condition' for the application of the cartel law is set at a very low threshold.
- The exceptions for joint ventures and for vertical supply arrangements are each too narrow.

Market limitation

Australia's competition laws are generally directed at conduct that harms competition in markets in Australia (see Chapter 18). This is because the CCA is concerned with the economic welfare of Australians, not citizens of other countries.

However, the cartel conduct prohibition is not expressly limited to arrangements affecting competition in Australian markets. In *Norcast v Bradken*,[589] the first and only case to consider the cartel prohibitions to date, the cartel prohibitions were found to be applicable to an arrangement concerning a tender for the sale of a Canadian corporation, which had business operations in Canada, Malaysia and Singapore, where the seller was based outside Australia and the tender was conducted outside Australia.

In the Draft Report, the Panel expresses the view that the cartel provisions should apply to conduct affecting goods or services supplied or acquired in Australian markets in a similar manner to the other competition law prohibitions. The ACCC submits that this change has the potential to create complexity in the context of criminal proceedings because, in a given case involving international

588 See, for example: ASTRA Subscription Media Australia, DR sub, page 7; Julie Clarke, DR sub, page 2; Coles Group Limited, DR sub, page 7; Law Council of Australia — Competition and Consumer Committee, DR sub, page 6; MasterCard, DR sub, page 2; Queensland Law Society, DR sub, page 2; and Retail Guild of Australia, DR sub, page 6.

589 *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235.

trade, it would require a jury to make a determination about market boundaries, which is a somewhat abstract economic concept (DR sub, page 37).

The Panel agrees that it would be inappropriate to require a jury to make a determination that involves abstract economic concepts. However, the Panel remains of the view that, for cartel conduct to be an offence in Australia, it should have an effect on trade or commerce within, to or from Australia. This is consistent with the treatment of cartel conduct (and competition law more generally) in comparable overseas jurisdictions (see Box 20.1).

Box 20.1: International comparisons of cartel conduct

In the **US**, the Foreign Trade Antitrust Improvements Act 1982 amended the Sherman Act so that it would not apply to conduct involving trade or commerce with foreign nations unless, relevantly, such conduct 'has a direct, substantial and reasonably foreseeable effect on US domestic trade or commerce or on export trade … of a person engaged in such trade or commerce in the US'.[590]

The effect of the Foreign Trade Antitrust Improvements Act was considered by the US Supreme Court in *F. Hoffman La Roche Ltd v Empagran SA* (2004). The Supreme Court concluded that the Sherman Act did not grant relief in respect of the foreign effects of foreign cartel conduct. Breyer J (delivering the opinion of the court) observed: 'The [Foreign Trade Antitrust Improvements Act] seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however, anti-competitive, as long as those arrangements adversely affect only foreign markets … It does so by removing from the Sherman Act's reach (1) export activities and (2) other commercial activities taking place abroad, unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States.'

In **Europe**, Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits 'agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition **within the internal market**' (being the European Economic Area).

In **New Zealand**, the proposed cartel laws contained in the Commerce (Cartels and Other Matters) Amendments Bill 2014 restrict the cartel conduct prohibition to conduct affecting the supply or acquisition of goods or services in New Zealand.

An international comparison of approaches to this issue is included at Appendix B.

The Panel considers that an approach, similar to that proposed in the New Zealand Cartel Bill, should be included in Australia's cartel law, confining the prohibition to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on business within Australia. The Panel's recommendation is reflected in the model legislative provisions at Appendix A.

Competing firms

Cartel conduct involves two or more competitors agreeing with each other not to compete. Cartels harm consumers because they usually increase prices or reduce choice.

590 15 US Code § 6a — Conduct involving trade or commerce with foreign nations.

The cartel prohibition sets a very low threshold for its application. In *Norcast v Bradken* the Federal Court concluded that the prohibition applies to an arrangement between corporations if there is a possibility (other than a remote possibility) that they are or would be in competition with each other.[591]

The Panel considers this threshold is too low. Corporations that are not in competition with each other in their immediate markets commonly undertake joint or collaborative activities that produce consumer benefits. Under the current law, those activities would constitute cartel conduct and be subject to criminal sanctions if there is a possibility that they might compete in the relevant field of activity.

The Panel considers the cartel prohibition should only apply to corporations that are in competition with each other or are likely to be in competition with each other, where likelihood is assessed on the balance of probabilities (that is, more likely that not).

Joint ventures

Joint ventures are a means by which two or more persons collaborate to undertake a commercial activity. They can be pro-competitive when they are employed as a means of developing new products or services or producing existing products or services more efficiently. However, they may also have anti-competitive effects, particularly where the participants are strong competitors in the field of activity proposed to be the subject of the joint venture.

The CCA provides exemptions from the criminal (section 44ZZRO) and civil (section 44ZZRP) cartel prohibitions for joint ventures, but the exemption is narrowly framed. It only applies where:

- the cartel provision is in a contract;
- it is for the purposes of a joint venture;
- the joint venture is for the production and/or supply of goods or services;
- in the case of an unincorporated joint venture, it is carried on jointly by the parties to the contract; and
- in the case of an incorporated joint venture, the joint venture company has been formed to enable the parties to carry on the joint venture under their joint control or ownership.

Submissions raise concerns that the narrow application of the current exemption is limiting legitimate commercial transactions. Some submissions note inconsistencies with other provisions of the CCA dealing with joint ventures.[592]

Exempting joint ventures from the cartel conduct prohibition does not remove them from the scope of the CCA. A joint venture that has the purpose, effect or likely effect of substantially lessening competition will be prohibited by section 45 of the CCA. Accordingly, the relevant question is whether joint ventures should be assessed under the cartel prohibition, which imposes per se liability and criminal sanctions, or assessed under the usual test of substantially lessening competition.

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591 *Norcast S.ár.L v Bradken Limited* (No 2) [2013] FCA 235 at para 259.

592 See, for example: Arnold Bloch Leibler, sub, page 3; Baker & McKenzie, sub, page 3; Caron Beaton-Wells and Brent Fisse, sub, pages 13-14; Consult Australia, sub, pages 1-2; International Bar Association (Antitrust Committee), sub, pages 25-26; Law Council of Australia — Competition and Consumer Committee, sub, page 9; Minter Ellison, sub, page 5; Queensland Law Society, sub, pages 10-12; and Shopping Centre Council of Australia, sub, pages 25-27.

The ACCC expresses a concern that, in its experience, cartelists have claimed their collaboration is a joint venture and sought to disguise their activities to evade the law (DR sub, page 39).

The Panel considers that joint ventures should be assessed against a competition test and that the current joint venture defence to cartel conduct is too narrow. The various limitations in the defence are unnecessary and increase business compliance costs. In particular, the defence need not be confined to provisions within written contracts (joint ventures include less formal documentation, including operating procedures) nor confined to production and supply joint ventures.

Again, as a comparison, the New Zealand Cartel Bill contains a broader exemption in respect of collaborative activity. Although the New Zealand exemption may be too broad, the limitations in the Australian law should be broadened.

Specifically, the Panel recommends three changes to the current exemption. First, the exemption should apply to joint venture provisions whether the provisions are contained in a contract, or form part of less formal arrangements such as management or operating protocols. Second, the exemption should apply to any joint venture for the production, supply, acquisition or marketing of goods or services. Third, the exemption should apply to provisions that satisfy any of the following tests:

- the provision relates to goods or services that are acquired, produced, supplied or marketed by or for the purposes of the joint venture;
- the provision is reasonably necessary for undertaking the joint venture; or
- the provision is for the purpose of the joint venture.

The Panel's recommendation is reflected in the model legislative provisions at Appendix A.

Vertical supply arrangements

Restrictions imposed in connection with the supply or acquisition of goods or services are common and may be pro-competitive or anti-competitive depending on the circumstances. For example, a franchisor may require its franchisees to confine their trading to a particular geographic region. Provided the products supplied by the franchise compete with a wide range of other products, the geographic restriction may increase competition by encouraging franchisees to invest in their designated business area. For that reason, vertical supply restrictions are usually only prohibited if they have the purpose, effect or likely effect of substantially lessening competition.

On occasions, a business (such as a wholesaler) may supply goods or services to another business (such as a retailer) and also compete with the retailer in the retail market. The business may wish to supply its goods or services to the second business on the condition that the second business confine its retail activities to a particular geographic region. Again, such trading conditions may be pro-competitive or anti-competitive, depending upon the range of competing suppliers and products in the retail market. They should only be prohibited if they substantially lessen competition. However, without a suitable exemption, such conditions would be a per se offence under the cartel laws.

The CCA currently provides an exemption from the cartel laws for vertical supply restrictions that constitute exclusive dealing within section 47 of the CCA. Although section 47 covers various forms of exclusive dealing, it does not cover all forms of vertical supply restrictions (this is discussed below in Section 20.3). Accordingly, vertical supply restrictions not covered by section 47 are also outside the exemption to the cartel conduct prohibitions. Submissions raise concerns that the exemption for vertical restrictions, based on section 47, is too narrow and should be broadened.

The ACCC cautions against a broader carve-out from the cartel laws for vertical restrictions (DR sub, page 40) and disagrees with the relevant amendments to section 47 proposed in the Draft Report:

> The ACCC does not support the proposed amendments to section 47 as proposed by Draft Recommendation 28. The ACCC considers that these amendments will inappropriately broaden the scope of the prohibition which, due to the anti-overlap provisions, will consequently narrow the application of the cartel and exclusionary dealing provisions. (DR sub, page 56)

The Panel considers that a broader exemption should be included in the cartel laws to ensure that vertical supply restrictions are assessed under a substantial lessening of competition test rather than a per se prohibition. While the ACCC's concerns are noted, the Panel does not believe that the current exemption, which is formulated by reference to section 47, is adequate to protect legitimate trading conduct from the cartel laws.

It is possible to formulate a clearer exemption that defines vertical trading restrictions that should be exempt from the per se cartel prohibitions and assessed under a substantial lessening of competition test. Again, as a comparison, the New Zealand Cartel Bill contains a broader exemption in respect of vertical supply restrictions. The Panel's recommendation is reflected in the model legislative provisions at Appendix A.

The Panel's view

The Panel supports a specific set of per se prohibitions in the CCA, with criminal sanctions aimed at serious cartel conduct. However, the current drafting of those provisions has given rise to concerns about their scope and whether they only target harmful anti-competitive conduct.

The prohibitions against cartel conduct should be simplified and the following specific changes made:

- The provisions should apply to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on business within Australia.
- The provisions should be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility.
- A broader exemption should be included for joint ventures, whether for the production, supply, acquisition or marketing of goods or services, recognising that such conduct will be prohibited by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition.
- An exemption should be included for trading restrictions imposed by one firm on another in connection with the supply or acquisition of goods or services, recognising that such conduct will be prohibited by section 45 of the CCA (or section 47 if retained) if it has the purpose, effect or likely effect of substantially lessening competition.

The CCA should also be amended to remove the prohibition on exclusionary provisions, with an amendment to the definition of cartel conduct to address any resulting gap in the law.

Immunity policy

The cartel conduct legislation was accompanied by administrative arrangements to support a joint CDPP/ACCC leniency program to be available for criminal cartel offences and the corresponding civil prohibitions. Owing to their secretive nature, detecting the existence, activities and impact of cartels can be difficult. An immunity policy can encourage businesses and individuals to disclose cartel behaviour and be a powerful disincentive to the formation of cartels.[593]

Submissions support the existence of the ACCC's immunity policy, which applies to cartel conduct and provides protection against civil proceedings instituted by the ACCC. Immunity from criminal prosecution is determined by the CDPP in accordance with the same principles that determine immunity under the ACCC's immunity policy.[594]

Where the ACCC is of the view that the applicant satisfies the conditions for immunity under the immunity policy, it will recommend that the CDPP grant the applicant immunity from prosecution. The CDPP will exercise an independent discretion when considering such a recommendation by the ACCC. Where the CDPP is satisfied that the applicant meets the ACCC's conditions for immunity, the CDPP will grant immunity, pursuant to subsection 9(6D) of the *Director of Public Prosecutions Act 1983*.

In its published guidance on its immunity policy, the ACCC has stated that it 'regularly reviews the effectiveness of its immunity policy'.[595] An attempt to legislate the immunity policy could limit its success by reducing its flexibility.

An important consideration for immunity applicants, and those suffering loss or damage as a result of the activities of cartels, is whether the outcome of an immunity application has an impact on the liability of the immunity applicant to compensate cartel victims. Submissions note the availability of 'bar orders' in some jurisdictions to deal with the interface between cartel prosecutions and compensation litigation.[596]

Bar orders have advantages and disadvantages. On the one hand, they may increase the incentive for cartel participants to disclose cartel conduct, thereby bringing the cartel to an end. On the other hand, bar orders prevent those who have been harmed by cartel conduct from recovering compensation from the immunity applicant, although they may still be able to recover compensation from other cartel participants who have not received immunity.

The Panel considers there is no evidence showing that current arrangements are failing to achieve their objective of bringing about the deterrence and disclosure of cartel conduct. Accordingly, the Panel does not recommend introducing bar orders.

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593 Australian Competition and Consumer Commission 2014, *Immunity & cooperation policy for cartel conduct*, Canberra, page 1.

594 Ibid., page 6.

595 Australian Competition and Consumer Commission 2014, *Updated Immunity Policy to uncover cartel conduct* , media release MR 225/14, 10 September, Canberra.

596 See, for example: Caron Beaton-Wells and Brent Fisse, sub, page 31; and Law Council of Australia — Competition and Consumer Committee, sub, page 56.

The Panel's view

The immunity policy is an important component of the detection and successful prosecution of cartel conduct. The immunity arrangements provide an adequate level of certainty and fit within the broader regime of the scheme for immunity for accomplices administered by the Commonwealth Director of Public Prosecutions.

Recommendation 27 — Cartel conduct prohibition

The prohibitions against cartel conduct in Part IV, Division 1 of the CCA should be simplified and the following specific changes made:

- The provisions should apply to cartel conduct involving persons who compete to supply goods or services to, or acquire goods or services from, persons resident in or carrying on business within Australia.
- The provisions should be confined to conduct involving firms that are actual or likely competitors, where 'likely' means on the balance of probabilities.
- A broad exemption should be included for joint ventures, whether for the production, supply, acquisition or marketing of goods or services, recognising that such conduct will be prohibited by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition.
- An exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including intellectual property licensing), recognising that such conduct will be prohibited by section 45 of the CCA (or section 47 if retained) if it has the purpose, effect or likely effect of substantially lessening competition.

This recommendation is reflected in the model legislative provisions in Appendix A.

Recommendation 28 — Exclusionary provisions

The CCA should be amended to remove the prohibition of exclusionary provisions in subparagraphs 45(2)(a)(i) and 45(2)(b)(i), with an amendment to the definition of cartel conduct to address any resulting gap in the law.

This recommendation is reflected in the model legislative provisions in Appendix A.

20.2 ANTI-COMPETITIVE DISCLOSURE OF INFORMATION

Since June 2012, the CCA has prohibited: the private disclosure of pricing information to a competitor on a per se basis; and the general disclosure of information where the purpose of the disclosure is to substantially lessen competition in a market (Part IV, Division 1A of the CCA). These prohibitions have become known as the 'price signalling' provisions.

At present, by regulation, the provisions only apply to banking services and both have a number of exceptions.[597] To date no cases have been brought under either provision.

597 *Competition and Consumer Regulations 2010*, regulation 48.

The provisions stem from the 2007 ACCC report on unleaded petrol prices.[598] That report identified conduct (the exchange of retail petrol prices among competitors) considered to be anti-competitive, but that did not amount to a 'price-fixing understanding' within the current judicial interpretation of section 45 of the CCA.

The ACCC recommended amending the law to broaden and clarify the meaning of the term 'understanding'. In particular, it recommended the law provide that an understanding may be found to have been arrived at, notwithstanding that it was ascertainable only by inference from surrounding circumstances.[599]

In October 2010, the then ACCC Chair, Graeme Samuel, expressed concerns about price signalling in the banking sector.[600] Subsequently, in December 2010, the then Australian Government, as part of its Competitive and Sustainable Banking System reforms, legislated to prohibit anti-competitive price signalling, initially in the banking sector.

Price signalling has the potential to harm the competitive process. Competitors may be able to use the disclosure of price information as a means of co-ordinating their pricing decisions. Depending on the form of price signalling and the market circumstances, price signalling may reduce the commercial risks for competing firms to engage in co-ordinated behaviour and thereby increase the likelihood of anti-competitive pricing outcomes. Box 20.2 outlines the laws in other jurisdictions that address anti-competitive disclosure of information.

598 Australian Competition and Consumer Commission 2007, Petrol Prices and Australian Consumers — Report of the ACCC Inquiry into the price of unleaded petrol, Canberra.

599 See in particular, Australian Competition and Consumer Commission 2007, Petrol Prices and Australian Consumers — Report of the ACCC Inquiry into the price of unleaded petrol, Canberra, Appendix R — Legal Advice on section 45 of the *Trade Practices Act 1974* from Julian Burnside QC 6 December 2007, page 368.

600 ABC RN Breakfast 2010, *ACCC warns banks about price signalling*, 25 October.

Box 20.2: International comparisons of anti-competitive disclosure of information

Anti-competitive price signalling and information exchanges (or 'concerted practices' as they are known in some jurisdictions) are subject to different laws in the US, Canada, the UK, and the EU.

In the **US**, the general provisions in section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act have been used to bring actions involving price signalling conduct (for example, the *Ethyl* case[601] and the *Petroleum Products*[602] case).

In **Canada**, the general provisions in subsection 45(1) of the Competition Act dealing with cartel conduct and section 90.1 dealing with agreements that prevent or lessen competition substantially in the market are relied upon. The Competition Bureau has noted that an agreement may be inferred in circumstances where there is unilateral information exchange together with parallel conduct.

In the **UK**, the general Chapter I prohibition in the Competition Act, which includes the concept of concerted practice, can be relied on to capture price signalling conduct.

Similarly, the **EU**'s general Article 101 prohibition, which includes the concept of 'concerted practice', can be relied on to capture price signalling conduct.

For further information on international approaches to this issue, see Appendix B.

Submissions contain a range of views that generally reflect those previously expressed in the debates leading up to the introduction of the legislation. It is fair to say that no-one seems happy with the provisions in their current form — submissions either argue for modification,[603] or repeal[604] or extension of the provisions to all sectors of the economy.[605]

Public disclosure of prices is a common business practice by which businesses communicate with a broad customer base and help consumers make informed choices. For this reason, the current public disclosure price signalling laws may over-capture pro-competitive or benign conduct.

Private disclosure of price information between competitors will generally have greater potential to harm competition. Private disclosure enables competitors to communicate their pricing intentions with each other without consumers observing the communication, thereby reducing the risk of adverse consumer reaction before a new pricing level becomes settled.

However, in some circumstances, competitors disclose pricing information in the ordinary course of business. As discussed in the context of cartel conduct, price disclosure may occur in connection with joint ventures and similar collaborative arrangements (for example, a bank lending syndicate or insurance layers offered by numerous insurers). Price disclosure may also occur in connection with a supply arrangement, but where the supplier also competes with its business customer in a downstream market.

The difficulties of defining the circumstances in which disclosure of price information is pro-competitive or benign, and the circumstances in which it is likely to be harmful to competition,

601 *E I Du Pont De Nemours & Co v FTC, 729 F.2d 128*.

602 *Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation State of Arizona v Standard Oil Co of California* 906 F.2d 432 (1990).

603 Australian Automobile Association, sub, page 12.

604 See, for example: American Bar Association, sub, pages 11-15; and Queensland Law Society, sub, page 9.

605 See, for example: ACCC, sub 1, page 9; and Law Council of Australia — SME Committee, sub, page 11.

have resulted in a complex set of provisions now contained in Division 1A of Part IV. The provisions endeavour to craft suitable exemptions from the prohibitions. However, the difficulty in catering for all circumstances has resulted in a general exemption for disclosure in the ordinary course of business.

The fact that the provisions were, from their enactment, confined to the banking sector indicates an understandable concern about their application to all parts of the economy. The Panel considers that competition laws ought to be capable of general application to all parts of the economy.

Unlike most parts of the competition law, the price signalling provisions do not enjoy wide support: they are complex and create an additional compliance burden for business.

Other provisions of the competition law are capable of addressing anti-competitive price signalling. For example, if the price signalling causes competitors to agree the level of their prices, the conduct will be prohibited as price fixing by the cartel provisions. If, on the other hand, the price signalling falls short of price fixing but has the effect of substantially lessening competition (by enabling competitors to co-ordinate their pricing decisions), the conduct will generally be prohibited by section 45.

The concern originally raised by the ACCC was that a practice of exchanging price information between competitors may not constitute an 'understanding' within the meaning of section 45 and thereby not be regulated by section 45. Whether that concern is realistic might be debated — it would be usual to infer that competitors had an understanding to exchange price information if they engaged in that conduct on a regular basis.

Nevertheless, the concern can be readily addressed by expanding section 45 so it applies to contracts, arrangements, understandings and concerted practices, where a concerted practice is a regular and deliberate activity undertaken by two or more firms. It would include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange.

Ensuring that section 45 of the CCA can apply to instances of concerted practice that substantially lessen competition will meet the policy intent of the price signalling provisions. This would remove the need for a separate division on price signalling within the CCA, and is consistent with simplifying the CCA and ensuring that its provisions apply generally throughout the economy.

None of the submissions to the Draft Report support the existing price signalling provisions, even those that oppose an amendment to introduce concerted practices into the CCA.[606] Among supporters of extending section 45 to cover concerted practices,[607] concerns are raised about the description of activity to be covered. RBB Economics notes that, while agreeing there is no rationale for price signalling laws to apply only to the banking sector, expanding the scope of section 45 to

606 See, for example: AGL Energy Limited, DR sub, pages 5-6; Arnold Bloch Leibler, DR sub, pages 3-4; ASTRA Subscription Media Australia, DR sub, page 7; Australian National Retailers Association, DR sub, page 22; Business Council of Australia, DR sub, page 20; Cement Industry Federation, DR sub, page 5; Foxtel, DR sub, page 4; Minter Ellison, DR sub, page 4; Origin Energy Limited, DR sub, page 2; and Woolworths Limited, DR sub, pages 40-42.

607 See, for example: Australian Aftermarket Automotive Association, DR sub, page 3; Australian Motor Industries Federation, DR sub, page 9; AURL FoodWorks, DR sub, page 12; BHP Billiton, DR sub, pages 4-5; CHOICE, DR sub, page 25; Julie Clarke, DR sub, page 2; Professor Philip Clarke, DR sub, page 3; Consumer Action Law Centre, DR sub, page 15; Customer Owned Banking Association, DR sub, page 3; Daryl Guppy, DR sub, page 7; National Seniors Australia, DR sub, pages 13-14; and Queensland Law Society, DR sub, pages 2-3.

cover concerted practices could provide 'exceptionally wide' discretion to the competition authority to intervene in markets (DR sub, page 5).

The ACCC considers that the prohibition should be broader, that consideration should be given to prohibiting certain types of concerted practice on a per se basis, and that a concerted practices concept should be included in civil cartel prohibitions (DR sub, pages 43-48). Caron Beaton-Wells and Brent Fisse consider the definition presented in the Draft Report 'both under-inclusive and over-inclusive: under-reach arising due to the definition mentioning regularity of conduct; over-reach because the definition fails to specify that the activity must be co-ordinated conduct geared to avoiding competition' (DR sub, pages 2-3).

Caron Beaton-Wells and Brent Fisse also submit that a concerted practices concept be included in civil cartel prohibitions (DR sub, pages 6-9). The Law Council of Australia — Competition and Consumer Committee seeks further consultation on the circumstances in which price signalling should be prohibited (DR sub, page 10).

The Panel considers that the issue of anti-competitive disclosure of information (particularly price information) requires only a modest refinement to Australia's competition laws. For the reasons expressed earlier, the Panel considers that the price signalling provisions contained in Division 1A of Part IV are not fit for purpose and should be repealed. Even without those specific provisions, many instances of anti-competitive disclosure of price information will contravene the existing competition laws:

- The disclosure may constitute evidence of an understanding about the prices to be charged by one of the parties to the disclosure in competition with another party, in contravention of the cartel laws.
- The regular disclosure of price information may constitute evidence of an understanding to disclose such information between the parties, and that understanding may have the purpose, effect or likely effect of substantially lessening competition in contravention of section 45.

The gap in Australia's competition laws, in comparison to comparable overseas jurisdictions (particularly Europe), is that anti-competitive disclosure of information between competitors will only contravene the law if the court is able to conclude that the parties to the disclosure had either reached an understanding about the prices to be charged (price fixing within the cartel laws), or reached an understanding about the disclosure of information with an anti-competitive purpose or effect. Australia's competition laws do not apply where two or more competitors engage in a co-ordinated practice, such as disclosure of price information, which practice can be shown to be likely to cause a substantial lessening of competition, unless the parties had reached an understanding about the practice.

The Panel considers that section 45 of the CCA should be expanded to include engaging in a concerted practice with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition. As noted above, some submissions express concern about the meaning to be given to the expression concerted practice, as it has not previously been used within Australia's competition laws.

The word 'concerted' means jointly arranged or carried out or co-ordinated. Hence, a concerted practice between market participants is a practice that is jointly arranged or carried out or co-ordinated between the participants. The expression 'concerted practice with one or more other persons' conveys that the impugned practice is neither unilateral conduct nor mere parallel conduct by market participants (for example, suppliers selling products at the same price).

The Panel's proposal is that such conduct would only be prohibited if it can be shown that the concerted practice has the purpose, effect or likely effect of substantially lessening competition. The Panel considers that the word 'concerted' has a clear and practical meaning and no further definition is required for the purposes of a legal enactment.

The Panel does not consider that the cartel conduct prohibitions should be expanded to include concerted practices. The Panel considers that imposing criminal sanctions for cartel conduct should require proof of a contract, arrangement or understanding between competitors.

The Panel's view

Competition laws should apply generally across the economy, not to particular sectors. There is no policy rationale for price signalling laws to apply only to the banking sector.

Public disclosure of pricing information is a common business practice by which suppliers communicate to their customers. It can help consumers to make informed choices and is therefore unlikely to raise significant competition concerns in most instances.

Private disclosure of pricing information has the potential to harm consumer interests since it can facilitate collusion or co-ordination between competitors. However, in many business circumstances, such disclosure is necessary and usual.

Section 45 of the CCA should be able to address instances of anti-competitive price disclosure. That can be achieved by expanding the section to prohibit a person engaging in a concerted practice with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition.

Recommendation 29 — Price signalling

The 'price signalling' provisions of Part IV, Division 1A of the CCA are not fit for purpose in their current form and should be repealed.

Section 45 should be extended to prohibit a person engaging in a concerted practice with one or more other persons that has the purpose, effect or likely effect of substantially lessening competition.

This recommendation is reflected in the model legislative provisions in Appendix A.

20.3 Vertical restrictions (other than resale price maintenance)

As products are supplied down through a supply chain, it is not uncommon for suppliers (whether manufacturers, importers or wholesalers) and acquirers (whether wholesale distributors or retailers) to impose and agree trading restrictions. For example:

- A manufacturer of sporting equipment may supply its products to a retailer on condition that the retailer not purchase similar products from a competing manufacturer (full-line forcing).
- A food franchisor may supply a franchise to a company on condition that the franchisee only operate within a specified geographic region.
- A retail chain may acquire whitegoods from an importer on condition that the importer not supply its products to a competing retail chain (exclusive dealing).
- A retailer may sell a particular mobile telephony plan on condition that the customer also acquire a particular mobile phone (second-line forcing or bundling).

- A franchisor may supply a franchise on condition that the franchisee purchase products for sale from third-party suppliers approved by the franchisor (third-line forcing).

Usually, vertical trading restrictions are unlikely to cause any significant competitive harm. Most markets have many manufacturers and importers of competing goods and many competing wholesalers and retailers. A vertical restriction agreed between one manufacturer and one retailer would be unlikely to cause any significant harm to competition. Vertical restrictions can also be commercially advantageous both to the parties to the agreement and to consumers. The restrictions are a means by which independent traders can align their commercial interests and objectives to the benefit of each and can, as a result, offer consumers a better quality product.

However, in some circumstances, vertical trading restrictions can damage competition and are prohibited by the exclusive dealing provisions in section 47 of the CCA. The effect of vertical restrictions can be to restrict or exclude other traders from reasonable access to the market, reducing consumer choice. This is likely to occur when a significant proportion of the market for a particular product becomes subject to such restrictions.

For example, this might occur if a particular manufacturer enjoys a position of market dominance for its product and supplies the product to retailers on condition that they not acquire any competing products. It may then become difficult for a competing manufacturer to gain access to the retail market.

For these reasons, section 47 prohibits most vertical restrictions only if they have the purpose, or have or are likely to have the effect, of substantially lessening competition. The one exception is third-line forcing. Under the CCA, third-line forcing is prohibited per se.

Submissions raise two main concerns in relation to section 47:

- whether third-line forcing should be prohibited per se; and
- whether the complexity in the language of section 47 can be reduced.

Third-line forcing

Broadly, third-line forcing involves the supply of goods or services on condition that the purchaser acquire goods or services from another person, or a refusal to supply because the purchaser will not agree to that condition.

Third-line forcing is similar in character to second-line forcing. Second-line forcing occurs where a corporation supplies a product on condition that the purchaser acquire another product from that corporation (or a related company); that is, the corporation bundles products together as a package.

Under the CCA, third-line forcing is prohibited per se; whereas, second-line forcing is only prohibited if it has the purpose, or has or is likely to have the effect, of substantially lessening competition.

Australia is the only comparable jurisdiction that prohibits third-line forcing per se. The US, Canada, the EU and New Zealand all leave the conduct to be dealt with by their general prohibitions against anti-competitive agreements or unilateral conduct — which are all assessed under a competition-based test. Further information on international approaches to this issue is included at Appendix B.

There has been significant debate for many years about whether the per se nature of Australia's prohibitions is appropriate. Both the Hilmer and Dawson Reviews recommended introducing a competition test to third-line forcing. The Hilmer Review noted, 'There is a broad spectrum of tying

arrangements, with many having a positive implication for economic welfare' and concluded that third-line forcing should only be prohibited if it substantially lessens competition.[608]

Submissions support the view that third-line forcing should no longer be a per se prohibition.[609] The vast majority of submissions to the Draft Report also support the Panel's call for a change from a per se prohibition to a substantial lessening of competition test.[610] Some submissions raise concerns about a lessening of freedom of contract through increased product bundling and tying;[611] however, the Panel's proposal is that the prohibition on conduct that substantially lessens competition would remain, and, in any case, the current per se prohibition could equally be seen to restrict suppliers' freedom.

Third-line forcing conduct can be exempted from the CCA by filing a notification with the ACCC. The ACCC is empowered to remove the exemption if it considers that the anti-competitive detriment outweighs any public benefit from the conduct. In practice, the vast majority of third-line forcing conduct notified to the ACCC is permitted, which strongly supports the view that the conduct is not overwhelmingly anti-competitive. The ACCC states that, in 2012-13, it received more than 750 third-line forcing notifications and that, in the vast majority of cases, no further action was taken (sub 1, page 87).

The Panel considers that third-line forcing can be beneficial for traders and consumers and that firms should be free to package products in a manner they believe consumers will want, provided the conduct does not substantially lessen competition. From an economic standpoint, there appears to be no justification for treating third-line forcing differently from other vertical restrictions or any basis for the view that such conduct will be overwhelmingly anti-competitive in the current Australian marketplace. Although exemption can be gained through the notification process, this imposes a regulatory cost on business.

Accordingly, the Panel considers that third-line forcing conduct should be prohibited only where it has the purpose, or has or is likely to have the effect, of substantially lessening competition.

Complexity of the provisions

Section 47 attempts to describe many of the common forms of vertical trading restrictions. Given that restrictions can take many forms, section 47 takes a detailed form.

The Panel considers that the present form of section 47 suffers from two deficiencies. First, because it attempts to describe a considerable number of categories of (non-price) vertical restriction, it is difficult for a business person to read and understand. The complexity might be tolerated if it constituted a comprehensive code of prohibited trading conduct. But it does not: the types of

608 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, pages 50 and 54.

609 See, for example: Baker & McKenzie, sub, page 3; Business Council of Australia, Summary Report, sub, page 19; Arlen Duke and Rhonda Smith, sub, page 28; EnergyAustralia, sub, page 12; Federal Chamber of Automotive Industries, sub, page 7; Foxtel, sub, page 2; Law Council of Australia — Competition and Consumer Committee, sub, page 9; Metcash Limited, sub, page 5; Queensland Law Society, sub, page 13; George Raitt, sub, page 2; and Woodward, L & Rubinstein, M, sub, page 4.

610 See, for example: Australian Chamber of Commerce & Industry, DR sub, page 18; ACCC, DR sub, page 55; Australian National Retailers Association, DR sub, page 12; Coles Group Limited, DR sub, page 7; iiNet, DR sub, page 4; and Woolworths Limited, DR sub, page 33.

611 See, for example: Australian Newsagents' Federation, DR sub, page 17; and Law Council of Australia — SME Committee, DR sub, page 16.

vertical restrictions described in section 47 are not exhaustive. Vertical restrictions not addressed by section 47 are covered by section 45, which is expressed in more general terms.

Hence, the second deficiency is that, despite its complexity, section 47 is not comprehensive, since it does not address every form of (non-price) vertical restriction.

Submissions criticise the complexity of section 47 and the vast majority support revision along the lines proposed in the Draft Report.[612] Some submissions suggest that section 47 could be deleted altogether, leaving vertical restrictions (including third-line forcing) to be addressed by section 45.[613] This is a reasonable proposal save for one matter. Section 47 prohibits both the contractual imposition of a trading restriction in connection with the supply or acquisition of goods and services, as well as a refusal to supply or acquire goods and services because the acquirer or supplier, respectively, will not agree to the trading restriction. However, section 45 only addresses the imposition of a trading restriction within a supply agreement — it does not address a refusal to supply or acquire.[614]

The amendments to section 46 recommended in this Report (see Recommendation 30) would address such refusals to supply or acquire. The test for illegality under an amended section 46 and under section 47 would be the same: whether the conduct (the refusal to deal because another person would not agree to a vertical restriction) had the purpose, effect or likely effect of substantially lessening competition.

Section 46 has an additional limitation not expressed in section 47, namely, the prohibition only applies to a corporation that has substantial market power. However, this will not limit the effectiveness of the law. It is well accepted that vertical restrictions will not substantially lessen competition unless they are imposed by a corporation with substantial market power.

The Panel considers that vertical trading restrictions, and associated refusals to supply, can be addressed by a combination of section 45 and an amended section 46. In effect, section 47 would become a redundant provision. The Panel favours simplifying the CCA by removing unnecessary provisions.

Removing section 47 would be consistent with a number of comparable jurisdictions:

- Despite the New Zealand Commerce Act 1986 containing very similar competition law provisions to Australia's provisions, the Commerce Act contains no equivalent of section 47. Vertical restrictions are addressed by the New Zealand equivalents of sections 45 and 46.
- Likewise, there is no equivalent to section 47 in the EU's competition laws. The two primary competition law provisions in Europe, Articles 101 and 102 of the TFEU, are equivalent to sections 45 and 46 of the CCA.

612 See, for example: ASTRA, DR sub, page 6; Australian Automobile Aftermarket Association, DR sub, page 4; Australian Corporate Lawyers Association, DR sub, page 3; Australian Motor Industry Federation, DR sub, page 11; Baker & McKenzie, DR sub, page 1; Coles Group Limited, DR sub, page 7; Julie Clarke, DR sub, page 4; Professor Philip Clarke, DR sub, page 4; Law Council of Australia BLS Competition & Consumer Committee, DR sub, page 34; MasterCard, DR sub, page 2; Queensland Law Society, DR sub, page 5; Retail Guild of Australia, DR sub, page 6; Virgin Australia, DR sub, page 4; and Wesfarmers Limited, DR sub, page 3.

613 See, for example: Arlen Duke and Rhonda Smith, sub, page 28; and Professor Alan Fels, sub, page 11.

614 Julie Clarke, DR sub, page 4.

If section 46 were not amended as recommended, the Panel considers that section 47 should be simplified along the lines proposed in the Draft Report. The Panel has included a simplified form of section 47 in the model legislative provisions in Appendix A. The model form takes account of submissions received in response to the Draft Report.

The Panel's view

The Panel has heard no economic or practical reason to retain the per se prohibition on third-line forcing. Retaining the per se prohibition imposes unnecessary costs on business because business must either refrain from preferred trading arrangements or file a notification with the ACCC.

The provisions on third-line forcing (subsections 47(6) and (7) of the CCA) should be brought into line with the rest of section 47 and only prohibited where conduct has the purpose, effect or likely effect of substantially lessening competition.

Section 47 is also unnecessarily complex. Given the Panel's recommendations to amend section 46 (see Recommendation 30), anti-competitive vertical restrictions (including third-line forcing) and associated refusals to supply or acquire can be addressed by sections 45 and 46, enabling section 47 to be repealed.

Recommendation 32— Third-line forcing test

Third-line forcing (subsections 47(6) and (7) of the CCA) should only be prohibited where it has the purpose, effect or likely effect of substantially lessening competition.

Recommendation 33 — Exclusive dealing coverage

Section 47 of the CCA should be repealed and vertical restrictions (including third-line forcing) and associated refusals to supply addressed by sections 45 and 46 (as amended in accordance with Recommendation 30).

20.4 Resale price maintenance

Resale price maintenance (RPM) is a form of vertical restraint concerning resale prices. RPM involves a supplier (for example, a manufacturer or importer) supplying a product to a person (for example, a retailer) on condition that the product not be advertised for sale or sold below a price specified by the supplier. Section 48 of the CCA prohibits RPM and makes it a per se offence; however, RPM may be authorised if a manufacturer can demonstrate that the imposition of RPM results in a public benefit.

The Dawson Review stated:

> The rationale behind a per se prohibition is that the conduct prohibited is so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry about its impact on competition.[615]

615 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act* (the Dawson Review), CanPrint Communications, Canberra, page 123.

The Law Council of Australia — Competition and Consumer Committee notes this position (sub, page 61), arguing that RPM should not merit a strict prohibition since, in markets where there is sufficient inter-brand competition, RPM will have a limited effect on competition and, in some instances, RPM may even be beneficial.

Is a per se prohibition appropriate?

The appropriateness of a per se prohibition of RPM has been debated for many years, both in Australia and overseas. In 2007, the US Supreme Court ruled that the practice of RPM should no longer be subject to a per se prohibition under US Federal law and should instead be tested under a rule of reason (competition) analysis (*Leegin Creative Leather Products Inc. v PSKS Inc.*).[616]

In Canada, RPM is also subject to a competition test, with conduct prohibited only when it has or is likely to have an adverse effect on competition in a market.[617] Other jurisdictions, such as the UK, the EU and New Zealand, maintain a per se prohibition — generally with some provision to authorise conduct.[618] See Appendix B for further information on international approaches to RPM.

Like other forms of vertical trading restriction, RPM will not have an effect on competition in a market if the product is subject to strong rivalry from competing products. In those circumstances, a manufacturer or importer would be unable commercially to specify a minimum price that is above the level determined by competition. The ACCC recently authorised Tooltechnic Systems (Aust) Pty Ltd to engage in RPM, noting that Tooltechnic had only a very small share of the market.[619]

Further, in a competitive market RPM may be beneficial to competition and consumers. For example, one purpose of imposing a minimum retail price within distribution arrangements is to create a financial incentive (through the retail margin) for a retailer to invest in retailing services (whether in the form of store fit-out or retailing staff). Otherwise, retailers that invest in their stores and staff training may be vulnerable to undercutting by 'discounter' retailers that do not make such investments.

Manufacturers may also wish to engage in RPM as a marketing or branding strategy, where a fixed retail price is a signal to consumers that the product is a premium product. RPM enables a manufacturer to control its products' branding and market positioning, which can be of value to consumers.

Nevertheless, concerns remain about the likely anti-competitive effects of RPM. The primary rationale for a per se prohibition on RPM (as opposed to a competition-based test) is that RPM may facilitate manufacturer or retailer collusion. The ACCC notes that RPM can cause significant harm to the competitive process, including by:

- facilitating collusion between suppliers: RPM conduct may be used by suppliers to reduce or eliminate price competition between its customers …
- facilitating collusion between retailers: a bottom up RPM occurs when one or more retailers compel a supplier to adopt RPM conduct to reduce or eliminate price competition at the retail level …

616 As noted by Law Council of Australia — Competition and Consumer Committee, sub, page 61.

617 Competition Act (Canada), section 76.

618 For example, subsection 9(1) Competition Act 1998 (UK), article 101(3) Treaty on the Functioning of the European Union (EU).

619 ACCC 2014, *ACCC authorises minimum retail process on Festool power tools,* media release 5 December, Canberra.

- supplier exclusion: an incumbent supplier may use RPM conduct to guarantee margins for retailers to make them unwilling to carry the products of a rival or new entrant;
- retailer exclusion: RPM conduct can be used as a means to eliminate retail competition from discount or more efficient retailers. (sub 1, page 116)

RPM and digital retailing

Historically, RPM has been considered in the context of 'bricks and mortar' retailers. Now, RPM is emerging as an issue for new models of digital-based retailing. eBay states, based on annual surveys of its sellers, that around one-quarter of sellers are instructed by their suppliers to sell at recommended retail prices. As eBay notes:

> This clearly restricts the ability for eBay sellers to price their products at what they consider to be an appropriate price point and puts them at risk of adverse treatment by suppliers should they not comply with pricing instructions … eBay remains concerned, however, about the widespread abuse of the prohibition on resale price maintenance in the context of ecommerce and the ability of small businesses in particular to maximise the opportunities available on market platforms such as eBay. (sub, page 3)

RPM in digital markets also received significant international legal attention recently when Apple was found to have breached EU and US competition laws by fixing the prices of e-books in collaboration with five publishers. Norton Rose Fulbright states that, prior to the conduct, the publishers switched their distribution arrangements from an independent distributor arrangement to an agency agreement, possibly to avoid breaching the relevant RPM provisions.[620]

On balance, and having regard to the potential for RPM to become more commonplace in the online economy, the Panel considers it prudent to retain the per se prohibition for the time being. Policymakers should monitor this type of conduct since per se prohibition may become unnecessary in future.

The Panel considers that allowing notification of RPM (discussed below) is an appropriate next step.

Avoiding RPM or seeking exemption

The prohibition against RPM does not apply when a manufacturer conducts business as a vertically integrated manufacturer/retailer. Under that business structure, where goods are not resold by an independent retailer, the manufacturer is also the retailer and is free to set its own retail price. A manufacturer may also choose to sell its products through an agency network. Under a genuine agency arrangement, the manufacturer sells its products directly to consumers and is therefore permitted to specify the retail price.

A general tenet of competition law is that companies within a corporate group are treated as a single economic entity and are not considered to be competitors. For that reason, the prohibitions in sections 45 and 47 do not apply to trading arrangements entered into between related companies.[621]

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620 Although moving to an agency agreement could circumvent the prohibition on RPM, in this case the agreement was not merely bilaterally between each publisher and Apple as agent, but also through a degree of horizontal collusion between the publishers. See: Coleman, M, *Australia: Technology: Lessons from the ebooks case,* Norton Rose Fullbright.

621 *Competition and Consumer Act 2010*, subsections 45(8) and 47(12).

A similar principle ought to apply to RPM. Yet, currently, there is no exemption for RPM between a manufacturer and a retailer that is a subsidiary of the manufacturer.

RPM can be authorised by the ACCC where it is found to result in a net public benefit. Although the option of authorisation exists, the Law Council of Australia — Competition and Consumer Committee notes that the use of authorisation for RPM, which has been available since 1995, is 'almost unheard of' (sub, page 62). To the Panel's knowledge, the authorisation granted recently to Tooltechnic, noted above, was the first ever application for authorisation in respect of RPM.

The absence of RPM authorisation applications contrasts with the number of authorisation applications lodged with the ACCC for other CCA provisions. This may be evidence that manufacturers do not believe they can demonstrate sufficient public benefit to be granted authorisation. The Law Council of Australia — Competition and Consumer Committee posits an alternative explanation, stating:

> There are few circumstances where a manufacturer that wished, for example, to specify minimum retail prices in launching a new product, would be prepared to place its launch on hold while the ACCC conducted a public inquiry into whether it would enhance economic efficiency. (sub, page 62)

It is possible that the cost and delay of the authorisation process is a real deterrent to businesses seeking exemption for a retailing strategy involving RPM.

The alternative exemption process under the CCA, notification, is not available for RPM. This reflects the traditional view that RPM is anti-competitive in the majority of circumstances. As discussed above, that view has been challenged in recent years.

In contrast, notification is available for other forms of vertical restraint, including third-line forcing. Notification is a less expensive and quicker means of obtaining exemption. The ACCC may withdraw the exemption if it forms the view that the anti-competitive harm of the notified conduct outweighs any public benefit.

The Panel considers that businesses should be permitted to seek exemption from the RPM prohibition more easily. This could be achieved through allowing RPM to receive exemption through the notification process, which is quicker and less expensive than authorisation. This change would also have the advantage of allowing the ACCC to assess RPM trading strategies more frequently, thereby gathering evidence on the competitive effects of RPM in Australia.

The Panel's view

The Panel does not see a sufficient case for changing the prohibition of RPM from a per se prohibition to a competition-based test.

Nevertheless, the notification process should be extended to RPM to provide a quicker and less expensive exemption process for business. Notification offers a means of testing the evidence of the competitive effects of RPM in Australia.

The prohibition should also be amended to include an exemption for RPM conduct between related bodies corporate, as is the case under sections 45 and 47.

Recommendation 34 — Resale price maintenance

The prohibition on resale price maintenance (RPM) in section 48 of the CCA should be retained in its current form as a per se prohibition, but notification should be available for RPM conduct.

This recommendation is reflected in the model legislative provisions in Appendix A.

The prohibition should also be amended to include an exemption for RPM conduct between related bodies corporate, as is the case under sections 45 and 47.

20.5 Liner shipping exemption under Part X of the CCA

The Terms of Reference (3.3.5) task the Review with considering whether existing exemptions from competition law and/or historic sector-specific arrangements are still warranted. Box 20.3 outlines previous reviews of Part X of the CCA and government responses.

International liner shipping has historically enjoyed a degree of exemption from competition laws, both in Australia and overseas. This allows shipping companies to form conferences (effectively a form of cartel) to service particular trade routes.

Part X of the CCA allows liner shipping operators to enter into agreements among themselves in relation to the freight rates to be charged, and the quantity and kinds of cargo to be carried, on particular trade routes. Operators register these agreements with the Registrar of Liner Shipping (an office created under Part X). Registration confers an exemption from the cartel conduct prohibitions and sections 45 and 47.

To register an agreement, the Registrar must be satisfied that various conditions have been met. The most significant condition concerns any provision of the agreement that would otherwise contravene the cartel conduct prohibitions, or sections 45 or 47. The Registrar must be satisfied that such a provision is necessary for the agreement to operate effectively and is of overall benefit to Australian exporters (in the case of an outward conference agreement) or Australian importers (in the case of an inward conference agreement).

Subject to receiving a report from the ACCC, the Minister is empowered under Part X to direct the Registrar to cancel the registration of a conference agreement, in whole or in part. The Minister may exercise the power if he or she is satisfied of certain matters, including that provisions of the agreement are not of overall benefit to Australian exporters or Australian importers.

Part X also imposes obligations on liner shipping operators to negotiate (but not necessarily reach agreement) with peak shipper[622] bodies around minimum service levels and to provide sufficient notification for changes to freight rates and surcharges.

Much of the liner shipping to and from Australia is organised along conference lines, although this is becoming less common.[623] Conference agreements allow for co-ordinated scheduling, revenue pooling, price fixing and capacity agreements.

622 The term shipper refers to the representative, owner or exporter of the goods being shipped.

623 See, for example: ACCC, sub 1, page 49; and Global Shippers' Forum, sub, page 3.

The historical argument for exempting liner shipping from competition law is that, without collaborative conduct among operators, the market would not deliver an efficient supply of liner cargo shipping services to Australia. The industry is characterised by lumpy investment, high fixed costs and low marginal costs. The premise underlying Part X is that, without co-operation among shipping companies, prices and service levels would be excessively volatile, owing to cycles of entry and exit creating periods of excess and under capacity.

As Shipping Australia Limited states:

> The fundamental issue is that international liner shipping has a set of characteristics that require a specialised regulatory regime that, in turn, provides some limited exemption for price setting. (sub, page 10)

Peak shipper bodies have also tended to support the Part X exemptions because they oblige shipping conferences to negotiate as a condition of registering agreements.

Box 20.3: Reviews of Part X

The most recent major review of Part X was conducted by the Productivity Commission (PC) in 2005. The PC recommended that Part X be repealed and replaced with ACCC authorisation for liner shipping agreements.[624] The recommendations of the 2005 inquiry report contrast with the PC's previous review of Part X in 1999, which concluded that, on balance, the regime served Australia's national interest at that time.[625] The recommendation to repeal Part X was repeated in the 2012 joint Australian-New Zealand PC study *Strengthening Trans-Tasman Economic Relations*.[626]

In response to the 2005 review, the then Australian Government did not fully accept the PC's recommendations but instead announced in mid-2006 its intention to introduce reforms to Part X.[627] Among other things, the reforms were intended to clarify Part X's objectives and remove discussion agreements from scope.

The reforms were not implemented. Had they been, Part X's operation would have been more closely aligned with the more pro-competitive regulatory regimes operating out of Europe and the US.

Although the test for registering a conference agreement under Part X involves assessing the 'overall benefit' to Australia of the agreement, it does not expressly require assessing its competitive effects. Also, the test is not assessed by the primary competition regulator, the ACCC, but by the Registrar of Liner Shipping.

624 Productivity Commission 2005, *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping*, Canberra, page xxvi.

625 Productivity Commission 1999, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974*, Canberra, page xxviii.

626 Australia and New Zealand Productivity Commissions 2012, Joint Study — *Strengthening Trans-Tasman Economic Relations*, recommendation 4.14, page 16.

627 Joint Media Statement by Costello, P (Treasurer), and Truss, W (Minister for Transport and Regional Services) 2006, *Government response to Productivity Commission Report 'Review of Part X of the Trade Practices Act 1974 (International Liner Cargo Shipping)'*, Media Release 4 August, Canberra.

No other industry enjoys legislative exemption from Australia's competition laws. This is despite the fact that other industries have similar economic characteristics to the liner shipping industry, particularly the international airline industry. If participants in other industries wish to make agreements that would otherwise contravene the competition law, they are required to seek authorisation from the ACCC.

The authorisation process is designed to test, in a public and transparent manner, whether agreements between competitors are in the public interest, weighing the potential anti-competitive detriment against any public benefits that the agreements may generate. An authorisation is usually granted for a specified period of time (typically five to 10 years) to enable the net effects of an agreement to be re-assessed at regular intervals.

Box 20.4 outlines examples of liner shipping regulation in other jurisdictions.

Box 20.4: Approaches to liner shipping regulation in other jurisdictions

The Panel notes that, over the last two decades, other jurisdictions have moved to more competitive regimes and this has not led to excessive instability or 'destructive competition'.

The Department of Infrastructure and Regional Development notes:

> The US and EU reforms, which have stripped shipping conferences of the ability to collude to set rates, have been shown to have had few negative effects. However, they have not been found to have any positive effects in reducing freight rates either. There is evidence that the reforms have been associated with increased market concentration. (DR sub, page 6)

The EU approach[628]

Prior to 2006, the EU provided a form of block exemption for conference agreements modelled on the 'revised Trans-Atlantic Conference Agreement' decision. Conferences could not discriminate between ports or transport users and needed to apply a uniform or common rate for all goods carried. The block exemption only applied to agreements that did not allow individual service contracts. Agreements that did not qualify generally required individual authorisation.

The European Commission also required that conferences not include:

- a prohibition on individual service contracts;
- restrictions, either binding or non-binding, on the contents of such contracts;
- a prohibition of independent action on joint service contracts; and
- also, that the terms of individual service contracts were to remain confidential, except where the shipper consented to such disclosure.

In 2006 the EU removed the block exemption for liner shipping. The industry is now subject to the general provisions of EU law and conference agreements must seek authorisation.[629]

628 Productivity Commission 2005, *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping, Inquiry Report*, Canberra, page 118.

629 Federal Maritime Commission 2012, Bureau of Trade Analysis, *Study of the 2008 Repeal of the Liner Conference Exemption from European Union Competition Law*, Washington DC, page 1.

Box 20.4: Approaches to liner shipping regulation in other jurisdictions *(continued)*

The US approach[630]

The US provides exemptions to anti-trust laws for liner shipping under the Shipping Act of 1984. This was significantly modified by the Ocean Shipping Reform Act of 1998.

The US exemptions apply to agreements between carriers that discuss, fix or regulate freight rates, cargo space accommodation and other service conditions, pool revenues, earnings or losses, or restrict or regulate other aspects of service, such as cargoes to be carried and sailing schedules. Agreements must be filed with the Federal Maritime Commission.

Importantly carrier agreements cannot:

- prohibit member carriers from engaging in negotiations for individual service contracts with shippers; or
- require members to disclose negotiations or make public terms and conditions of individual service contracts or adopt rules or requirements affecting the right of member carriers to enter into individual service contracts.

The requirements that carrier agreements cannot prohibit or limit confidential individual service contracts mean that US shipping regulation still creates competition between shipping carriers. This is because agreements on pricing are effectively non-binding and terms of individual service contracts that deviate from the conference tariff are not observable.

The 2005 PC report on liner shipping and Part X concluded that the evidence did not support continued special treatment of the liner shipping industry under Australia's competition laws. The Panel has not received any information to cast doubt on that conclusion.

Shipping Australia Limited strongly supports retention of Part X but notes:

> The norm now is the Discussion Agreement which does not pool revenues as stated in the draft report nor fix prices in the way the old Conference system did. (DR sub, page 3)

Further, it argues that Part X is pro-competitive:

> It minimises barriers to entry to the Australian trade and ensures a high level of contestability from both direct new entrants and transhipment operators with individual shipping lines competing fiercely for market share. (DR sub, page 3)

However, other submissions raise concerns that not all conduct is in shippers' interests and may be anti-competitive.

The Australian Peak Shippers Association Inc. considers:

> The setting of prices of freight surcharges by shipping lines, consortia and alliances should no longer be exempt from scrutiny under the current legislation. These surcharges, of which there are many … are randomly instituted or increased by shipping lines with little or no justification. They are essentially a clandestine method of increasing sea freight rates as all exporters will tell you the real sea freight rate is the total cost of moving a container through the stevedores' wharf gates to finally land with the customer across the oceans of the world. (sub, page 7)

630 Productivity Commission 2005, *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping, Inquiry Report*, Canberra, page 116.

and:

> … the exemption afforded the various Discussion Agreements that allows them to discuss sea freight rates and publish recommended general rate increases (GRIs), albeit that any published GRIs are not binding on their members, should be rescinded as they amount to 'price signalling' to the market. (DR sub, page 2)

The Panel considers that the ACCC should be the body to determine whether agreements entered into and practices undertaken by international liner shippers are pro-competitive or anti-competitive. If, as Shipping Australia Limited claims, the current Discussion Agreements can be shown to be pro-competitive, they are unlikely to contravene the competition laws and the agreements would likely be authorised by the ACCC.

In comparison, in the international air freight industry, airlines reach agreements for the sale of freight capacity among themselves without contravening competition laws. To the extent that international airlines wish to discuss air freight rates or surcharges, or pool revenues or co-ordinate their operations, they must do so in accordance with the competition law and seek any necessary authorisations under it.

Internationally, the trend is to remove special competition law exemptions for international liner shipping. If Part X were repealed, the authorisation procedure under the CCA would enable the ACCC to assess conference agreements as needed on a net public benefit basis. That would induce greater focus on the competitive effects of conference agreements, while allowing full input from shippers.

Additionally, as discussed in Section 22.3 the Panel recommends that the ACCC be given power to issue block exemptions: these would exempt categories of conduct defined by the ACCC. If that power were to be introduced, the ACCC should develop a block exemption or exemptions for categories of liner shipping conduct that do not raise competition concerns, such as consortia or operational agreements (vessel sharing, co-ordination of routes and schedules). The block exemption(s) should be developed in consultation with liner shipping operators and shippers.

The Australian Peak Shippers Association 'strongly recommends that all sections of Part X, which support the negotiating position of Australian exporters/shippers, should be maintained' (sub, page 7). If Part X were repealed, shippers would be able to formulate collective negotiation arrangements under the existing mechanisms in the CCA.

If Part X were repealed, existing liner shipping agreements would face the full provisions of the CCA and some may be in breach of them. Therefore, a transition would be required. The Panel considers a period of two years should be sufficient to: create a block exemption; identify shipping agreements that qualify; and either authorise or modify other agreements to ensure compliance with the CCA.

The Panel's view

Part X should be repealed and the liner shipping industry should be subject to the normal operation of the CCA.

The ACCC should be given power to grant block exemptions (see Recommendation 39). In consultation with the shipping industry and shippers, the ACCC should develop a block exemption for conference agreements that contain a minimum standard of pro-competitive features.

For example, conference agreements that co-ordinate scheduling and the exchange of capacity, while allowing confidential individual service contracts and not involving a common conference tariff and pooling of revenues and losses, should be eligible for a block exemption. Other forms of agreement that do not qualify for the block exemption, and thereby risk contravening Part IV provisions, should be subject to individual authorisation.

If a block exemption power is not introduced, it would be preferable to require conference agreements to seek authorisation by the ACCC as needed on the basis of the normal net public benefit test. Authorisation should be straightforward, involving a minimal compliance burden where shipping agreements have been negotiated with shippers.

Implementation

Repealing Part X would require transitional arrangements for existing agreements. The transition should be sufficiently long to allow for authorisations to be sought as needed and to identify agreements that qualify for the block exemption. The Panel considers a two-year transition should be sufficient.

The block exemption for liner shipping agreements should be designed by the ACCC, in consultation with the Department of Infrastructure and Regional Development, the Treasury, liner shipping operators and shipper bodies. Consultation on the block exemption should commence within six months of agreeing the recommendation and the details of the block exemption should be available within 12 months. This would be concurrent with the introduction of a Bill to repeal Part X to take effect 12 months later.

Recommendation 4 — Liner shipping

Part X of the CCA should be repealed.

A block exemption granted by the ACCC should be available for liner shipping agreements that meet a minimum standard of pro-competitive features (see Recommendation 39). The minimum standard of pro-competitive features to qualify for the block exemption should be determined by the ACCC in consultation with shippers, their representative bodies and the liner shipping industry.

Other agreements that risk contravening the competition provisions of the CCA should be subject to individual authorisation, as needed, by the ACCC.

Repeal of Part X will mean that existing agreements are no longer exempt from the competition provisions of the CCA. Transitional arrangements are therefore warranted.

A transitional period of two years should allow for the necessary authorisations to be sought and to identify agreements that qualify for the proposed block exemption.

21 Secondary Boycotts and Employment-Related Matters

Negotiating employment terms and conditions has always been excluded from most of the competition law provisions of the *Competition and Consumer Act 2010* (CCA). This is achieved through paragraph 51(2)(a), which provides:

> In determining whether a contravention of a provision of [Part IV], other than section 45D, 45DA, 45DB, 45E, 45EA or 48, has been committed, regard shall not be had … to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, **to the extent that the contract, arrangement or understanding, or the provision, relates to the remuneration, conditions of employment, hours of work or working conditions of employees**. (emphasis added)

The reason for this exclusion is that the negotiation and determination of employment terms and conditions is governed by a separate regulatory regime, currently contained in the *Fair Work Act 2009*. The policy rationale is that labour markets are not in all respects comparable to other product or service markets — a point recognised by the Productivity Commission (PC) in its Issues Papers for its inquiry into the Workplace Relations Framework:

> The Commission also recognises that the 'price' of labour differs from the price of most other inputs into an economy. This is not only because the price (wage) offered usually affects people's workplace performance and because of the virtual exclusion of WR [workplace relations] from competition policy (Issues Paper 5), though these are distinctive features. It is also because many people's incomes and indeed wellbeing depend to a considerable extent on that price.[631]
>
> In part, industrial law may be separated from competition law because it has ethical and social dimensions at its heart, to a greater extent potentially than the business-to-business aspects of competition law. In addition, labour markets have some characteristics different from goods markets ...[632]

As a general principle, the Panel concurs with the PC's view in this regard.

However, two categories of employment-related conduct do not fall within the general exclusion:

- secondary boycotts, which are prohibited by sections 45D, 45DA and 45DB of the CCA; and
- trading restrictions in industrial agreements, which are prohibited by sections 45E and 45EA of the CCA.

The Panel received submissions to both the Issues Paper and the Draft Report that address each of these practices.

631 Productivity Commission 2015, *Workplaces Relations Framework*, Issues Paper 1, Canberra, page 15.

632 Productivity Commission 2015, *Workplaces Relations Framework*, Issues Paper 5, Canberra, page 6.

21.1 SECONDARY BOYCOTTS

The CCA prohibits certain types of secondary boycott conduct. Generally, a secondary boycott involves two or more persons, acting in concert with each other, who engage in conduct:

- that hinders or prevents a third person supplying goods or services to, or acquiring goods or services from, a fourth person (who is not an employer of the persons acting in concert), where the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person (section 45D);
- that hinders or prevents a third person supplying goods or services to, or acquiring goods and services from, a fourth person (who is not an employer of the persons acting in concert), where the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing a substantial lessening of competition in any market in which the fourth person trades (section 45DA); or
- for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia (section 45DB).

The secondary boycott prohibitions generally apply to employees who are members of the same employee organisation. Under section 45DC, an employee organisation may become liable for the secondary boycott activity of its members.

Secondary boycotts are harmful to trading freedom and therefore harmful to competition. Where accompanied by effective enforcement, secondary boycott prohibitions have been shown to have a significant deterrent effect on behaviour that would otherwise compromise consumers' ability to access goods and services in a competitive market.

The Swanson Committee observed:

> ... no section of the community should be entitled to be the judge in its own cause on matters directly aimed at interfering with the competitive process between firms. We make no exceptions to that position. If an organisation or group of persons for its own reasons deliberatively interferes with the competitive process, then the community is entitled to have those reasons scrutinised by a body independent of the persons engaged in the dispute.[633]

The Panel considers this policy rationale, including its application to employee organisations, to be as relevant today as it was when first formulated. The Panel sees a strong case for effective secondary boycott provisions. The existence of such prohibitions and their enforcement by the ACCC or parties harmed by the conduct serve the public interest.

633 Trade Practices Act Review Committee 1976, *Report to the Minister for Business and Consumer Affairs*, Canberra, page 85, paragraph 10.16.

The Panel's view is confirmed by the findings of the Royal Commission into Trade Union Governance and Corruption (the Royal Commission) concerning the Construction, Forestry, Mining and Energy Union (CFMEU) and Boral, published in Volume 2, Part 8.2 of the Royal Commission's Interim Report.[634]

The secondary boycott provisions of the CCA have been the subject of numerous amendments since their inception in 1977, particularly in relation to the types of conduct that should or should not be excluded from the operation of the laws.

Presently, the secondary boycott prohibitions have two general exceptions (or defences):

- The first defence applies if the dominant purpose for which a person engages in the conduct is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or a fellow employee (subsection 45DD(1)).
- The second defence applies if the dominant purpose for which a person engages in the conduct is substantially related to environmental protection or consumer protection, and engaging in the conduct does not constitute industrial action (subsection 45DD(3)).

The Panel received submissions in relation to each of these defences.

The Panel also received submissions in relation to the effectiveness of the current law in deterring secondary boycott behaviour. The submissions focus on the role of the Australian Competition and Consumer Commission (ACCC) in enforcing the secondary boycott law and the deterrent effect of the sanctions for contraventions. These issues are also discussed in the Interim Report of the Royal Commission.[635]

Employment exceptions

A number of submissions argue for or against retaining the secondary boycott prohibition; some wish to broaden the scope of the employment exception. The Australian Chamber of Commerce and Industry (ACCI) supports retaining the secondary boycott provisions and separating commercial and workplace laws.[636] The Australian Council of Trade Unions (ACTU) seeks to either abolish the secondary boycott provisions (DR sub, page 10) or widen the employment exception applicable to secondary boycotts, arguing that it does not reflect Australia's international obligations under the International Labour Organisation's Convention 87 (sub, page 3).

However, the Panel does not consider that the case has been made to either limit the scope of the prohibitions or broaden the applicable exceptions. Either of these options would weaken the effectiveness of the secondary boycott provisions.

Environmental and consumer protection exception

A number of submissions to the Issues Paper and the Draft Report argue for or against retaining the exception for secondary boycotts where the dominant purpose is environmental or consumer protection. Consumer and environmental organisations argue for retaining (or expanding) the

634 Heydon AC QC, J D 2015, *Royal Commission into Trade Union Governance and Corruption*, Volume 2, Commonwealth of Australia, Canberra, pages 1011 to 1115.

635 Ibid.

636 See sub, page 25 and DR sub, page 14. See also Master Builders Australia, sub 1, page 17.

exception, while industry groups argue for its removal.[637] The Tasmanian Government proposes a separate inquiry into the public interest of retaining the environmental exception by an independent body (DR sub, page 1).

The Panel did not receive compelling evidence of actual secondary boycott activity falling within the environmental and consumer protection exception in the CCA. In the absence of such evidence, the Panel does not see an immediate case for amending the exception. However, if such evidence arises from future boycott activity, the exception should be reassessed.

During Panel consultations, industry representatives appeared to be primarily concerned that environmental groups may damage a supplier in a market through a public advocacy campaign based on false or misleading information.

Submissions also tended to express concerns about public advocacy campaigns or false and misleading information, rather than secondary boycott activity as such. As consumer and environmental protection issues are often the subject of public advocacy, the Panel can understand that some may regard the secondary boycott exceptions as a form of protection of public advocacy in these areas.

The Panel considers that, although a public advocacy campaign may damage a business, it does so by attempting to influence the behaviour of businesses and consumers. Businesses and consumers are free to make up their own minds about the merits of the campaign.

A public advocacy campaign is therefore distinct from a secondary boycott—the latter aims not just to influence but also to hinder or prevent the supply or acquisition of goods or services. The Australian Food and Grocery Council acknowledges this:

> It is important to distinguish public advocacy (which should be permitted) from secondary boycott behaviour (which should be prohibited). (DR sub, page 11)

However, a further question arises: if an environmental or consumer organisation advocates against customers purchasing products from a trading business, should the advocacy be subject to the laws prohibiting false, misleading and deceptive conduct?[638] Presently, those laws only apply insofar as a person is engaged in trade or commerce.

Expanding the laws concerning false, misleading or deceptive conduct to organisations involved in public advocacy campaigns directed at trading businesses raises complex issues. Many public advocacy campaigns directed at trading businesses concern health issues (for example, tobacco, alcohol and fast food) or social issues (for example, gambling). Consideration of expanding those laws in that context is beyond the Terms of Reference of this Review. We therefore make no recommendation in this regard.

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637 See, for example: Australian Conservation Foundation, sub, pages 2-5; Australian Food and Grocery Council, sub, page 28; Australian Forest Products Association, sub, pages 3-5; Australian Lawyers for Human Rights, sub, pages 1-2; Australian Network of Environmental Defender's Offices, sub, pages 4-6; Australian Petroleum Production & Exploration Association, DR sub, page 13; Consumers Health Forum of Australia, sub, page 5; Greenpeace Australia, The Wilderness Society, OXFAM Australia, GetUp!, Voiceless, Friends of the Earth, AidWatch, sub, pages 1-3; ITS Global, sub, pages 1-5; National Farmers' Federation, sub, page 15; RSPCA Australia, sub, pages 1-2; and Voiceless, sub, page 3.

638 See, for example: National Farmers' Federation, sub, page 15.

Enforcement and deterrence

A number of submissions raise concerns around whether or not the ACCC is taking sufficient steps to enforce the secondary boycott provisions.[639] ACCI's submission discusses the importance of publicly enforcing the provisions, including the availability of guidance about the laws for small business. ACCI argues that information about the ACCC's enforcement decisions in relation to secondary boycotts lacks transparency.[640] Submissions also support the Royal Commission into the Building and Construction Industry (the Cole Royal Commission) recommendation:

> The Building and Construction Industry Improvement Act contain secondary boycott provisions mirroring ss 45D–45E of the *Trade Practices Act 1974* (Cth), but limited in operation to the building and construction industry.[641]

Submissions argue that the degree of concerns in the construction industry, and the complexity of the issues, warrant shared jurisdiction of these matters between the ACCC and any Australian Building and Construction Commission-type body, should one be re-established. [642]

In response to these concerns, the ACCC states that it carefully considers each and every complaint about secondary boycott conduct, noting that between 1 July 2012 and 30 June 2014 it was contacted only nine times about secondary boycott issues. Four of these cases related to employee organisations and all were investigated. The ACCC also notes that a number of features make enforcement challenging:

- difficulties in obtaining documentary evidence;
- lack of co-operation of witnesses; and
- potential overlaps between the ACCC and Fair Work Commission and Fair Work Building and Construction (sub 3, pages 6-7).

In December 2014, the Interim Report of the Royal Commission into Trade Union Governance and Corruption was tabled in Parliament. In that report, the Royal Commission states that its findings concerning the CFMEU and Boral suggest the following possible problems:

- the ineffectiveness of the current secondary boycott provisions in sections 45D and 45E of the CCA to deter illegal secondary boycotts by trade unions;
- the absence of specific provisions making it unlawful for the competitors or target of a secondary boycott knowingly to supply a product or service in substitute for a supply by the target;
- an inability or unwillingness by the regulatory authorities to investigate and prosecute breaches of the secondary boycott provisions by trade unions speedily;
- the absence of any speedy and effective method by which injunctions granted by a court restraining a trade union from engaging in an illegal secondary boycott can be enforced;

639 See, for example: Australian Chamber of Commerce and Industry, sub, pages 31-42; and Australian Mines & Metals Association, sub, page 4.

640 Australian Chamber of Commerce & Industry, sub, pages 42-44.

641 Cole RFD QC, T R H 2003, *Final Report of the Royal Commission into the Building and Construction Industry*, Volume 1, page 158 (Recommendation 181). See, for example: Australian Chamber of Commerce & Industry, sub, page 42; and Boral Limited, DR sub, page 11.

642 See, for example: Boral Limited, DR sub, page 17; and Australian Industry Group, DR sub, page 22.

- the absence of a single statutory regulator dedicated to the regulation of trade unions with sufficient legal power to investigate and prosecute breaches of the secondary boycott provisions; and
- the absence of appropriate legal duties owed by the officers of trade unions to their members, and the absence of appropriate mechanisms by which such officers can be held accountable to their members.[643]

As with all competition laws, secondary boycotts need to be enforced consistently and effectively — and in a timely manner. The Panel reiterates its concerns expressed in the Draft Report regarding: the ability and willingness of the relevant regulatory bodies to investigate and bring legal proceedings to enforce the law; the speed with which legal proceedings can be commenced and completed; and the sanctions available for contraventions of the law.

The Panel believes that the ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law. The Panel expects the ACCC will further develop its capability to enforce prohibitions on unlawful secondary boycotts in a timely way, especially in light of the Panel's recommendation that its charter focus more clearly on competition issues (see Recommendation 49). As with all competition laws, the secondary boycott laws will only act as a deterrent to unlawful behaviour if the laws are enforced consistently and effectively.

It would be useful for the ACCC to report generally about the number of complaints it receives about different parts of the CCA, including secondary boycotts and the manner in which the complaints are resolved. However, the ACCC should not be required to report publicly on investigations where it has decided that no contravention has occurred. Persons who are the subject of any ACCC investigation are entitled to a reasonable degree of privacy concerning allegations that are investigated and the outcomes of the investigation, unless proceedings are instituted.

Currently, the Federal Court has exclusive jurisdiction in respect of the prohibitions in sections 45D, 45DA, 45DB, 45E and 45EA (subsection 86(4) of the CCA and subsection 4(4) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987*). Despite that, it is open to litigants to bring secondary boycott proceedings in the state Supreme Courts under the Competition Codes of the States and Territories.

As the Competition Code is a law of the States (enacted through the various 1995 Competition Policy Reform Acts of the States), each state Supreme Court has jurisdiction to hear and determine such proceedings. This is convenient to litigants because a contravention of the secondary boycott sections may arise in connection with other common law disputes between employers and employee organisations that are commonly litigated in state courts.

The Panel supports the current arrangements for access to secondary boycott remedies through both Federal and state jurisdictions.

As discussed in Chapter 23 below, a corporation that contravenes the secondary boycott provisions is liable to a civil penalty not exceeding $750,000. This can be compared with much higher penalties for contravention of other competition law provisions ($10 million).[644] The Panel sees no reason why this should be the case — a view shared by Boral Limited (DR sub, page 13). Penalties listed in the CCA

643 Heydon AC QC, J D 2015, *Royal Commission into Trade Union Governance and Corruption*, Volume 2, Commonwealth of Australia, Canberra, pages 1106-1108.

644 Australian Mines & Metals Association (sub, page 7) notes the penalty level and supported a thorough examination of the adequacy and effectiveness of remedies and penalties for secondary boycotts.

are maximum penalties. The courts will determine penalties based on a wide range of factors, including the harm resulting from the conduct.

The Panel's view

A strong case remains for the prohibition of secondary boycotts, which should be retained in the CCA. A sufficient case has not been made to limit the scope of the secondary boycott prohibitions, nor to broaden the scope of the exception for employment-related matters.

In the absence of compelling evidence that the exceptions for the purposes of environmental and consumer protection (as distinct from public advocacy campaigns) are harming business, the Panel does not see an immediate case for amending them. However, if such evidence arises from future boycott activity, the exceptions should be re-assessed.

Employer groups in building, construction and mining perceive inadequacies in the public enforcement of the secondary boycott provisions of the CCA. Timely and effective enforcement serves as a deterrent to boycott activity and needs to exist both in regulatory culture and capability. The Panel believes that the ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of competition laws.

The ACCC should record the number of complaints made to it in respect of different parts of the CCA in its annual report, including secondary boycott matters and the number of such matters investigated and resolved in each financial year.

Further, the Panel sees no reason why the maximum pecuniary penalties for breaches of secondary boycott provisions should be lower than those for other breaches of the competition law.

Recommendation 36 — Secondary boycotts

The prohibitions on secondary boycotts in sections 45D-45DE of the CCA should be maintained and effectively enforced.

The ACCC should pursue secondary boycott cases with increased vigour, comparable to that which it applies in pursuing other contraventions of the competition law. It should also publish in its annual report the number of complaints made to it in respect of different parts of the CCA, including secondary boycott conduct and the number of such matters investigated and resolved each year.

The maximum penalty level for secondary boycotts should be the same as that applying to other breaches of the competition law.

21.2 Trading Restrictions in Industrial Agreements

Section 45E of the CCA prohibits a person from making a contract, arrangement or understanding with an organisation of employees that contains a provision that has the purpose of:

- preventing or hindering the person from supplying or continuing to supply goods or services to a second person that the first person has been accustomed, or is under an obligation, to supply, or doing so subject to conditions; or

- preventing or hindering the person from acquiring or continuing to acquire goods or services from a second person that the first person has been accustomed, or is under an obligation, to acquire, or doing so subject to conditions.

Section 45EA also prohibits a person from giving effect to such a provision.

Employer groups in the building, construction and resources industries raise concerns about industrial agreements that restrict employers in relation to acquiring services from contractors and labour hire businesses.[645] They argue that restrictions on the use of contractors are particularly acute in their industries because the work tends to be project-based and the requirement for labour is not constant but dependent on the stage of a construction project. Submissions also refer to terms of industrial agreements that regulate the supply of certain goods, such as uniforms,[646] or non-labour services, such as superannuation.[647]

The concern expressed by employer groups arises from a possible conflict between the intended operation of sections 45E and 45EA and the regulation of awards and industrial agreements under the Fair Work Act. In this regard, the Panel notes that amendments to the Fair Work Act have expanded the scope of conduct it regulates beyond the remuneration, conditions of employment, hours of work or working conditions of employees, and that this has occurred since sections 45E and 45EA were enacted.

This issue was brought into focus by the 2012 decision of the Full Court of the Federal Court, *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108. The case considered the question of whether it was lawful for the Fair Work Commission to approve an enterprise agreement under the Fair Work Act that contained a provision requiring the employer to engage or deal only with those contractors who apply wages and conditions no less favourable than those provided for in the agreement. The Full Court concluded that it was lawful for the Fair Work Commission to approve the agreement.

Relevantly, the Full Court concluded that the enterprise agreement did not involve any contravention of section 45E because:

- it was not an agreement with an organisation of employees in the sense required by section 45E; and
- as the agreement had statutory force, it was not a contract, arrangement or understanding within the meaning of section 45E.

It appears that there may be a conflict between the purposes of the CCA, as reflected in sections 45E and 45EA, and the industrial conduct permitted under the Fair Work Act. The apparent purpose of subsection 51(2) and sections 45E and 45EA is to exempt from the CCA contracts governing the remuneration, conditions of employment, hours of work or working conditions of employees, while prohibiting contracts between employers and employee organisations that otherwise hinder the trading freedom of the employer (in respect of the supply and acquisition of goods and services, which would include contractors).

645 See, for example: Australian Industry Group, sub, page 20; Australian Mines & Metals Association, sub, page 11; Master Builders Australia, sub, page 9; and Minerals Council of Australia, sub, page 14.

646 ACTU, DR sub, pages 12-13.

647 See, for example: Industry Super Australia, DR sub, pages 8-9; and Financial Services Council, DR sub, pages 1-2.

However, it appears to be lawful under the Fair Work Act to make awards and register industrial agreements that place restrictions on the freedom of employers to engage contractors or source certain goods or non-labour services.

Although the evidence suggests that these issues are more significant in some industries than others, it is desirable that the apparent conflict between the objective of sections 45E and 45EA and the operation of the Fair Work Act be resolved. The Panel favours competition over restrictions and believes that businesses should generally be free to supply and acquire goods and services, including contract labour if they choose.

The Draft Report notes a number of possible solutions to the apparent conflict, including:

- a procedural right for the ACCC to be notified by the Fair Work Commission of proceedings for approval of workplace agreements that contain potential restrictions of the kind referred to in sections 45E and 45EA;
- an amendment to sections 45E and 45EA so that they expressly include awards and industrial agreements (as proposed by employer representatives); and
- an amendment to sections 45E, 45EA and possibly paragraph 51(2)(a) to exempt workplace agreements approved under the Fair Work Act (as proposed by trade unions).

A number of submissions address these proposals.

The ACTU states that section 172 of the Fair Work Act, which defines the permitted subject matter of an enterprise agreement, encompasses matters such as 'ensuring that contractors are engaged on conditions no less favourable [than] those the instrument prescribes for employees, the provision of leave to workers to attend union training, salary packaging and superannuation' and argues that 'negotiation and agreement making in relation to such matters is, and must remain, legitimate'. The ACTU submits that (absent the repeal of the trading restriction provisions) sections 45E and 45EA and paragraph 51(2)(a) should be amended to exempt the bargaining, making and approval of enterprise agreements or proposed enterprise agreements (DR sub, pages 12-13).

Industry Super Australia states:

> ... superannuation is not simply another financial service or product that is provided to employers. Superannuation is a key employment condition and takes the form of deferred wages' and that it is 'entirely appropriate that matters pertaining to superannuation be the subject of workplace collective bargaining between employers and employees (DR sub, page 9).[648]

Conversely, a number of employer representative groups support an amendment to sections 45E and 45EA so that they expressly apply to awards and industrial agreements to prevent interference in the freedom of companies to engage contractors.[649]

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648 The Financial Services Council (DR sub, page 1) notes that 'Competition in the default superannuation market is currently under consideration by the Government through the Treasury's 'Better regulation and governance, enhanced transparency and improved competition in superannuation Discussion Paper'.

649 See, for example: Australian Mines & Metals Association, sub, page 12; Australian Chamber of Commerce and Industry, DR sub, page 15; Australian Industry Group, sub, page 20; Australian Petroleum Production and Exploration Association Limited, DR sub, page 11; Business Council of Australia, DR sub, page 51; and Master Builders Australia, sub 1, page 9 and DR sub, page 20.

The Panel considers that collective bargaining in respect of the remuneration, conditions of employment, hours of work or working conditions of employees should continue to be exempt from the application of the CCA, as reflected in paragraph 51(2)(a).

However, the Panel does not support expanding these categories. Collective bargaining should not intrude on the freedom of companies to acquire goods or services, including labour services, from other contractors, or their freedom to supply goods or services to others.

Accordingly, the Panel considers that sections 45E and 45EA should be amended so that they expressly apply to awards and industrial agreements, except to the extent that the awards and industrial agreements deal with the remuneration, conditions of employment, hours of work or working conditions of employees.[650] Such an amendment would preserve the integrity of the current exception in paragraph 51(2)(a), while protecting the trading freedom of employers outside the scope of that exception.

With that change to the CCA, it would become necessary for the Fair Work Commission to consider whether a proposed award or industrial agreement may potentially fall within the scope of sections 45E and 45EA. The Panel considers that the ACCC should be given the right to intervene (that is, to be notified, appear and be heard) in proceedings before the Fair Work Commission concerning compliance with sections 45E and 45EA. From a practical standpoint, this would require a protocol to be established between the ACCC and the Fair Work Commission. This would allow the Fair Work Commission to identify potential non-employment restrictions in lodged applications and notify the ACCC accordingly.

Also, the Panel observes that sections 45E and 45EA are presently framed in narrow terms. The prohibition only applies to restrictions affecting persons with whom the employer 'has been accustomed, or is under an obligation' to deal. As framed, the prohibition would not apply to a restriction in relation to any contractor with whom the employer had not previously dealt.

The ACTU submits that the reason for that limitation is that sections 45E and 45EA were originally enacted as offshoots of the secondary boycott provisions — the 'provisions were clearly aimed at preventing a union from entering into an arrangement with a trader to change that trader's behaviour in support of the union's boycott' (DR sub, pages 9 and 11).

Contraventions of sections 45E and 45EA can arise in the context of secondary boycott conduct, as illustrated by the findings of the Royal Commission into Trade Union Governance and Corruption concerning the CFMEU and Boral published in its Interim Report.[651] However, that does not support the limitations of sections 45E and 45EA to restrictions affecting persons with whom the employer 'has been accustomed, or is under an obligation' to deal. The same harm can arise if the restriction relates to a contractor with whom the employer has not previously dealt, but with whom the employer wishes to deal. This restriction should be removed from the provisions.

Further, consistent with the discussion above in relation to secondary boycotts, breaches of anti-competitive trading restrictions should not be subject to a lower maximum penalty than other breaches of competition laws.

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650 To achieve this application, the exception in paragraph 51(2)(a) may need to be amended so that it applies to sections 45E and 45EA.

651 Heydon AC QC, J D 2015, *Royal Commission into Trade Union Governance and Corruption*, Volume 2, Commonwealth of Australia, pages 1011 to 1115.

The Panel's view

There is an apparent conflict between the object of sections 45E and 45EA of the CCA and industrial conduct permitted under the Fair Work Act. The Panel considers it desirable that this apparent conflict be resolved. The Panel favours competition over restrictions and believes that businesses should generally be free to supply and acquire goods and services, including contract labour, if they choose.

The Panel considers that sections 45E and 45EA should be amended so that they expressly apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.

The Panel also considers that the ACCC should be given the right to intervene in proceedings (that is, to be notified, appear and be heard) before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA.

The present limitation in sections 45E and 45EA, such that the prohibition only applies to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation,' to deal, should be removed.

Breaches of anti-competitive trading restrictions should not be subject to a lower maximum penalty than other breaches of the competition law.

Recommendation 37 — Trading restrictions in industrial agreements

Sections 45E and 45EA of the CCA should be amended so that they apply to awards and industrial agreements, except to the extent they relate to the remuneration, conditions of employment, hours of work or working conditions of employees.

Further, the present limitation in sections 45E and 45EA, such that the prohibitions only apply to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation,' to deal, should be removed.

These recommendations are reflected in the model provisions in Appendix A.

The ACCC should be given the right to intervene in proceedings before the Fair Work Commission and make submissions concerning compliance with sections 45E and 45EA. A protocol should be established between the ACCC and the Fair Work Commission.

The maximum penalty for breaches of sections 45E and 45EA should be the same as that applying to other breaches of the competition law.

22 Exemption Processes

Competition is desirable not for its own sake but because, in most circumstances, it improves the welfare of Australians by increasing choice, diversity and efficiency in the supply of goods and services. In other words, competition is a means to an end. In some circumstances, arrangements that lessen competition may nonetheless produce public benefits that outweigh the detriment resulting from the lessening of competition.

The *Competition and Consumer Act 2010* (CCA) has various procedures by which businesses can apply to the Australian Competition and Consumer Commission (ACCC) for an exemption from the competition law for particular commercial arrangements on the basis that the arrangements generate a net public benefit. The CCA presently contains three separate exemption processes — authorisation, notification and clearance — that have different features.

The **authorisation** process applies to most types of business conduct. The ACCC may grant authorisation if it is satisfied that the conduct generates a net public benefit. Exemption from the competition laws does not commence until the ACCC has made a determination in respect of the application, which often takes many months.

At present, applications for merger authorisations are treated differently to other applications. Merger applications must be made to the Australian Competition Tribunal (the Tribunal) and are subject to a time limit for determination. As discussed earlier in the context of mergers, the Panel's view is that merger authorisation applications should be made instead to the ACCC in the first instance, with the Tribunal exercising a power of review (see Chapter 18).

As an alternative to authorisation, a **notification** may be given to the ACCC in respect of exclusive dealing conduct (prohibited under section 47), collective bargaining conduct (prohibited under the cartel provisions and section 45) and price signalling (prohibited under Division 1A). Notification has an advantage over authorisation in that the relevant exemption is provided upon filing the notification.[652] The ACCC may withdraw the exemption if it subsequently forms the view that the notified conduct does not give rise to a net public benefit. As discussed earlier in the context of resale price maintenance (RPM), the Panel considers that the notification procedure should be extended to RPM conduct (see Section 20.4).

Businesses can also apply for a formal **clearance** of a merger transaction. Like authorisation, the clearance procedure only provides exemption from the merger law after the ACCC has made a determination on the application. The ACCC may grant clearance if it is satisfied that the merger is not likely to substantially lessen competition (see Chapter 18).

A number of submissions comment on these exemption processes. In addition to issues concerning the merger approval processes (discussed in Section 18.5), submissions raise three matters for consideration:

- whether the authorisation and notification processes can be simplified;[653]

652 In the case of third-line forcing, a type of exclusive dealing, and collective bargaining, the exemption commences 14 days after filing the notification.

653 Law Council of Australia — Competition and Consumer Committee, sub, pages 75-77.

- whether the notification process for collective bargaining is fulfilling its potential;[654] and
- whether the ACCC should be granted a general power to issue block exemptions.[655]

22.1 SIMPLIFICATION OF THE AUTHORISATION AND NOTIFICATION PROCESSES

Wherever possible, it is desirable to remove unnecessary complexity. Like much of the CCA, the authorisation and notification processes are unnecessarily complex, which imposes costs on business. Specifically:

- The authorisation process focuses on the specific provisions of the CCA that might be contravened by the proposed business conduct. As a consequence, several different applications may be required in respect of a single commercial arrangement depending upon the number of provisions of the CCA that apply to the arrangement.
- The authorisation and notification procedures do not empower the ACCC to grant exemption if the ACCC is satisfied that the proposed business conduct is unlikely to substantially lessen competition. In order to grant the exemption, the ACCC is required to assess the net public benefit of the proposed conduct. In contrast, the formal clearance process for mergers does enable the ACCC to exempt a merger if it is satisfied that the merger is unlikely to substantially lessen competition.

Significant steps can be taken to simplify the authorisation and notification processes. First, in respect of authorisation, it should be permissible to apply for authorisation of a business arrangement or conduct through a single application and without regard to the specific provisions of the CCA that might be contravened by the proposed conduct. Second, for both authorisation and notification, the ACCC should be empowered to grant the exemption if it is satisfied that either the proposed conduct is unlikely to substantially lessen competition or is likely to result in a net public benefit.

Each of these changes would assist in focusing the exemption process on the issues of substance and away from technicalities. Submissions to the Draft Report largely support this approach;[656] although, two submissions indicate their concern that the new arrangements could create uncertainty.[657]

The ACCC supports the objective of simplification. However, it expresses concern that empowering it to grant authorisation based on assessing the competitive effect of conduct may increase its workload materially. This is because a business may seek authorisation rather than rely on its own judgment about compliance with competition law. The ACCC also notes that, in the case of conduct that is subject to per se prohibition, allowing exemption on the basis that particular conduct does not substantially lessen competition represents a significant change to existing policy settings (DR sub, pages 65 and 66).

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654 See, for example: Australian Dairy Farmers, sub, page 11; and Queensland Dairyfarmers' Organisation, sub, page 8.

655 Baker & McKenzie, sub, page 6.

656 See, for example: Australian Chicken Growers' Council Ltd, DR sub, page 3, Australian National Retailers Association, DR sub, page 13; Australian Taxi Industries Association, DR sub, page 12; BHP Billiton, DR sub, page 1; Business Council of Australia, DR sub, page 51; Julie Clarke, DR sub, page 5; Coles Group Limited, DR sub, page 7; Law Council of Australia — Competition and Consumer Committee, DR sub, page 34; Law Council of Australia — SME Committee, DR sub, page 20; Master Builders Australia, DR sub, pages 20-21; Queensland Law Society, DR sub, page 6; Retail Guild of Australia, DR sub, page 7; and Telstra, DR sub, page 6.

657 See, for example: Australian Motor Industry Federation, DR sub, page 13; and Australian Newsagents' Federation, DR sub, page 18.

The Panel's view

Submissions broadly support the regime of exemptions under the CCA.

The authorisation and notification processes can be simplified by ensuring that only a single authorisation application is required for a single business arrangement or conduct.

It is also desirable for business to have a regulatory avenue available to demonstrate that specified conduct would not substantially lessen competition, thereby gaining exemption from the competition law.

However, allowing exemption from the per se prohibitions (such as the cartel conduct prohibitions) on the basis that specified conduct does not substantially lessen competition would involve a significant change to current law and policy. Although not all cartel conduct substantially lessens competition (occasionally cartel conduct occurs between small firms that hold an insubstantial market share), it is almost always anti-competitive in nature and usually has no countervailing public benefit.

In respect of such conduct, it is appropriate that exemption be based on demonstrating that the conduct has a net public benefit. Exemption on the basis that conduct does not substantially lessen competition should only be available in respect of sections 45, 46 (as proposed to be amended), 47 (if retained) and 50, being provisions that include the 'substantial lessening of competition' test.

Recommendation 38 — Authorisation and notification

The authorisation and notification provisions in Part VII of the CCA should be simplified to:

- ensure that only a single authorisation application is required for a single business transaction or arrangement; and
- empower the ACCC to grant an exemption from sections 45, 46 (as proposed to be amended), 47 (if retained) and 50 if it is satisfied that the conduct would not be likely to substantially lessen competition or that the conduct would result, or would be likely to result, in a benefit to the public that would outweigh any detriment.

This recommendation is reflected in the model legislative provisions in Appendix A.

22.2 Collective bargaining notification

Collective bargaining is an arrangement by which two or more competing businesses come together to negotiate with a supplier or a business customer over terms, conditions and prices. Collective bargaining arrangements may take various forms and have different effects upon competition. For example, two or more competing suppliers might wish to appoint a bargaining agent to act on their behalf to negotiate standard terms and conditions of trade with one or more business customers; under a different arrangement, two or more competing suppliers might wish to jointly negotiate price with a large business customer with the understanding that, if price is not agreed during the negotiation, none of the suppliers will deal with the business customer. The latter form of arrangement is often referred to as a 'collective boycott'.

Collective bargaining will usually contravene the cartel prohibitions because the underlying arrangement will usually lead to the competing businesses agreeing to pay or receive the same price for goods or services (price fixing) or agreeing not to deal with a particular supplier or business

customer (collective boycott). Therefore, in the absence of an exemption, it will usually be unlawful for competing businesses to engage in collective bargaining.

Although collective bargaining will often be harmful to competition, it can also have beneficial effects. Small businesses dealing with large businesses often face an imbalance in bargaining power. That imbalance can result in inefficient or unfair commercial outcomes. Permitting small business to bargain collectively in certain circumstances can redress the imbalance in power and result in more efficient market outcomes.

For that reason, the CCA permits businesses, particularly small businesses, to seek an exemption for collective bargaining in certain circumstances by filing a notification with the ACCC. The collective bargaining notification process has the potential to address a number of the concerns raised by small businesses that supply goods and services to larger businesses.

In consultations with small business, the Panel discovered a low level of awareness of how the collective bargaining provisions might benefit the sector. There appears to be a need to enhance small business awareness of the notification process.

Submissions broadly support the collective bargaining notification process, with a number noting the need to increase the flexibility and effectiveness of collective bargaining for small business.[658] Suggestions include:

- improving the timeliness and/or decreasing the costs of the notification process;[659] and
- increasing flexibility and simplification (for example, by broadening the range of parties covered by arrangement notification).[660]

The Shopping Centre Council of Australia has an alternative view, stating that many small businesses believe they can achieve a better outcome through individual negotiations with suppliers (DR sub, page 7).

Some submissions support an increased role for peak bodies in filing applications and negotiating collective bargaining arrangements on behalf of members.[661] However, others express a contrary view, with Independent Contractors Australia stating that bargaining parties should always be named publicly and that authority to bargain collectively should only be granted to parties who have direct commercial arrangements with the bargaining target (DR sub, page 9).

The ACCC also supports amending and simplifying the collective bargaining notification process to increase the use of collective bargaining by small business. It observes that it continues to receive more applications for authorisation of collective bargaining arrangements than notifications, even though the notification process is intended to be simpler and less expensive than the authorisation process. This indicates that the notification process is not working as intended.

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658 See, for example: Australian Chicken Growers' Council Limited, DR sub, pages 2-5; Australian Dairy Farmers, DR sub, page 14; Australian Newsagents' Federation, DR sub, pages 28-30; Business Council of Cooperatives and Mutuals, DR sub, page 4; Grain Producers SA, DR sub, page 3; Growcom, DR sub, page 2; and Woolworths Limited, DR sub, pages 32-33.

659 Australian Newsagents' Federation, sub, pages 11-12.

660 See, for example: Australian Chicken Growers' Council Limited, sub, page 7; and Australian Dairy Farmers, sub, page 11.

661 See, for example: Australian Dairy Farmers, sub, page 11.

The ACCC also notes that, currently, it receives very few collective bargaining proposals that include collective boycott activity, even when that activity could be efficiency-enhancing. The ACCC believes there may be a perception among small businesses and their advisors that a collective bargaining arrangement that includes the prospect of a collective boycott would not be approved. The ACCC submits to the contrary that such arrangements are capable of being approved in appropriate circumstances (DR sub, pages 112-113).

Box 22.1 below identifies a number of changes the ACCC recommends making to the collective bargaining notification process to improve its utility.

Box 22.1: ACCC-proposed collective bargaining reforms

The ACCC identifies a package of amendments to address current deficiencies in the collective bargaining notification process (DR sub, pages 112-113).

First, the ACCC considers safeguards are necessary to make notifications involving collective boycott proposals more likely to be approved. In particular, the ACCC recommends that:

- The ACCC be able to impose conditions on notifications involving collective boycott activity where conditions could address any identified concerns and enable the ACCC to allow the notification to stand. Currently, the ACCC is not able to allow the notification to stand subject to conditions, and so must object to the notification in its totality in such circumstances.
- The timeframe for the ACCC to assess collective boycott notifications be extended from 14 to 60 days. A longer time period before a collective boycott notification would come into force would allow the ACCC adequate time to consult with the counterparty/ies and assess the proposed conduct.
- In exceptional circumstances where a collective boycott is causing imminent serious detriment to the public, the ACCC should have a limited 'stop power' to require collective boycott conduct to cease, subject to Tribunal review.

Second, the ACCC considers it important to address the current inflexibility with the notification process and recommends that greater flexibility be provided:

- in the nomination of members of the bargaining group, such that a notification could be lodged to cover future (unnamed) members of the bargaining group;
- in the nomination of the counterparties with whom the group seeks to negotiate, such that a notification could be lodged to cover multiple counterparties; and
- for the ACCC to impose different timeframes for the expiration of collective bargaining notifications. Currently collective bargaining/collective boycott notifications expire automatically after three years. The ACCC should be able to set a timeframe to suit the circumstances, with the current three-year period remaining as a default.

Third, the current maximum value thresholds for a party to notify a collective bargaining arrangement should be reviewed to ensure that they are not restricting participation by small businesses.

In conjunction with the proposed legislative changes, the ACCC would amend its collective bargaining notification guidelines to provide information about the range of factors relevant to considering whether a collective boycott may be necessary to achieve the benefits of collective bargaining. This may help to address the perception that collective boycotts are unlikely to be approved.

Box 22.1: ACCC-proposed collective bargaining reforms *(continued)*

The ACCC supports the Draft Report's recommendation that the ACCC should enhance the awareness of the collective bargaining notification process and its benefits for small business. This will be particularly important if the ACCC's proposed amendments are implemented and the collective bargaining notification process becomes more flexible and accessible for small business.

The Panel's view

The collective bargaining notification process is potentially of significant benefit to small business and could be more widely used. The regime could be simplified in respect of the businesses covered by a notification. The regime could also better facilitate collective boycott activity where it enhances efficiency.

The Panel considers that the ACCC's proposals strike an appropriate balance between facilitating the exemption of collective bargaining, including the potential to engage in boycott activity, while maintaining safeguards.

Recommendation 54 — Collective bargaining

The CCA should be reformed to introduce greater flexibility into the notification process for collective bargaining by small business.

Reform should include allowing:

- the nomination of members of the bargaining group, such that a notification could be lodged to cover future (unnamed) members;
- the nomination of the counterparties with whom the group seeks to negotiate, such that a notification could be lodged to cover multiple counterparties; and
- different timeframes for different collective bargaining notifications, based on the circumstances of each application.

Additionally, the ACCC should be empowered to impose conditions on notifications involving collective boycott activity, the timeframe for ACCC assessment of notifications for conduct that includes collective boycott activity should be extended from 14 to 60 days to provide more time for the ACCC to consult and assess the proposed conduct, and the ACCC should have a limited 'stop power' to require collective boycott conduct to cease, for use in exceptional circumstances where a collective boycott is causing imminent serious detriment to the public.

The current maximum value thresholds for a party to notify a collective bargaining arrangement should be reviewed in consultation with representatives of small business to ensure that they are high enough to include typical small business transactions.

The ACCC should take steps to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses. The ACCC should also amend its collective bargaining notification guidelines. This should include providing information about the range of factors considered relevant to determining whether a collective boycott may be necessary to achieve the benefits of collective bargaining.

22.3 BLOCK EXEMPTIONS

Competition law regimes in some other jurisdictions provide a mechanism by which defined categories of conduct are granted a 'safe harbour' exemption from competition law. Box 22.2 below summarises examples of block exemptions in other jurisdictions.

The block exemption removes the need to make individual applications for exemption. The exemption is granted if the competition regulator considers that certain conditions are satisfied: either that the category of conduct is unlikely to damage competition; or that the conduct is likely to generate a net public benefit.

Box 22.2: International examples of block exemptions

UK

The Secretary of State may make a block exemption order exempting agreements from the prohibition against certain horizontal conduct.[662] These agreements must contribute to improving production or distribution, or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit. The agreements must not impose on the parties concerned restrictions that are not indispensable to the attainment of those objectives, or afford the undertakings concerned the possibility of eliminating competition.

EU

The European Commission may grant exemptions for certain agreements and practices if those agreements and practices are assessed as having significant countervailing benefits. This may be done on an agreement-by-agreement basis or through applying block exemptions for categories of conduct.[663]

Singapore

Under section 36 of the Competition Act 2004 (Singapore), the Competition Commission of Singapore may recommend to the Minister that a particular category of agreement be exempted from the prohibition on anti-competitive agreements.

A block exemption power under the CCA may be an efficient way to deal with certain types of business conduct that are unlikely to raise competition concerns, either because of the parties engaged in the conduct or the nature of the conduct itself. This would be an efficient means to provide certainty for businesses in respect of conduct that is unlikely to raise significant competition problems. It may also play a role in educating and informing business about the types of conduct that do not raise competition concerns and those that do.

Submissions to the Draft Report broadly support empowering the ACCC to grant block exemptions,[664] with a number seeking more details on how the recommendation would work in practice.[665]

662 *Competition Act 1998* (UK), section 6.

663 Treaty on the Functioning of the European Union, Article 101(3).

664 See, for example: Arnold Bloch Leibler, DR sub, page 3; Australian Chicken Growers Council Ltd, DR sub, page 3; ACCC, DR sub, page 67; Australian National Retailers Association, DR sub, page 14; Baker & McKenzie, DR sub, page 2; BHP Billiton, DR sub, page 1; Law Council of Australia — Competition and Consumer Committee, DR sub, pages 24-28; Queensland Law Society, DR sub, page 6; and Retail Guild of Australia, DR sub, page 7.

The ACCC supports this proposal. It also notes that such a power would be an effective way to deal with shipping conference agreements if Part X of the CCA were repealed, and could be used in the context of intellectual property (IP) licences if subsection 51(3) of the CCA were repealed (DR sub, page 67).

The ACCC submits that a block exemption regime should incorporate the following features (DR sub, page 68):

- The basis for the ACCC issuing a particular block exemption should be either that the conduct is unlikely to substantially lessen competition or that it results in a net public benefit.
- The ACCC should have the ability to set parameters that exclude or limit the benefit of the block exemption in certain circumstances and to revoke or amend the block exemption in particular circumstances, subject to an appropriate consultation and notice period.
- It should be possible for the ACCC to impose a time limit on the operation of the block exemption, after which it may review and re-consider the terms of the block exemption and issue a new one if the public benefit/detriment test is met.
- The ACCC should publicly consult and issue a draft document prior to issuing the block exemption.[666]

The Panel considers that the ACCC's suggestions have merit.

665 See, for example: Australian Newsagents' Federation, DR sub, page 18; Australian Taxi Industry Association, DR sub, page 12; Consumer Action Law Centre, DR sub, page 18; Law Council of Australia — SME Business Law Committee, DR sub, page 20; and Spier Consulting Legal, DR sub, page 19.

666 See also discussion by Consumer Action Law Centre, DR sub, page 18.

The Panel's view

A block exemption power, exercisable by the ACCC, should be introduced to the CCA to supplement the authorisation and notification frameworks.

Such a power would be helpful in establishing 'safe harbours' for business, reducing compliance costs and providing further certainty about the application of the CCA. It would also create a preferable process for exempting efficiency-enhancing arrangements entered into by international liner shipping firms and IP owners if Part X and subsection 51(3), respectively, were to be repealed in line with the Panel's recommendations.

The test to be applied for granting a block exemption should be consistent with the test the Panel proposes in respect of authorisations and notifications generally — that the ACCC be satisfied that the conduct described in the block exemption:

- would not have the effect, or be likely to have the effect, of substantially lessening competition; or
- would result, or be likely to result, in a benefit to the public that outweighs any detriment to the public flowing from the conduct.

The ACCC should be empowered to grant a block exemption that applies generally to specified conduct or is limited such that it applies: to specified persons or classes of persons; in specified circumstances; or on specified conditions. A block exemption should cease to have effect at the end of a period specified in the exemption.

The details of the procedural aspects of the block exemption power should be refined as part of any implementation process. The Panel considers that the ACCC should publicly consult and issue a draft document prior to issuing the block exemption. The ACCC should also maintain a public register of all block exemptions, including those no longer in force.

Recommendation 39 — Block exemption power

A block exemption power, exercisable by the ACCC, should be introduced and operate alongside the authorisation and notification frameworks in Part VII of the CCA.

This power would enable the ACCC to create safe harbours, where conduct or categories of conduct are unlikely to raise competition concerns, on the same basis as the test proposed by the Panel for authorisations and notifications (see Recommendation 38).

The ACCC should also maintain a public register of all block exemptions, including those no longer in force. The decision to issue a block exemption would be reviewable by the Australian Competition Tribunal.

The Panel's recommended form of block exemption power is reflected in the model legislative provisions in Appendix A.

23 Enforcement and Remedies

The *Competition and Consumer Act 2010* (CCA) confers both public and private enforcement rights to take action under the competition law.

Public enforcement is undertaken by the Australian Competition and Consumer Commission (ACCC). The ACCC is empowered to investigate possible contraventions of the competition law and to institute proceedings in the Federal Court of Australia seeking penalties and other remedies depending on the contravention.[667]

The ACCC is also empowered under section 155 of the CCA to compel individuals to appear before it to answer questions about a potential contravention, and to compel corporations and individuals to provide information and produce documents.

Individuals may also bring proceedings in the Federal Court to seek redress for contraventions of the competition law.

Submissions raise a number of concerns about the scope of public and private enforcement rights under the CCA and about the ACCC's use of its powers under section 155 of the CCA.

23.1 Public enforcement

In proceedings commenced by the ACCC, the Federal Court may impose various sanctions or grant various categories of relief in respect of a contravention of the competition laws, including:[668]

- in the case of cartel conduct, a term of imprisonment for up to 10 years on an individual who has knowingly participated in the contravention (or a fine of up to 2,000 penalty units, currently $340,000, or both) and, in respect of a contravening corporation, a fine in an amount not exceeding the greater of $10 million, three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the corporation's annual turnover;
- in the case of a contravention by a corporation of any other competition law provision (except sections 45D, 45DB, 45E, or 45EA), a civil penalty in an amount not exceeding the greater of $10 million, three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the corporation's annual turnover;
- in the case of a contravention by a corporation of section 45D, 45DB, 45E, or 45EA, a civil penalty not exceeding $750,000;
- an injunction to prevent the continuation of the contravening conduct;
- a range of probationary and community service-type orders;
- orders publicising the contravention;
- orders for compensation on behalf of other identified persons; and
- in the case of a merger that has been completed, an order that the acquiring corporation divest the business or assets that were acquired.

667 The Commonwealth Director of Public Prosecutions may also commence prosecutions relating to criminal offences such as making and giving effect to cartel provisions in sections 44ZZRF and 44ZZRG of the CCA.

668 See *Competition and Consumer Act 2010,* Part VI.

Only a few submissions address the adequacy of the sanctions and remedies that may be imposed for contraventions of the competition law. There appears to be general approval of the severity of the sanctions.

The Panel received some comments, particularly from the Australian Mines and Metals Association (sub, page 7), in relation to the adequacy of pecuniary penalties for contravening the secondary boycott provisions. As discussed earlier, the Panel considers that the maximum penalty should be the same as that for other contraventions of Part IV (see Recommendation 36).

A few submissions propose that a divestiture remedy be available for contraventions of section 46 (in addition to applying to breaches of the merger provisions). This issue is discussed above in Section 19.1 in the context of section 46. The Panel does not support such a proposal.

23.2 PRIVATE ENFORCEMENT

Consumers or businesses harmed by a contravention of the competition law can seek relief from the Federal Court, most commonly damages (compensation) or injunctions to prevent and restrain the contravening conduct.

A number of submissions comment on the difficulties confronting many consumers and small businesses that wish to bring private actions in the Federal Court in respect of competition law. For example, Caron Beaton-Wells and Brent Fisse note that private parties face a range of difficulties in pursuing private action, including:

- uncertainty as to when the limitations period commences;
- difficulties in obtaining access to information generally and information from the ACCC;
- the apparent inability to rely on admissions made in ACCC proceedings, owing to the uncertain scope of section 83 of the CCA;
- challenges in proving and quantifying loss; and
- requirements imposed by section 5 of the CCA to seek ministerial consent in relation to proceedings involving extraterritorial conduct. (sub, pages 29-30)

From submissions and consultations with small business, the Panel is convinced that there are significant barriers to small business taking private action to enforce the competition laws.[669] A private action would be beyond the means of many small businesses. In some cases, a small business might not wish to bring a proceeding for fear of damaging a necessary trading relationship.

These issues are considered below.

Section 83 of the CCA

The CCA provides one mechanism intended to reduce the costs associated with private enforcement proceedings. Section 83 is intended to facilitate private actions by enabling findings of fact made against a corporation in one proceeding (typically a proceeding brought by the ACCC) to be used as prima facie evidence against the corporation in another proceeding (typically a proceeding brought by a private litigant).

669 See, for example: Retail Guild of Australia, DR sub, page 48; and Ritchies Stores, DR sub, page 3.

However, a significant potential deficiency has emerged in respect of the scope of section 83. Many ACCC proceedings are resolved by the corporate defendant making admissions of fact(s) that establish the contravention, but it is uncertain whether section 83 applies to such admissions. A number of decisions of the Federal Court suggest that section 83 is confined to findings of fact made by the court after a contested hearing.[670]

The effectiveness of section 83 as a means of reducing the costs of private actions could be enhanced if the section were amended to apply, not just to *findings* of fact, but to *admissions* of fact made by a corporation in another proceeding.[671]

However, submissions express concern about the impact that extending section 83 to admissions of fact might have on the willingness of parties to co-operate in cartel matters or settle matters with the ACCC, compromising the effectiveness of public enforcement of the CCA.[672] The assumption underlying those concerns is that companies may choose to settle a proceeding brought by the ACCC on the basis of admissions of fact, believing that those admissions cannot be relied upon by a private litigant seeking compensation in a follow-on proceeding. If the admissions could be relied upon, it might change how respondent companies assess the advantages of settlement.

Despite these concerns, the Panel continues to support extending section 83 to admissions of fact, for the following reasons:

- First, the current distinction between findings of fact and admissions of fact for the purposes of section 83 is somewhat artificial. Most contested hearings involve a mixture of factual admissions (often made in pleadings) and factual findings to resolve the dispute. It is difficult to separate the factual admissions and findings. Further, there is a real possibility that admissions of fact made by a respondent company in a proceeding brought by the ACCC would be admissible against that company in a follow-on proceeding under section 81 of the *Evidence Act 1995* in any event, thereby rendering the perceived distinction under section 83 irrelevant.[673]
- Second, it is doubtful that a change to section 83 would materially alter the assessment by a respondent whether or not to settle an ACCC proceeding. The decision to resolve an ACCC matter by admissions is a significant one that would usually subject the respondent company to a financial sanction and adverse publicity. Having taken that decision, it is unlikely that the respondent company would subsequently contest the admitted facts in a follow-on proceeding.

  Even if the respondent company wished to preserve that right, the proposed change to section 83 would not prevent it from doing so. Section 83 merely makes the admitted fact prima facie evidence of that fact in the follow-on proceeding. The respondent company remains free, should it so choose, to adduce evidence in the follow-on proceeding contrary to

670 *ACCC v Apollo Optical (Aust) Pty Ltd* [2001] FCA 1456 at [24]; *ACCC v ABB Transmission and Distribution Limited (No. 2)* [2002] FCA 588 at [51]; *ACCC v Leahy Petroleum Pty Ltd (No 3)* [2005] FCA 265 at [118]; *ACCC v Dataline.net.au Pty Ltd* [2006] FCA 1427 at [107].

671 See, for example: CHOICE, DR sub, pages 29-30; Consumer Action Law Centre, DR sub, page 18; Law Council of Australia — SME Committee, DR sub, page 21; Master Grocers Association/Liquor Retailers Association, DR sub, page 25; National Seniors Australia, DR sub, page 15; Retail Guild of Australia, DR sub, page 7; Spier Consulting Legal, DR sub, pages 20-21 and David Wright, DR sub, page 8.

672 ACCC, DR sub, page 79. See also submissions opposing changes to section 83 from Arnold Bloch Leibler, DR sub, page 8; Business Council of Australia, DR sub, page 22; Minter Ellison, DR sub, page 7; and Queensland Law Society, DR sub, pages 7-8.

673 See the discussion by Ryan J in *ACCC v Pratt (No 3)* [2009] FCA 407.

> the admitted fact. Furthermore, admissions of fact in an ACCC proceeding will rarely, if ever, address the question of loss and damage suffered by market participants as a result of the contravening conduct. Accordingly, a plaintiff in a follow-on proceeding would need to prove loss and damage against the respondent company in order to recover compensation.

The proposed amendment to section 83 removes doubt about its operation in the context of factual admissions and reduces the costs and risks of proceedings brought by persons who may have suffered loss and damage by reason of admitted contravening conduct.

Cost of litigation and access to justice

Smaller businesses frequently seek assistance from the ACCC in respect of competition law concerns. The ACCC plays a very important role in enforcing the law on behalf of businesses that are unable to do so themselves. Nevertheless, the ACCC is unable to take proceedings in respect of all complaints brought to it. Understandably, it seeks to prioritise the cases that it will pursue within its budgetary constraints. This can lead to some dissatisfaction among small businesses when the ACCC does not pursue their complaints. In part, this dissatisfaction is due to the absence of an effective alternative option they can pursue themselves.

In general, the dispute resolution processes currently available to smaller businesses for competition law-related disputes do not meet their expectations. The Panel sympathises with their frustrations and considers that developing alternative dispute resolution processes could go some way to addressing small business concerns.

The Australian Chamber of Commerce and Industry (ACCI) considers, 'alternative dispute resolution services that provides quality information quickly, informally and at low cost is essential to improving both competition and productivity for small and medium businesses' (sub, page 13).

A number of possible alternative dispute resolution options are put forward by small business. The Office of the Australian Small Business Commissioner states:

> Access to justice is another key component of a competitive marketplace. A small business focuses on plying its trade or profession. Disputes will arise from time to time, but small businesses will often not have the skills and resources on hand to deal with these incidents that arise in the course of business but are not a part of the *ordinary* course of that business. These types of business disruption are not easily catered for by small business and, depending on the particular dispute, can impact small business disproportionately, particularly where there is unequal bargaining power. (sub, page 4)

The Australian Small Business Commissioner is an Australian Government initiative designed to act as an advocate for small businesses. However, the Australian Small Business Commissioner does not directly provide mediation or arbitration services.[674]

The Panel notes that some States and Territories have introduced their own small business commissioners, offices of small business and ombudsmen that provide dispute resolution services.

Both the South Australian Small Business Commissioner and the New South Wales Small Business Commissioner have some capacity to consider complaints falling within the remit of the CCA. The South Australian Small Business Commissioner is able to assist with businesses that are treated

674 Australian Small Business Commissioner, Our Role, Australian Small Business Commissioner, Canberra, viewed 10 February 2015, <http://asbc.gov.au/about/our-role>.

unfairly in their commercial dealings with other businesses in the marketplace and in franchising disputes.[675] The New South Wales Small Business Commissioner lists a range of disputes that can be considered through its mediation service, including those involving suppliers, wholesalers and purchasers, service providers, franchises and unfair contracts.[676] The Western Australian Small Business Development Corporation states that it provides Western Australian small businesses with access to a speedy, low-cost, non-litigious process to resolve disputes with other businesses (sub, page 28).

These services are in addition to any court or tribunal-based dispute resolution services, which are often available for consumer law matters.

The Panel supports the positive comments received in submissions about the offices of small business and ombudsmen services. The Law Council of Australia — SME Committee notes that these offices already provide a valuable mediation function to many small businesses and believes that these initiatives should be supported and if possible extended (DR sub, pages 2-3).

A number of concerns small businesses raise with the Panel were also raised with the Productivity Commission (PC) in the context of the PC's *Access to Justice Arrangements* inquiry:

- access to effective and low cost small business advice and dispute resolution services that are responsive to their individual needs;
- the variety of frameworks providing dispute resolution services, some of which overlap; and
- the cost of accessing court-based dispute resolution and the frequently drawn-out nature of proceedings.

The PC's *Access to Justice Arrangements* report concludes:

> Adequately resourced advice and resolution services that cater to the needs of small business, such as small business commissioners, have the potential to quickly and fairly resolve many legal disputes and allow small businesses to avoid the uncertainty and hiatus associated with being involved in a protracted, formal dispute.[677]

The PC recommends that the Australian, state and territory governments should ensure by no later than 31 December 2015 that their Small Business Commissioners or dedicated Small Business Offices, have the financial resources, personnel and statutory capacity to, at a minimum:

- provide comprehensive advice to small businesses on their rights and obligations, including appropriate referrals to other government and non-government agencies;
- identify emerging and persistent areas of legal concern to small business and advocate for appropriate policy reform;
- work co-operatively with other state, territory and national small business agencies;
- mediate or refer disputes between small businesses and other businesses and state or territory government agencies, including local governments; and

675 Small Business Commissioner of South Australia, Dispute Resolution, Small Business Commissioner of South Australia, Adelaide, viewed 9 February 2015, <www.sasbc.sa.gov.au/dispute_resolution/overview>.

676 NSW Small Business Commissioner, What to expect from our service, NSW Small Business Commissioner, Sydney, viewed 9 February 2015, <www.smallbusiness.nsw.gov.au/solving-problems/commercial-dispute-resolution>.

677 Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra.

- have the power to compel state or territory government agencies, including local governments, to provide information on, and participate in mediation related to, disputes with individual small businesses. [678]

In addition, dispute resolution processes are available under industry codes and through industry ombudsmen; for example, the Telecommunications Industry Ombudsman.

The PC also makes a number of recommendations designed to ensure efficient and streamlined services and minimise court-related costs for businesses:

- ensure that future reviews of industry codes consider whether dispute resolution services provided pursuant to an industry code, often by industry associations or third parties, are provided instead by the Australian Small Business Commissioner under the framework of that industry code;[679]
- broaden the use of the Federal Court's fast-track model to facilitate lower cost and more timely access to justice;[680] and
- better manage the costs of litigation, including through the use of costs budgets for parties engaged in litigation.[681]

Although some submissions argue 'no costs' orders for small businesses would be of assistance,[682] such changes could have unintended consequences; for example, encouraging frivolous or vexatious actions.

The Panel also notes that the proposal for a Small Business and Family Enterprise Ombudsman is in the process of being implemented and is expected to be finalised by 1 July 2015.[683] The proposal to extend unfair contract terms laws to small business contracts also remains in progress, with the Australian Government currently reviewing feedback from consultations and developing a response in co-operation with state and territory consumer affairs ministers.[684]

The Law Council of Australia — SME Committee does not support creating a new body solely to handle CCA-related small business disputes (DR sub, pages 2-3). The submission from the Office of the Australian Small Business Commissioner indicates that dispute resolution services are already available at both Commonwealth and state level; rather, the issue is raising small business' awareness of their existence (DR sub, pages 1-3). Any new functions should be given to current service providers. Noting these submissions, the Panel does not consider a specific body is needed to deal with competition law dispute resolution.

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678 Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra, page 299 and Recommendation 8.3.

679 Ibid., Recommendation 9.3.

680 Ibid., Recommendation 11.1.

681 Ibid., Recommendation 13.3.

682 See, for example: Master Grocers Australia, DR sub, page 58; and Independent Supermarket Retailers Guild of South Australia, DR sub, page 6.

683 The Australian Small Business Commissioner will continue to operate until the Small Business and Family Enterprise Ombudsman commences, which is expected to occur by 1 July 2015. See Department of the Treasury, Small Business and Family Enterprise Ombudsman, Department of the Treasury, Canberra, viewed 9 February 2015, <www.treasury.gov.au/Policy-Topics/Business/Small-Business/Family-Enterprise-Ombudsman>.

684 Department of the Treasury, Extending Unfair Contract Term Protections to Small Businesses, Department of the Treasury, Canberra, viewed 9 February 2015, <www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms>.

During consultation, the Panel heard concerns from some small businesses about their experience of raising concerns about anti-competitive conduct with the ACCC. These include:

- responses from the ACCC that fail to explain clearly why the ACCC has decided not to pursue particular matters;
- responses from the ACCC that were not timely; and
- where the ACCC decided to pursue concerns raised by a small business, it failed to provide regular updates on the investigation's progress.

The Panel considers that the ACCC should tighten up its response to small business complaints concerning competition laws. If the ACCC determines that it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the business to alternative dispute resolution procedures. Where the ACCC does pursue a complaint raised by small business, it should keep the small business informed of the progress and outcome of its investigation.

While the Panel finds no evidence of systemic concerns, it is pleasing to note that the ACCC continues to look for ways to enhance its interaction with small business complainants and acknowledges room for improvement (ACCC, DR sub, page 109).

Private actions involving overseas conduct

Conduct that contravenes Australia's competition laws may take place overseas. From time to time, multinational corporations have entered into cartel arrangements that apply to many parts of the world, including Australia. Recent examples that have been the subject of ACCC proceedings include international cartels concerning vitamins, international air freight and the supply of marine hoses.

Currently, those seeking compensation under Australian competition law in respect of contravening conduct that occurs overseas face two regulatory impediments: the business residence test; and the need to obtain ministerial consent.

Business residence test

Overseas conduct will only be subject to Australian law if it is engaged in by a corporation incorporated in, or carrying on business within Australia (subsection 5(1) of the CCA). The effect of that provision is that, in respect of contravening conduct that occurs overseas, a foreign corporation will only be subject to Australian competition law if it otherwise carries on business in Australia.

The Panel considers that the application of the law to a foreign corporation should not depend on whether the corporation otherwise carries on business in Australia.[685] Australian competition law is generally limited in its scope (and should be so limited) to conduct that harms competition in an Australian market. If a foreign corporation engages in conduct that harms competition in an Australian market, it should be subject to Australian law.

685 The Commonwealth has power under subsection 51(xx) of the Constitution to make laws with respect to trading or financial corporations formed within the limits of the Commonwealth and foreign corporations. There is no additional requirement that foreign corporations have any particular connection with Australia.

Submissions on this topic support the Panel's Draft Recommendation to remove the 'business residence' requirement in section 5 of the CCA.[686]

A number of submissions question whether it is appropriate for Australia's competition laws to be limited to conduct that harms competition in an Australian market. For example, the Law Council of Australia — Competition and Consumer Committee notes that the 'market in Australia' requirement provides a strong jurisdictional nexus with Australia, but it might be too high a threshold to establish in all cases. An alternative is for the conduct to have an effect on local prices or terms of supply (DR sub, page 7). Ian Stewart comments:

> The logical jurisdictional connection lies somewhere between extraterritorial conduct that affects prices or terms of supply of goods or services supplied in a market in Australia … and extraterritorial conduct that affects prices or terms of supply of goods or services supplied into Australia (regardless of whether or not a market in Australia for those goods or services can be said to exist). (DR sub, pages 2 and 3)

This issue does not arise directly out of the Panel's recommendation to reform section 5 to remove the 'business residence' requirement. Since its enactment, Australia's competition law prohibitions have generally been limited to conduct that harms competition in a market in Australia. That limitation arises out of the substantive prohibitions, not section 5.

Until recently, the limitation has not been controversial. However, it assumed importance in the ACCC's recent proceedings against two international airlines, Air New Zealand and Garuda, in respect of alleged cartel conduct that occurred overseas. The case related to surcharges applied to air freight services on routes from overseas locations to Australia. On 31 October 2014, the Federal Court found that the air freight services affected by the cartel conduct were not supplied in a market in Australia and, accordingly, the cartel conduct was not prohibited by Australian law (as in force at the time of the conduct).[687]

The air freight surcharge case concerned the law against price fixing prior to the enactment of the cartel conduct prohibitions in Division 1 of Part IV of the CCA. As discussed in Chapter 20, the new cartel conduct prohibitions do not expressly require the conduct to affect goods or services traded in an Australian market. Although the Panel considers that the cartel conduct prohibitions should be limited to conduct that has a relevant territorial nexus with Australia, the Panel agrees with submissions that the appropriate nexus should not be stated in terms of having an effect on a market in Australia. Such a test would be inappropriate for a criminal offence that requires determination before a jury. Instead, the Panel recommends that, for cartel conduct to be an offence in Australia, it should have an effect on trade or commerce within, to or from Australia (see Recommendation 27).

However, the Panel is not persuaded that further change is required to the substantive competition law provisions to remove the requirement that the relevant conduct must harm competition in a market in Australia. While from time to time cases such as the air freight surcharge case may give rise to difficult questions about the application of the law, the Panel considers that the 'market in Australia' requirement is a sensible limitation to the scope of Australia's competition laws.

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686 See, for example: Arnold Bloch Leibler, DR sub, page 2; Australian Automotive Aftermarket Association, DR sub, page 3; Australian Chamber of Commerce and Industry, DR sub, page 18; Australian Competition and Consumer Commission, DR sub, page 35; Australian Industry Group, DR sub, page 20; Australian National Retailers Association, DR sub, page 12; Law Council of Australia — SME Committee, DR sub, pages 12-13; and Ian Stewart, DR sub, pages 1-2.

687 *Australian Competition and Consumer Commission v Air New Zealand Limited* [2014] FCA 1157 at [20].

Although the Panel considers that the business residence test in section 5 is unnecessary, a question remains whether section 5 should stipulate any other connection between the conduct and Australia as a requirement when the competition law is applied to overseas conduct. As discussed above, such a connection will often be required in any event because many of the substantive competition law provisions depend upon the conduct harming competition in an Australian market. However, not all provisions have that requirement (for example, resale price maintenance).

The Panel considers that it would be appropriate to re-frame section 5 so that the competition law applies to conduct undertaken overseas insofar as the conduct relates to 'trade or commerce' as defined in the CCA: that is, trade or commerce within Australia or between Australia and places outside Australia. That requirement would state a minimum connection between the overseas conduct and Australia. This would ensure that Australian law could not be applied to overseas conduct that had no direct relationship to trade or commerce within Australia or between Australia and places outside Australia.

Ministerial consent

The second regulatory impediment to private proceedings in section 5 of the CCA is that, if a person wishes to seek damages or other compensatory orders in relation to contravening conduct that occurred overseas, he or she must obtain the consent of the Minister (subsections 5(3) and (4)). The Minister is required to grant consent unless the conduct was required or specifically authorised by a foreign law and the Minister is of the view that it is not in the national interest to grant consent (subsection 5(5)).[688] This requirement was introduced in 1986, at a time when there was concern over the extra-territorial reach of some competition laws.[689]

The concern originated out of litigation commenced years earlier in the US by Westinghouse in respect of an overseas uranium cartel. Australian uranium producers became defendants to the US litigation.[690] This resulted in the Australian Government enacting legislation to prevent the enforcement of the US judgment in Australia.[691]

Also, at that time, many other jurisdictions, particularly developing countries, did not have competition laws. As a result, there was potential for diplomatic issues to arise if proceedings were brought in Australia for contravention of Australia's competition laws in respect of overseas conduct that was authorised or permitted by the laws of the jurisdiction in which the conduct occurred.

Since that time, many countries have enacted competition laws. Further, a greater uniformity has emerged concerning the extra-territorial reach of competition laws in comparable jurisdictions. In general, competition laws of comparable jurisdictions apply to overseas conduct if the conduct has a direct effect on domestic markets or trade.[692]

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688 Similar requirements exist for the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001*, section 12AC.

689 *Trade Practices Revision Act 1986*, section 8.

690 A summary of the litigation arising from the uranium cartel, and the political responses to the litigation, is contained in Senz, D and Charlesworth, H, 2001, 'Building Blocks: Australia's Response to Foreign Extraterritorial Legislation', *Melbourne Journal of International Law*, Melbourne Law School, Melbourne, Vol 2, pages 69-121.

691 *Foreign Antitrust Judgment (Restriction of Enforcement) Act 1979*, which was subsequently incorporated into the *Foreign Proceedings (Excess of Jurisdiction) Act 1984*.

692 In the US, see F. Hoffman La Roche Ltd v Empagran SA (2004) 542 US 174. In the EU, see A. Ahlstrom OY v EC Commission [1988] 4 CMLR 901 (known as the Wood Pulp case).

In comparable overseas jurisdictions, such as the US, Canada, UK, EU, and New Zealand, there is no requirement to seek governmental consent in order to take proceedings in respect of contravening conduct that occurs overseas (see Appendix B).

The requirement for ministerial consent imposes a material hurdle for private plaintiffs seeking redress for breaches of competition law and can give rise to substantial additional costs in the litigation. The ministerial consideration of the issue also takes time. Further, a defendant to a proceeding can seek judicial review of the Minister's decision, which may cause delay in the principal proceeding.[693]

The ministerial consent requirements apply to the Australian Consumer Law (ACL) as well as the competition law. Although the Panel is not reviewing the ACL generally, the Terms of Reference ask the Review to consider the ACL to the extent that it extends to protections for small business. This requirement could be relevant to small businesses privately enforcing the laws concerning unconscionable conduct.

While a number of submissions support the Draft Recommendations concerning section 5,[694] few expressly address the requirement for ministerial consent. The Law Council of Australia — Competition and Consumer Committee supports removing the requirement for ministerial consent (DR sub, page 8), as does Spier Consulting Legal (DR sub, page 9). Professor Philip Clarke does not support that recommendation, arguing that the requirement for ministerial consent helps to prevent damage to international comity from the extra-territorial operation of domestic competition laws (DR sub, page 2).

The Panel considers that, today, there is a very low likelihood that Australian competition law proceedings involving overseas conduct would create diplomatic concerns. Accordingly, it considers that there is no ongoing need for the requirement for ministerial consent. Removing that requirement would reduce the costs of such actions where consent would currently be required.

Proving loss or damage

A matter raised in some submissions is the inclusion of a power to seek orders, in the nature of 'cy-pres' orders, for breach of the competition law. A cy-pres order is used in the administration of estates or trusts where the original bequest or trust object fails for some reason. The court may order a cy-pres scheme to direct the application of funds toward a similar objective as the original gift or trust.

In the context of competition law, it has been proposed that orders of that kind might be used when it can be shown that contravening conduct has caused quantifiable detriment, but it is not possible to identify the persons damaged by the conduct.[695] The suggestion is that the court would order an amount of compensation or damages be paid into a trust fund to be spent in a manner directed by the court.

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693 In 2008, Cathay Pacific unsuccessfully challenged the Minister's decision to grant consent: *Cathay Pacific Airways Limited v Assistant Treasurer and Minister for Competition Policy and Consumer Affairs* [2010] FCA 510.

694 See, for example: Arnold Bloch Leibler, DR sub, page 2; Australian Aftermarket Automotive Association, DR sub, page 3; Australian Chamber of Commerce and Industry, DR sub, page 18; Australian Competition and Consumer Commission, DR sub, page 35; Australian Industry Group, DR sub, page 20; Australian National Retailers Association, DR sub, page 12; Law Council of Australia — SME Committee, DR sub, pages 12-13; and Ian Stewart, DR sub, pages 1-2.

695 See, for example: Consumer Action Law Centre, DR sub, pages 18-19.

This proposal was previously considered (and rejected) by the Dawson Review. The Panel agrees with the conclusion of the Dawson Review:

> Such orders would involve the payment of compensation or damages into a trust fund to be directed toward purposes that are identified by the Court. For example, money from the trust might be used for the promotion of consumer or other affected interests. Acceptance of such a proposal would be to invite the Court, which is concerned with the administration of the Act, to become inappropriately involved in matters of policy in an area where the Act offers no guidance.[696]

The Panel's view

Private enforcement of competition laws is an important right. However, there are many regulatory and practical impediments to exercising this right. The Panel considers it important to find ways to reduce those impediments.

The effectiveness of section 83 of the CCA, as a means of reducing the costs of private actions, would be enhanced if the section were amended to apply to admissions of fact made by a corporation in another proceeding, in addition to findings of fact.

Small businesses face significant practical difficulties in exercising rights of private enforcement. Understandably, the ACCC is not able to take proceedings in respect of all complaints brought to it. However, the ACCC should place some priority on its response to small business complaints concerning competition laws. If the ACCC determines that it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the complainant to alternative dispute resolution processes.

Small business commissioners, small business offices and ombudsmen provide important, effective and low cost services to small businesses. These services are capable of resolving commercial disputes involving competition law issues in an effective and low-cost manner. They should provide dispute resolution services over competition-related disputes rather than having a CCA-specific dispute resolution scheme.

The Panel agrees with Recommendation 8.3 of the PC's *Access to Justice Arrangements* report, which is directed to enhancing the capacity of the Small Business Commissioners and dedicated Small Business Offices in each jurisdiction to provide alternative dispute resolution processes.

Contravening conduct that occurs overseas should be subject to Australian competition law if the conduct relates to trade or commerce within Australia or between Australia and places outside Australia, regardless of whether the person engaging in the conduct carries on business in Australia.

Given that competition laws and policies are now commonplace around the world, there is no reason why private parties should have to seek ministerial consent before launching a proceeding that involves overseas conduct.

696 Commonwealth of Australia 2003, *Review of the Competition Provisions of the Trade Practices Act*, CanPrint Communications, Canberra, page 163.

Recommendation 41 — Private actions

Section 83 of the CCA should be amended so that it extends to admissions of fact made by the person against whom the proceedings are brought in addition to findings of fact made by the court.

This recommendation is reflected in the model legislative provisions in Appendix A.

Recommendation 53 — Small business access to remedies

The ACCC should take a more active approach in connecting small business to alternative dispute resolution schemes where it considers complaints have merit but are not a priority for public enforcement.

Where the ACCC determines it is unable to pursue a particular complaint on behalf of a small business, the ACCC should communicate clearly and promptly its reasons for not acting and direct the business to alternative dispute resolution processes. Where the ACCC pursues a complaint raised by a small business, the ACCC should provide that business with regular updates on the progress of its investigation.

Resourcing of the ACCC should allow it to test the law on a regular basis to ensure that the law is acting as a deterrent to unlawful behaviour.

Small business commissioners, small business offices and ombudsmen should work with business stakeholder groups to raise awareness of their advice and dispute resolution services.

The Panel endorses the following recommendations from the Productivity Commission's *Access to Justice Arrangements* report:

- Recommendations 8.2 and 8.4 to ensure that small businesses in each Australian jurisdiction have access to effective and low cost small business advice and dispute resolution services;
- Recommendation 8.3 to ensure that small business commissioners, small business offices or ombudsmen provide a minimum set of services, which are delivered in an efficient and effective manner;
- Recommendation 9.3 to ensure that future reviews of industry codes consider whether dispute resolution services provided pursuant to an industry code, often by industry associations or third parties, are provided instead by the Australian Small Business Commissioner under the framework of that industry code;
- Recommendation 11.1 to broaden the use of the Federal Court's fast track model to facilitate lower cost and more timely access to justice; and
- Recommendation 13.3 to assist in managing the costs of litigation, including through the use of costs budgets for parties engaged in litigation.[697]

697 Productivity Commission 2014, *Access to Justice Arrangements*, Inquiry Report No. 72, Canberra.

Recommendation 26 — Extra-territorial reach of the law

Section 5 of the CCA, which applies the competition law to certain conduct engaged in outside Australia, should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions. Instead, the competition law should apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia.

The in-principle view of the Panel is that the foregoing changes should also be made in respect of actions brought under the Australian Consumer Law.

This recommendation is reflected in the model legislative provisions in Appendix A.

23.3 ACCC'S INVESTIGATIVE POWERS

The ACCC's primary investigative power is contained in section 155 of the CCA. Section 155 gives the ACCC power:

- to compel individuals to appear before it to answer questions about a potential contravention; and
- to compel corporations and individuals to provide information and to produce documents to it, if the ACCC has reason to believe that the person or corporation is capable of giving evidence, furnishing information or producing documents relating to a possible contravention of the CCA. It is not necessary for the ACCC to have reasonable grounds to believe that a contravention has occurred before exercising those powers.

The section 155 powers have been a longstanding feature of Australia's competition law framework. Contraventions of competition laws, particularly cartel-type conduct, are often clandestine. Thus, it is thought necessary to give the competition regulator strong coercive powers to uncover such contraventions.

The ACCC outlines ways to strengthen its investigative powers under section 155 (sub 1, pages 97-101). The ACCC proposes that the section 155 powers be able to be used in a wider range of circumstances. Such circumstances include: after seeking injunctive relief; during multi-party investigations; and in relation to specific matters, such as designated telecommunication matters and the investigation of compliance with court-enforceable undertakings, which are not currently open to section 155 notices.

Conversely, a range of submissions criticise the ACCC's use of its current section 155 powers, citing the scope of the notices and the costs of compliance.[698] Submissions also comment on the use of section 155 powers in the context of applications for merger clearance.[699]

An appropriate balance must be achieved with respect to coercive powers. The Panel considers that the ability to compel business to provide evidence, information and documents relating to a potential contravention of the competition law is crucial to the ACCC's administration of the CCA.

698 See, for example: Arnold Bloch Leibler, sub, pages 6-7; and Telstra, sub, pages 12-13.

699 See, for example: Foxtel, sub, pages 7-8.

However, the Panel does not support the ACCC's proposal that the powers be available for use after the ACCC has commenced proceedings in respect of an alleged contravention. The use of the powers at that time is likely to cause conflict with the court's overall supervision of the proceedings. The court's discovery and subpoena powers can be exercised to require production of additional documents.

The Panel considers that the ACCC should be able to use section 155 powers to investigate compliance with court-enforceable undertakings. The ability to gather information about a possible contravention of an undertaking accepted by the ACCC would assist in protecting the integrity of undertakings as part of the broader compliance and enforcement framework.

The Panel understands the concerns expressed by business over the cost of compliance with section 155 notices that require the production of documents. In the digital age, businesses retain many more documents, such as emails, than was the case 20 years ago. As a consequence, compliance with a section 155 notice may require electronic searches of tens of thousands of documents, which can occasion very large expense.[700]

The courts have recognised the cost of documentary searches and, over the last 10 years, have modified the rights of discovery. For example, the Federal Court Rules 2011 (20.14) now require a party to undertake a reasonable search for documents. In determining what is a reasonable search, the party may take into account factors such as the number of documents involved and the ease and cost of retrieving the documents.

The ACCC's published guideline on section 155 acknowledges the burden that section 155 notices may impose on a recipient and accepts that the ACCC should take the burden into account.[701] The Panel considers that this is an important responsibility for the ACCC, which should be exercised on each occasion that a notice is issued. The ACCC should accept a responsibility to frame a section 155 notice in the narrowest form possible, consistent with the scope of the matter being investigated.

There may also be scope to recognise, in the CCA or in a guideline, a principle equivalent to that recognised in the Federal Court Rules: that, in a digital age, the obligation to search for documents should be subject to a requirement of reasonableness, having regard to factors such as the number of documents involved and the ease and cost of retrieving the document. A number of submissions support such a proposal.[702] However, some fear this could 'water down' a powerful tool used to obtain evidence about serious contraventions of the CCA.[703] For its part, the ACCC states that it will review its internal processes for issuing section 155 notices in view of the concerns raised in submissions to the Review (DR sub, page 72).

As to whether the reasonable search criteria should be enacted in the CCA or implemented as an administrative guideline, a number of submissions consider that the requirement that recipients

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700 See, for example: Coles Group Limited, DR sub, page 10; and Telstra, sub, page 13.

701 Australian Competition and Consumer Commission 2008, *A guide to the Australian Competition and Consumer Commission's power to obtain information, documents and evidence under s 155 of the Trade Practices Act 1974*, Canberra, page 8.

702 See, for example: AGL Energy Limited, DR sub, page 6; Australian Corporate Lawyers Association, DR sub, page 3; Australian Motor Industry Federation, DR sub, page 13; Coles Group Limited, DR sub, pages 10-11; Law Council of Australia — Competition and Consumer Committee, DR sub, page 34; Queensland Law Society, DR sub, page 7; Retail Guild of Australia, DR sub, page 7; and Wesfarmers Limited, DR sub, page 3.

703 See, for example: ACCC, DR sub, page 72; Law Council of Australia — SME Committee, DR sub, page 21; and Spier Consulting Legal, DR sub, page 20.

undertake a reasonable search for documents should be enshrined in legislation.[704] The Panel agrees. The failure to comply with a section 155 notice is an offence; accordingly, it is important that the scope of the legal obligation imposed by section 155 be contained in the legislation.

The Panel agrees with the ACCC's suggestion that, should a reasonable search test be introduced into the CCA, the most effective approach would be to introduce a defence to a 'refusal or failure to comply with a notice' under paragraph 155(5)(a) of the CCA that would be available to a recipient of a notice issued under paragraph 155(1)(b) who can demonstrate that a reasonable search was undertaken in order to comply with the notice (DR sub, page 73).

The Panel's view

Compulsory evidence-gathering powers are important to the ACCC's ability to enforce the CCA. Those powers should extend to gathering information about a possible contravention of an undertaking accepted by the ACCC. This will assist in protecting the integrity of undertakings as part of the broader compliance and enforcement framework.

The exercise of the ACCC's powers under section 155 can impose a regulatory burden on recipients of compulsory notices.

The ACCC should accept a responsibility to frame section 155 notices in the narrowest form possible, consistent with the scope of the matter being investigated.

Further, in complying with a section 155 notice, the recipient should be required to undertake a reasonable search.

Compliance with compulsory powers facilitates the ACCC's ability to investigate competition concerns. The ACCC states that the current sanction for a corporation failing to comply with a section 155 notice is too low. The present sanction is up to 20 penalty units for an individual (or 12 months imprisonment) which, when applied to a corporation, amounts to a fine of up to $17,000.[705]

In contrast, a person failing to comply with a notice issued by the Australian Securities and Investments Commission faces a sanction of up to 100 penalty units or two years imprisonment, or both,[706] which translates to a fine of $85,000 for a corporation. Given the importance of compliance with section 155 notices to the administration of competition laws, the Panel agrees that the current sanction for a corporation failing to comply is inadequate.

The Panel's view

The current sanction for a corporation failing to comply with section 155 of the CCA is inadequate.

704 See, for example: Business Council of Australia, DR sub, pages 24-25; Foxtel, DR sub, page, 7; Telstra Corporation Limited, DR sub, page 4; and Woolworths Limited, DR sub, pages 26-27.

705 *Competition and Consumer Act 2010*, subsection 155(6A). See sections 4AA (level of penalty units) and 4B (penalties for corporations five times that of individuals) of the *Crimes Act 1914*.

706 *Australian Securities and Investments Commission Act 2001*, section 63.

Recommendation 40 — Section 155 notices

The section 155 power should be extended to cover the investigation of alleged contraventions of court-enforceable undertakings.

The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age. Section 155 should be amended so that it is a defence to a 'refusal or failure to comply with a notice' under paragraph 155(5)(a) of the CCA that a recipient of a notice under paragraph 155(1)(b) can demonstrate that a reasonable search was undertaken in order to comply with the notice.

The fine for non-compliance with section 155 of the CCA should be increased in line with similar notice-based evidence-gathering powers in the *Australian Securities and Investments Commission Act 2001*.

24 National Access Regime

In some markets, competition depends on access to infrastructure facilities that occupy strategic positions in an industry (the so-called 'essential' or 'bottleneck' facilities).

The National Access Regime (the Regime) in Part IIIA of the *Competition and Consumer Act 2010* (CCA) provides a legal framework by which third parties can seek and obtain access to such bottleneck facilities in order to compete, or compete more effectively, in upstream and downstream markets.

The two objectives of the Regime, as stated in the objects clause of Part IIIA, are to:

> ... promote the economically efficient operation of, use of, and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
>
> provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.[707]

Generally, to gain access to bottleneck infrastructure under the Regime, two steps must be taken.[708]

First, an application must be made to the National Competition Council (NCC) to recommend declaration of the infrastructure service, and the relevant Minister must then accept the recommendation and declare the service. To recommend declaration of an infrastructure service and declare the service, the NCC and the Minister respectively must be satisfied of specified criteria concerning the service (see Box 24.1). Declaration activates the arbitration processes under the Regime.

Second, the person seeking access must request access from the infrastructure owner. If negotiations fail, terms and conditions of access can be arbitrated by the Australian Competition and Consumer Commission (ACCC).

The Panel recommends combining the roles of the NCC and the ACCC under the Regime in the proposed Access and Pricing Regulator. See Section 27.1 for further discussion of these issues.

Box 24.1: Declaration criteria in the CCA (sections 44G and 44H)

The NCC cannot recommend that a service be declared, and the Minister cannot declare a service, unless satisfied of all of the following matters:

a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;

b) that it would be uneconomical for anyone to develop another facility to provide the service;

707 *Competition and Consumer Act 2010*, section 44AA.

708 National Competition Council 2011, *Access to Monopoly Infrastructure in Australia*, Canberra, page 4.

Box 24.1: Declaration criteria in the CCA (sections 44G and 44H) *(continued)*

c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

the importance of the facility to the national economy;

e) that access to the service:[709]

(i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or

(ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the NCC/designated Minister believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement; and

f) that access (or increased access) to the service would not be contrary to the public interest.

An infrastructure service may be exempted from declaration under Part IIIA of the CCA by any of the following regulatory processes:

- Prior to the construction of a new facility, the operator of the proposed facility may apply to the NCC for a recommendation to the relevant Minister that the facility be ineligible for declaration. The facility will become ineligible if the Minister makes that decision. The Minister may only make that decision if he or she is satisfied that one of the declaration criteria will not be fulfilled.
- A State or Territory applies to the NCC for a recommendation to the relevant Australian Government Minister that an access regime for a particular infrastructure service in that State or Territory is 'effective'. The infrastructure service will be exempted from declaration if the Australian Government Minister makes that decision. The criteria to be applied for that decision are set out in the Competition Principles Agreement (CPA).[710]
- The Australian Government or a State or Territory may apply to the ACCC for approval of a competitive tender process for the construction and operation of an infrastructure facility that is to be publicly owned. The facility will be exempted from declaration if the ACCC makes that decision. The ACCC may only approve the tender process if it is satisfied that reasonable terms and conditions of access to the facility will be the result of the tender process.
- Operators of monopoly infrastructure submit an undertaking to the ACCC setting out the terms and conditions on which the operator will offer services using the infrastructure. The ACCC is empowered to accept or reject the undertaking. If the undertaking is accepted, the service cannot be declared.

709 Criterion (d) was repealed effective 14 July 2010.

710 Council of Australian Governments 1995 (as amended to 13 April 2007), Competition Principles Agreement, clause 6.

The Regime was recently reviewed by the Productivity Commission (PC),[711] which recommended retaining the Regime but revising its declaration criteria. The Review's Terms of Reference require the Panel to consider whether the Regime is adequate, taking into account the PC's inquiry.

A number of submissions comment on the Regime, raising the primary issues of:

- whether it is in the public interest to retain the Regime;
- whether the PC's recommendations concerning the declaration criteria should be implemented; and
- whether there should be broader rights of review of access declarations and arbitrations before the Australian Competition Tribunal (the Tribunal).

24.1 Costs and benefits of the National Access Regime

Australia is unique among comparable jurisdictions in having a general access regime that may potentially apply to any privately owned infrastructure facility that exists within a supply chain.[712]

The Regime facilitates intrusive economic regulation of infrastructure assets. It overrides private property rights, mandating that the operator of an infrastructure facility make that facility available for use by a third party on terms and conditions (including price) determined by a regulatory body (the ACCC). By that process, the economic return that the operator is able to earn on its investment in the facility will be subject to regulation.

Economic regulation of privately owned assets can impose costs on the economy. In recommending the introduction of the Regime, the Hilmer Review was conscious of the economic costs that might be imposed:

> The Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment. Nevertheless, there are some industries where there is a strong public interest in ensuring that effective competition can take place ...[713]

The PC also noted the costs created by access regulation:

> Access regulation also imposes costs, in particular where it adversely affects incentives for investment in markets for infrastructure services. There are costs associated with errors in setting access prices. For example, when prices are set too low, this can lead to delayed investment in infrastructure, or the non-provision of some infrastructure services. Regulated third party access can also impose costs on infrastructure service providers from coordinating multiple users of their facilities.[714]

Given the economic costs that can be caused by this form of regulation, it is important to examine the benefits of the Regime carefully and to ask whether those benefits can be achieved by a less intrusive form of regulation.

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711 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra.

712 See, for example: Aurizon, sub, page 64; BHP Billiton, sub, page 28; and BCA, sub Main Report, page 79.

713 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, page 248.

714 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, pages 7-8.

Original objective of the regime

The Regime was introduced in 1995 based on the recommendation of the Hilmer Review.

One of the Hilmer Review's major recommendations was to introduce competition into various industries that, at that time, were largely in public ownership. Those industries included electricity, gas, rail, airports, ports and telecommunications. Each of those industries consisted of potentially contestable commercial activities that required the use of 'bottleneck' infrastructure facilities.

The Hilmer Review recommended introducing competition into those industries by separating them into their contestable and natural monopoly elements. As the contestable elements required access to the natural monopoly elements, the Hilmer Review recommended introducing a single national access regime to regulate that access.

Part IIIA of the CCA was originally enacted to provide a common framework for access to infrastructure within each of those industries. However, it soon became clear that each industry had distinct physical, technical and economic characteristics and that it was preferable to address access issues on an industry-by-industry basis. Distinct access regimes have subsequently emerged (see Box 24.2).

Box 24.2: Existing access regimes

In the **electricity** industry, generators and retailers require access to the transmission and distribution wires. Access is governed by an industry-specific regime established by the National Electricity Law.

In the **gas** industry, producers and retailers require access to transmission and distribution pipelines. Access is governed by an industry-specific regime established by the National Gas Law.

In the **telecommunications** industry, providers of residential fixed line telephony and data services require access to fixed line infrastructure (historically copper wire, but currently being replaced by optical fibre and wireless services). Access to fixed line infrastructure is governed by an industry specific access regime, established under Part XIC of the CCA.

The interstate **rail** track network is the subject of an access undertaking given by the rail track's operator, Australian Rail Track Corporation (ARTC), to the ACCC under Part IIIA. Intrastate rail track networks are subject to access regimes established in the State or Territory in which the railway is located.

Ports throughout Australia are subject to various regulatory frameworks established in the State or Territory in which the port is located.

Airport facilities are not regulated by an industry-specific access regime and are potentially subject to declaration under Part IIIA. Currently, no airport services are the subject of declaration.

What is the role of Part IIIA today?

Currently, only two services are declared under Part IIIA:

- the Tasmanian railway network was declared in 2007; and
- the Goldsworthy iron ore railway in the Pilbara, owned by BHP Billiton, was declared in 2008.

No-one has sought access to the Goldsworthy railway since it was declared.[715]

Access to the ARTC interstate[716] and Hunter Valley[717] rail networks, as well as the Co-operative Bulk Holdings bulk wheat port terminals in Western Australia,[718] are governed by access undertakings accepted by the ACCC under Part IIIA.

Since Part IIIA was enacted in 1995, four other services have been declared but the declarations have since expired or been revoked:

- airport services at Melbourne Airport — declared in 1997, expired in 1998;
- airport services at Sydney International Airport — declared in 2000, expired in 2005;
- airport services at Sydney Airport — declared in 2005, expired in 2010; and
- sewage transmission services on Sydney Water's sewage reticulation network — declared in 2005. As the access seeker did not pursue access, the declaration was revoked in October 2009 following the enactment of a separate New South Wales access regime under the *Water Industry Competition Act 2006*.

Thus, few infrastructure assets are currently regulated under Part IIIA. For the most part, the bottleneck infrastructure assets cited by the Hilmer Review as requiring access regulation have been regulated by industry-specific access regimes. Those regimes are either established under a co-operative legislative scheme of the States and Territories (for example, the National Electricity Law and the National Gas Law) or under a legislative scheme of individual States and Territories (for example, port regulation).

However, Part IIIA continues to provide a legislative framework upon which industry-specific access regimes are based, acting as both a model and a 'back stop'. Its legislative provisions are a model upon which industry specific access regimes have been developed. It also operates as a back stop to access regimes implemented through access undertakings accepted under Part IIIA (such as the ARTC rail track) or access regimes implemented under state and territory laws and certified as effective under Part IIIA. The undertaking and certification processes exempt the relevant facility from declaration under Part IIIA.

Accordingly, Part IIIA has an indirect role in supporting many industry-specific access regimes, even though its direct role is limited.

What is the anticipated role of Part IIIA into the future?

In considering the anticipated role of Part IIIA into the future, the Panel has asked: What are the infrastructure facilities for which access regulation under Part IIIA would be expected to improve competition and economic efficiency in the Australian economy in the future? The Panel is of the view that, unless those facilities or categories of facilities can be identified, it is difficult to conclude that economic benefits outweigh the regulatory burden and costs imposed by Part IIIA on Australian businesses fits.

715 BHP Billiton, sub, page 23.

716 Australian Competition and Consumer Commission 2008, ARTC Interstate Rail access undertaking 2008.

717 Australian Competition and Consumer Commission 2011, ARTC Hunter Valley access undertaking 2011.

718 ACCC, sub 1, page 133.

Thus, in the Draft Report, the Panel invited comment on:

- the categories of infrastructure to which Part IIIA might be applied in the future, particularly in the mining sector, and the costs and benefits that would arise from access regulation of that infrastructure; and
- whether Part IIIA should be confined in its scope to the categories of bottleneck infrastructure cited by the Hilmer Review.

Submissions responding to this invitation reflect two different perspectives.

Some argue that it is unnecessary to identify the types of infrastructure to which Part IIIA might be applied in the future. The Australian Pipeline Industry Association is of the view that 'the categories should be as broad as possible'; it considers that 'effective use of the declaration criteria should ensure declaration only occurs where it is in the public interest' (DR sub, page 1).

The New South Wales Government states, 'it is appropriate to maintain the current scope of the application of the Part IIIA regime' (DR sub, page 14). Similarly, the ACCC does not see a need to identify those facilities for which access regulation will be required in the future:

> … the competition principles relating to access regulation and the back-stop role of Part IIIA mean that Australia's competition policy can flexibly adapt to apply (or cease to apply) to facilities in response to changes in technological or other market conditions. (DR sub, page 84)

The NCC also supports the back stop role performed by Part IIIA. It submits:

> One of the important objectives of Part IIIA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in various industries. The certification process is designed to allow effective state and territory regimes to supplant the National Access Regime where such regimes also incorporate the principles set out in the Competition Principles Agreement. A principles based approach to the scope and operation of access regulation is important. (DR sub, page 3)

Other submissions express a contrary view. Professors Ergas and Fels observe:

> Regulatory and third party access regimes exist outside of the Part IIIA declaration framework for virtually all of the industries identified by the Hilmer Committee as requiring a framework for access. No industries where additional access regulation would be necessary were identified by the Productivity Commission in its review of the National Access Regime. (DR sub, page i)

The Business Council of Australia (BCA) (DR sub, page 23), Virgin Australia (DR sub, page 7) and the Department of Infrastructure and Regional Development (DR sub, page 5) raise the potential need for access regulation at airports in the future. The Department of Infrastructure and Regional Development also notes:

> … the likelihood of capacity constraints at some airports and intermodal terminals in the next decade does have the potential to lead to an increase in access disputes … The Department believes that in the event commercial negotiations fail to provide acceptable outcomes, the National Access Regime in its current form provides an important backstop to the regulatory system. (DR sub, page 5)

The regulatory issue that arises in respect of airports is generally one of monopoly pricing rather than access. Although airports are bottleneck facilities, their operators are not vertically integrated into upstream and downstream markets. Hence, they have limited incentive to reduce competition in

dependent markets,[719] but they have power to impose monopoly charges on users of their facilities. To some extent, Part IIIA can be used as a means of addressing monopoly pricing at airports. However, that is not its original objective and its processes are cumbersome and not well suited to that function. As noted above, particular airport services at Melbourne Airport, Sydney Airport and Sydney International Airport have, in the past, been declared under Part IIIA, but those declarations have lapsed. Virgin Australia describes Part IIIA as a second-best option for ensuring access at airports but submits that Part IIIA should remain available in respect of airports until a better airport regulatory model is put in place (DR sub, page 7).

Asciano raises the potential need for access regulation of privatised ports in the future. It observes that two issues arise from the creation of private port operator monopolies: vertical integration and monopoly pricing. If the port operator integrates into downstream services, such as stevedoring, incentives may arise to restrict access to port services by competing stevedoring businesses. Currently, Part IIIA addresses such issues where they arise, although Asciano is critical of the time involved in invoking that regime. Asciano submits that Part IIIA is not suited to addressing monopoly pricing issues and that ports require economic regulation at the time of privatisation (DR sub, pages 15-19).

Glencore Coal observes, 'The historical development of coal mining infrastructure in Australia has resulted in multi-user infrastructure, developed by State and Federal governments and now in the process of passing into the hands of private owners' (DR sub, page 1). With a focus on the east coast coal supply chains, Glencore Coal submits that Part IIIA should apply to the following kinds of mining infrastructure:

- below rail infrastructure, particularly existing below rail infrastructure and extensions of and expansions to that infrastructure;
- port terminal infrastructure; and
- port authority activities including rights to approve the construction of new terminals, control of vessel movements and port channel access. (DR sub, page 3)

However, Glencore Coal draws a distinction between privately developed single-user infrastructure and publicly developed multi-user infrastructure that has been privatised:

> … we would regard it as being highly significant to the decision to impose regulation whether the infrastructure has been developed by a private party who has borne the cost and risk of that development without government support, or whether the infrastructure has been developed by government before being sold to a private owner as an existing multi-user monopoly, or with some other form of government support. (DR sub, page 11)

A number of other submissions note this distinction. Rio Tinto submits that single-user infrastructure used primarily for the export of goods that is closely integrated with the production of those goods should be excluded from declaration under Part IIIA. It observes:

> Where infrastructure is integrated with the production of goods and has a single owner or operator, the production process and the operation of infrastructure are likely to be highly co-ordinated. Introducing a third party user onto such infrastructure will necessarily interrupt that coordination and create inefficiencies.

719 Commonwealth of Australia 1993, *National Competition Policy* (the Hilmer Review), Australian Government Publishing Service, Canberra, pages 240-241; and Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, pages 276 and 278.

> … Where such infrastructure is used to produce and export goods, third party access is unlikely to generate any benefits for Australian consumers. Where goods are being exported it is highly likely they are being exported into a competitive global market and that access to infrastructure is not necessary to allow competition in such markets. (DR sub, pages 7-8)

BHP Billiton makes a similar submission (DR sub, page 7). It notes that, in 2005, the Exports and Infrastructure Taskforce[720] considered the impact of applying the Part IIIA declaration regime to export infrastructure, and concluded that excluding from the application of that regime:

> ... vertically integrated, tightly managed, logistics chains, especially those related to our export industries ... would minimise the risk that access regimes would disrupt and undermine the very areas of the economy that have performed best in the management of export related infrastructure. (DR sub, page 6)

Professors Ergas and Fels also consider that Part IIIA should not apply to vertically integrated commercial facilities, including facilities used to export commodities. They observe:

> … any potential benefit from the Part IIIA declaration provisions would be limited, and any benefits could only be achieved at a considerable cost:
>
> - The declaration of vertically integrated facilities used to export commodities whose prices are determined in competitive global markets would not affect the prices of these commodities. Declaration would therefore not lead to competition benefits.
> - The declaration of vertically integrated commercial facilities operating in a competitive market context would give rise to a range of economic costs that may be very large. These include the ongoing costs of disputes, the consequences of pricing inefficiencies, inefficiencies arising from the disruption of vertically integrated processes, and dynamic (investment) inefficiencies'. (DR sub, page i)

Three important themes emerge from the foregoing.

First, Part IIIA has played an important role in developing industry-specific access regimes for the bottleneck infrastructure identified by the Hilmer Review and introducing competition in those industries.

Second, in the future, Part IIIA will continue to provide a back stop to those industry-specific access regimes. While it would be possible to devise other legislative arrangements to maintain the current access regimes, it seems unnecessary to disrupt the role performed by Part IIIA in that context. That back stop role also applies to airports and ports. Although the primary economic issue at ports and airports is monopoly pricing, access problems might arise in the future that could be addressed by Part IIIA.

Third, beyond the circumstances envisaged by the Hilmer Review, imposing an access regime upon privately developed single-user infrastructure is more likely to produce inefficiency than efficiency, impeding the competitiveness of Australian industry. This is particularly so for vertically integrated export industries that are subject to the constraints of international competition in the final goods market.

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720 The Exports and Infrastructure Taskforce was established to identify and report to the then Prime Minister on 'any bottlenecks, of a physical or regulatory kind, in the operation of Australia's infrastructure that may impede the full realisation of Australia's export opportunities'.

In the Panel's view, it is important to preserve the beneficial aspects of the Regime while modifying its economically detrimental aspects.

Conclusions of the Productivity Commission

The PC considered that the Regime results in a range of potential benefits:

- improvements to economic efficiency where the Regime reduces monopoly pricing, increases competition in dependent markets, or results in more efficient investment;
- benefits from greater consistency in access regulation across the economy; and
- administrative and compliance cost savings and more effective and efficient infrastructure regulation if the Regime supplants other less effective policy responses, or if its role as an overarching access regime improves other access regimes.[721]

However, the PC also recognised that the Regime imposes costs:

- access regulation may result in economic distortions including adverse effects on investment in markets for infrastructure services;
- administrative and compliance costs can be substantial; and
- where access regulation is applied, there might be production costs incurred by the infrastructure service provider from co-ordinating multiple users of its facility.[722]

The PC concluded that the Regime had net benefits and should be retained:

> Based on a qualitative assessment of the available data, the Commission has determined that the Regime is likely to generate net benefits to the community. The Commission considers that the Regime should be retained, and its scope confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third party access. Renewed emphasis should be given to ensuring that the Regime better targets the economic problem to reduce the risk of imposing unnecessary costs on the community and deterring investment in markets for infrastructure services for little gain.[723]

721 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, page 215.

722 Ibid., pages 215-216, 237-240.

723 Ibid., page 10.

The Panel's view

The National Access Regime in Part IIIA of the CCA was originally established to enable third-party access to identified bottleneck infrastructure where it was apparent that economic efficiency would be enhanced by promoting competition in markets that were dependent upon access to that infrastructure.

The bottleneck infrastructure identified by the Hilmer Review included electricity wires, gas pipelines, telecommunication lines, freight rail networks, airports and ports. Distinct access regimes have emerged for these different types of infrastructure, reflecting their distinct physical, technical and economic characteristics. Those regimes appear to be achieving the original policy goals identified by the Hilmer Review. Part IIIA has played an important role in developing these access regimes.

Part IIIA should continue to provide a back stop to the current industry-specific access regimes. It may also be needed for future access regulation of airport and port infrastructure.

However, imposing an access regime upon privately developed single-user infrastructure is more likely to be produce inefficiency than efficiency, impeding the competitiveness of Australian industry.

The Panel agrees with the conclusion of the recent PC inquiry that the National Access Regime is likely to generate net benefits to the community, but its scope should be confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third-party access.

24.2 THE DECLARATION CRITERIA

The scope of the Regime is largely governed by the criteria for declaration (set out in Box 24.1). An infrastructure facility cannot be declared (activating the Regime) unless the relevant Minister is satisfied that all of the criteria for declaration are satisfied.

The PC recommended the following changes to the declaration criteria in Part IIIA:

- that criterion (a) will be satisfied if access to an infrastructure service on reasonable terms and conditions through declaration (rather than access per se) would promote a material increase in competition in a dependent market;
- that criterion (b) will be satisfied where total foreseeable market demand for the infrastructure service over the declaration period could be met at least cost by the facility;
- as an alternative recommendation, that criterion (b) will be satisfied where it would be uneconomical for anyone (other than the service provider) to develop another facility to provide the service; and
- that criterion (f) will be satisfied if access on reasonable terms and conditions through declaration would promote the public interest.[724]

A number of submissions address the proposed changes to criteria (a), (b) and (f).

724 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, pages 249-252.

Criterion (a)

As outlined in Box 24.1, criterion (a) is 'that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service'.

The PC concluded that criterion (a) should be expressly focused on the specific effect of declaration (rather than access) on promoting competition in dependent markets. It reasoned that the relevant comparison should be between the future state of competition in a dependent market without declaration (the status quo) and a situation in which the service is declared. The test should not be satisfied where there is already effective competition in dependent markets because declaration would be unlikely to promote a material increase in competition.[725]

No submissions oppose the proposed change to criterion (a) and the change does not appear to be controversial. However, a number of submissions argue that the PC's recommendation does not go far enough. Professors Ergas and Fels observe that the word 'material' is intended to be read as 'not trivial',[726] thus creating a low threshold, and that the criterion can be met in circumstances where claimed increases in competition in a dependent market are hypothesised or speculative, and where the dependent market is of no or very limited national significance (DR sub, pages v and 31).

They recommend that criterion (a) be amended such that access must result in a 'substantial improvement in competition' (DR sub, page 60). They also submit that criterion (a) should require that the dependent market, in which competition is to be improved by access, should be 'substantial or nationally significant' (DR sub, pages 60-61).

Similarly, BHP Billiton draws attention to the conclusions of the Tribunal when reviewing the declaration of the Goldsworthy rail line in the Pilbara. The Tribunal concluded that access to the Goldsworthy rail line would not increase competition in the downstream global market for iron ore as that market was already subject to effective competition.[727] It also concluded that access would not increase competition in the upstream market for iron ore tenements in the Pilbara observing, 'In the case of the Goldsworthy line, it has the fewest tenements surrounding it, many of which are within trucking distance to the port. Access to that line will have only a minor effect on the tenement market'.[728] Nevertheless, it concluded that criterion (a) was satisfied because access would increase competition in a market for rail haulage for iron ore in the vicinity of the Goldsworthy railway, and that that increase was more than trivial.[729]

In respect of that conclusion, BHP Billiton observes:

> BHP Billiton is the only supplier and the only customer in that 'market'. In the almost six years since the Goldsworthy railway was declared, no party has sought access to the Goldsworthy railway or otherwise sought to enter that 'market', and declaration has had no impact on competition in that "market". The promotion of competition in that 'market', even had it occurred, could have no expected impact on national competitiveness. (DR sub, page 18)

725 Ibid., pages 172-173.

726 See also *Re Fortescue Metals Group* (2011) 271 ALR 256 at [583].

727 Ibid, at [1083] and [1084].

728 Ibid, at [1131].

729 Ibid, at [1144] - [1147].

The Panel agrees with the PC's recommendation to re-focus criterion (a) on the specific effect of declaration. However, the Panel is also concerned that criterion (a) sets a low threshold for declaration. The burdens of access regulation should not be imposed on the operations of a facility unless access is expected to produce significant efficiency gains from competition. This requires that competition be increased in a market that is significant and that the increase in competition is substantial.

Criterion (b)

As outlined in Box 24.1, declaration criterion (b) is 'that it would be uneconomical for anyone to develop another facility to provide the service'.

Until the High Court decision in the Pilbara rail access case,[730] the NCC and the Tribunal had interpreted criterion (b) as a 'natural monopoly' test. Under that test, it would be uneconomical to develop another facility if the facility in question could provide society's reasonably foreseeable demand for the service at a lower total cost than if it were to be met by two or more facilities.

In the Pilbara rail access case, the High Court rejected that interpretation of criterion (b) in favour of a 'private profitability' or 'economic feasibility' test:

> ... requiring the decision maker to be satisfied that there is not anyone for whom it would be profitable to develop another facility.[731]

The High Court's interpretation of criterion (b) gave effect to clause 6 of the CPA, which was entered into by all Australian jurisdictions following the Hilmer Review. By clause 6, all jurisdictions agreed that the Regime should be a regime for access to services provided by means of significant facilities where, among other things:

- it would not be economically ***feasible*** to duplicate the facility; and
- access to the service is ***necessary*** in order to ***permit*** effective competition in a downstream or upstream market.

Those tests require an evaluation of whether duplication is feasible or practical for a participant in the market.[732]

Understood in that way, criterion (b) directs attention to the competition objective that lies at the heart of Part IIIA: whether the facility is a bottleneck, in the sense that access to the facility is necessary or essential to participate in an upstream or downstream market. Applying criterion (b) in that way promotes both competition and economic efficiency. If it is commercially feasible to develop another facility, the facility owner and access seeker have commercial incentives to reach an access agreement where it is efficient to do so. Where the facility can be bypassed, the facility owner has no incentive to refuse access and has an incentive to allow access if its overall costs will thereby be reduced.

If the facility owner and access seeker are unable to reach agreement, it is a strong indication that substantial inefficiencies will result from access. Even if developing another facility causes average industry costs to increase, that occurs in many industries in which the presence of bottlenecks is not an issue.

730 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379.

731 Ibid., at [77].

732 Ibid., at [96].

Further, the development of an alternative facility is likely to lead to more intense competition between the facility owner and the access seeker than would arise under access. There are substantial economic benefits from facilities-based competition including the expansion of overall capacity in the market, technological innovation, experimentation with different operational methodologies and the avoidance of co-ordination costs and other diseconomies.

As discussed above, criterion (a) also has a competition focus, but it is a different focus to criterion (b). Criterion (b) asks whether the facility is a bottleneck in the sense that it is commercially infeasible to bypass the facility. If the facility is a bottleneck, criterion (a) asks whether declaration will increase competition in a dependent market. Such a range of competitors may already be participating in the dependent markets through other means that access to the facility will not have a material effect on competition. This is particularly so in a dependent market that is export-oriented.

In its recent inquiry, the PC concluded that neither the 'private profitability' test approved by the High Court nor the 'natural monopoly' test previously applied by the NCC was apt. The PC was concerned that the private profitability test might be difficult to assess in practice and give rise to disputes (as argued by the ACCC and the NCC in their submissions to the PC inquiry). On the other hand, the natural monopoly test as traditionally applied was narrowly focused on demand for the service supplied by the relevant infrastructure, rather than total market demand.

The PC concluded that a new test was preferable:

> The Commission's preferred approach to criterion (b) accounts for both the total demand in the market in which the infrastructure service is supplied, and the production costs incurred by infrastructure service providers from coordinating multiple users of infrastructure.
>
> Criterion (b) should be satisfied where total foreseeable market demand for the infrastructure service over the declaration period could be met at least cost by the facility.[733]

The PC also concluded that, if the test were to remain as a 'private profitability' test, criterion (b) should be amended to exclude any consideration of whether the operator of the infrastructure service was able to duplicate the facility:

> If criterion (b) continues to be applied as a private profitability test, the Commission considers that the term 'anyone' should not include the incumbent infrastructure service provider. This is because an incumbent service provider would avoid access regulation if it successfully argued that it could profitably duplicate its own facilities (although it would not be required to do so). All else equal, having the incumbent duplicate, or say it will duplicate, its facility would do little to nothing to promote competition.[734]

The NCC (sub, page10 and DR sub, page 5), Fortescue (sub, page 1), AngloAmerican Metallurgical Coal (sub, page 5), Glencore Coal (sub, page 8 and DR sub, page 10), Baker and McKenzie (DR sub, page 7), Infrashare (DR sub, page 5) and the ACCC (DR sub, page 85) support the PC's proposed change to criterion (b).[735]

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733 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, page 19.

734 Ibid., page 20.

735 The Queensland Competition Authority 'has not formed a conclusive position on the PC's market-based approach … [but] considers both the natural monopoly test and the PC's market based approach are superior to the exiting private profitability test' (DR sub, page 2).

BHP Billiton (sub, page 34 and DR sub, page 17), Rio Tinto Iron Ore (sub, page 2 and DR sub, page 9) and Professors Ergas and Fels (DR sub, page 61) do not support the PC's proposal and support instead the 'private profitability' test. Professors Ergas and Fels argue that a natural monopoly test divorces criterion (b):

> ... from its original purpose: to ensure that access is available where an efficient access seeker requires it to compete (and that a facility was hence essential for competition), and that a facility could not, practically and reasonably, be duplicated. (DR sub, page 20)

In weighing up the 'private profitability' test against the PC's recommendation, Professor Hilmer remarked in 2013:

> The PC approach may do better on public benefit, while the High Court approach may do better on certainty and speed of resolution. Either could work, with the proviso that there be a further review after say 5 years …[736]

The Panel considers that maintaining the 'private profitability/economically feasible' test for criterion (b) will best promote the competition policy objectives underpinning Part IIIA. Under that test, access regulation will only be considered where there is a bottleneck that needs to be addressed. Absent a bottleneck problem, competition and economic efficiency will be advanced if market participants are free to negotiate private arrangements concerning access.

The alternative approach, evaluating whether a facility is a natural monopoly, suffers from a number of shortcomings.

First, as observed by Professors Ergas and Fels, there are many instances in which such a test:

> ... will almost trivially be met; for example, in respect of any facility that is dimensioned to operate with spare capacity, so that it would be cheaper for a third party to share an existing facility than to construct their own or use a substitute facility. (DR sub, page 20)

Second, the test requires the decision-maker to evaluate least-cost solutions in complex industries, burdened by information asymmetries where the risk of error is high. In contrast, and as observed by the High Court, the 'economically feasible' test:

> … is a question that bankers and investors must ask and answer in relation to any investment in infrastructure. Indeed, it may properly be described as the question that lies at the heart of every decision to invest in infrastructure, whether that decision is to be made by the entrepreneur or a financier of the venture.[737]

It is important to recognise that the test for criterion (b) posited by the PC, viz., whether total foreseeable market demand for the infrastructure service could be met at least cost by the facility, is a relevant factor in assessing whether developing an alternative facility is economically feasible. That was recognised by the High Court:

> … if the new facility is not more efficient than the existing facility, it is to be doubted that development of the new facility in competition with a natural monopoly would be

736 Professor F J Hilmer 2013, *National Competition Policy: Coming of Age*, Annual Baxt Lecture on Competition Policy, Melbourne, page 22.

737 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [106].

> profitable. Especially would that be so where, as here, the capital costs of establishing the new facility would necessarily be very large.[738]

Nevertheless, the Panel considers that criterion (b) should not be amended to make that test the focus of the enquiry. Rather, criterion (b) should continue to ask a competition question: whether it is economically feasible to bypass the facility. However, the Panel considers that it is desirable to revise criterion (b), as suggested by the PC, so as to exclude the service provider from the assessment of feasible duplication by anyone.

The practical operation of the criterion should be re-assessed after a suitable interval of five to 10 years.

Criterion (f)

As outlined in Box 24.1, declaration criterion (f) is that 'access (or increased access) to the service would not be contrary to the public interest'.

The PC recommended criterion (f) be amended to strengthen the public interest test. It observed:

> Given the costs associated with access regulation, it is appropriate that a service can only be declared where the decision maker is satisfied that declaration is likely to generate overall gains to the community. To support this, criterion (f) would be better drafted as an affirmative test that requires the public interest to be *promoted* (as opposed to access being 'not contrary to' the public interest). This approach is consistent with the focus of the National Competition Policy reforms and the guiding principle that competition will promote community welfare by increasing national income through encouraging improvements in efficiency.
>
> …
>
> Assessments under criterion (f) should specifically include any effects on investment (positive and negative) in markets for infrastructure services and dependent markets, and the administrative and compliance costs that would arise due to declaration. This change would also require criterion (f) to be framed as a test that assesses factors that affect the public interest with and without declaration.[739]

Rio Tinto Iron Ore (sub, page 9 and DR sub, page 9), BHP Billiton (DR sub, page 19), the Law Council of Australia — Competition and Consumer Committee (sub, page 47), the BCA (sub, Main Report, page 78) and Professors Fels and Ergas (DR sub, page 62) support the PC's proposed changes to criterion (f).

The NCC (sub, pages 10-11) and AngloAmerican Metallurgical Coal (sub, pages 5-6) do not support the PC's proposal.[740] The NCC argues:

> There is a genuine risk that raising the hurdle higher will render declaration impossible and as a result nullify any effective threat from declaration as a means of encouraging private settlements of access disputes. (sub, page 11)

738 Ibid., at [102].

739 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, pages 20-21.

740 Infrashare do not comment directly on criterion (f) but argue with respect to the public interest test that 'the Panel should be seeking to make it easier, not more difficult, for access seekers to have critical infrastructure declared' (DR sub, page 6).

A foundational principle of competition policy is that regulatory intervention into markets should only occur where the public interest is promoted. Although criteria (a) and (b) are important considerations in assessing whether an infrastructure facility should be declared, they do not exhaust the considerations that may bear upon the public interest in a given case.

In particular, as the PC observed,[741] third-party access may cause inefficiencies in dependent markets; in particular, access may negatively affect the ability of the infrastructure owner to co-ordinate its supply chain in the most efficient manner and may lead to the need to undertake additional capital investment in dependent markets (for example, larger stockpiles or other facilities). All factors that bear upon the overall public interest, including the history of the ownership of the asset, should be taken into account in the declaration decision.

The Panel's view

The declaration criteria in Part IIIA should be targeted to ensure that third-party access is only mandated where it is in the public interest. To that end:

- Criterion (a) should require that access on reasonable terms and conditions through declaration promote a substantial increase in competition in a dependent market that is nationally significant.
- Criterion (b) should require that it be uneconomical for anyone (other than the service provider) to develop another facility to provide the service.
- Criterion (f) should require that access on reasonable terms and conditions through declaration promote the public interest.

Other access regimes

As outlined earlier, a majority of access is regulated through state government or industry-specific access regimes. These regimes are closely linked to the national regime. As the ACCC notes:

> Along with the competition principles, Part IIIA provides an umbrella or template from which the industry-specific access regimes are drawn. Part IIIA has been influential in underpinning key principles in industries such as energy, telecommunication, ports, water and rail. (DR sub, page 82)

The Panel considers that the CPA should be updated to reflect the revised declaration criteria. As the PC observed in relation to their recommendations:

> There is a strong rationale for aligning the principles in clause 6(3) of the CPA with the relevant declaration criteria in the CCA. Clause 6 of the CPA provides a framework for state and territory access regimes. Therefore, if ... amendments to the declaration criteria are not reflected in clause 6(3), state and territory access regimes may not be appropriately targeted at the economic problem that access regulation should address. The differences in wording between clause 6(3) and the declaration criteria are also likely to increase uncertainty over the interpretation of both.[742]

741 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, pages 100-105.

742 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, page 255.

In making amendments to the declaration criteria, and the associated changes to the CPA, the Panel is aware that the criteria will flow on to state and industry-specific access regimes. The Panel believes that national conformity in access regimes is important for regulatory certainty across Australia.

The Panel's view

The Competition Principles Agreement should be updated to reflect the revised declaration criteria. This should bring about national conformity in the various state and industry-specific access regimes.

24.3 Review of access decisions by the Australian Competition Tribunal

The NCC must decide whether or not to recommend declaration of an infrastructure service within 180 days of receiving the application. The Minister must decide whether or not to declare the service within 60 days of receiving the recommendation from the NCC.

The Minister's decision to declare or not to declare a service is subject to review by the Tribunal. ACCC arbitration decisions in respect of a declared service are also subject to review by the Tribunal.

Since Australia enacted the former Trade Practices Act in 1974, the Tribunal (formerly the Trade Practices Tribunal) has fulfilled an important role in both the development and the administration of the law. While the Tribunal is given a number of functions under the CCA, its primary function is as a body of review. It is empowered to undertake merits reviews of various decisions of the ACCC, including authorisations and access arbitrations. Its particular strength lies in its composition. For the purposes of hearing and determining a matter that comes before it, the Tribunal is constituted by a presidential member (who is a Federal Court judge) and two other members (who have qualifications in industry, commerce, economics, law or public administration).

In the past few years, the role of the Tribunal in reviewing declaration decisions of the Minister and arbitration decisions of the ACCC has been narrowed. By amendments to the CCA made in 2010, the Tribunal's review is largely confined to examining the information taken into account by the NCC (in making a recommendation) or the ACCC (in making an arbitration decision), subject to the ability to request additional information the Tribunal considers reasonable and appropriate.[743]

Additionally, in the Pilbara rail access case, the High Court ruled that a 'reconsideration' of the Minister's decision to declare or not declare a service was different to the Tribunal's usual functions in a re-hearing and involved 'reviewing what the original decision maker decided and doing that by reference to the material that was placed before the original decision maker'.[744]

Rio Tinto Iron Ore submits:

> The great strength of the Tribunal process prior to the amendments was that primary evidence … was tested through cross-examination … This allowed a much more rigorous examination than is possible before the NCC or Minister and is therefore much more likely to arrive at the correct result. (sub, page 10)

743 *Competition and Consumer Act 2010*, sections 44ZZOAAA and 44ZZOAA.

744 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [60].

Access decisions should be made in a timely manner. The amendments made to the CCA in 2010 were intended to speed up declaration and arbitration decisions, including review by the Tribunal. At that time, the determination of the Pilbara rail access applications had taken many years — an undesirable outcome.

That said, decisions to declare a service under Part IIIA or determine terms and conditions of access are very significant. The Hilmer Review expected that such decisions would be infrequent. As noted above, that is also the view of the PC which re-stated that the scope of Part IIIA should be 'confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third-party access'.[745]

In circumstances where access declarations and arbitrations are expected to be rare, and the costs of making a wrong decision are likely to be high, the Panel supports enabling a thorough examination of the costs and benefits of the decision while avoiding unnecessary delays. An appropriate balance can be achieved between empowering the Tribunal to undertake merits reviews of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, and maintaining suitable statutory time limits for the review process.

The Panel's view

The Australian Competition Tribunal fulfils an important role in both the development and the administration of Australia's competition laws.

Decisions to declare a service under Part IIIA, or determine terms and conditions of access, are very significant economic decisions where the costs of making a wrong decision are likely to be high.

The Panel favours empowering the Tribunal to undertake a merits review of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, while maintaining suitable statutory time limits for the review process.

Implementation

Updating the CPA to reflect the revised declaration criteria will require agreement of the States and Territories. Since amendments to the declaration criteria could affect existing access declarations, the Australian Government should work closely with the States and Territories to ensure there are no unintended consequences. However, given Part IIIA was recently reviewed by the PC, there should be no need for further public consultation on the proposed amendments.

745 Productivity Commission 2013, *National Access Regime*, Inquiry Report no.66, Canberra, page 2.

Recommendation 42 — National Access Regime

The declaration criteria in Part IIIA of the CCA should be targeted to ensure that third-party access only be mandated where it is in the public interest. To that end:

- Criterion (a) should require that access on reasonable terms and conditions through declaration promote a substantial increase in competition in a dependent market that is nationally significant.
- Criterion (b) should require that it be uneconomical for anyone (other than the service provider) to develop another facility to provide the service.
- Criterion (f) should require that access on reasonable terms and conditions through declaration promote the public interest.

The Competition Principles Agreement should be updated to reflect the revised declaration criteria.

The Australian Competition Tribunal should be empowered to undertake a merits review of access decisions, while maintaining suitable statutory time limits for the review process.

PART 5 — COMPETITION INSTITUTIONS

This Part asks whether our current competition institutions are fit for purpose to operate in the long-term interests of consumers. We also identify the best institutional structure to take forward future reforms to competition policy.

The institutions that currently oversee the competition framework undertake four broad functions.

At the Commonwealth level, competition policy is implemented through the Australian Competition and Consumer Commission (ACCC), the National Competition Council (NCC), the Australian Competition Tribunal (the Tribunal) and the Federal Court of Australia. In addition, state and territory regulators such as the New South Wales Independent Pricing and Regulatory Tribunal (IPART) implement aspects of competition policy.

Under National Competition Policy (NCP), a range of new regulatory institutions were created. For example, the Australian Energy Regulator (AER) and the Australian Energy Market Commission (AEMC) were created to perform functions under a legislative framework focused on the long-term interests of consumers.

The Panel has considered the institutional arrangements that will be needed to implement the reform agenda flowing out of this Review. We identify important factors for the success of a future competition institution, including the need for a national approach, with 'buy in' from all Australian governments, and the ability of the institution to provide independent advice on competition policy.

25 Institutional Structures for Future Competition Policy

25.1 Strong institutions to sustain reform

The Panel believes that effective reform is unlikely to occur without an appropriate institutional regime to support it. The need for leadership in competition policy reform was recognised in the intergovernmental agreements giving effect to National Competition Policy (NCP), but momentum has since flagged. In particular, the National Competition Council's (NCC) role has diminished as reforms agreed two decades ago are finalised or put aside unfinished.

The Panel believes that strong leadership will be required to progress a new round of competition reform and that the multi-jurisdictional nature of reform calls for a body able to represent all jurisdictions. The Panel identifies a number of dimensions to the required leadership, including advocacy, holding governments to account and regularly analysing the state of competition, and assesses whether an existing institution could perform all of these various functions.

25.2 Lessons from NCP

The NCP reforms adopted by the Australian Government and state and territory governments in 1995 went beyond amendments to the *Competition and Consumer Act 2010* (CCA) (then the *Trade Practices Act 1974* (TPA)). They included:

- reforms to public monopolies and other government businesses, including structural reforms and competitive neutrality requirements;
- a national access regime to provide third-party access to essential infrastructure; and
- a legislation review program to assess whether regulatory restrictions on competition are in the public interest.

This was an economy-wide reform agenda with a national focus. It required action from the Australian Government and state and territory governments, at times in concert (for example, the creation of a national energy market) but more frequently requiring individual governments to make or amend their own laws (for example, the legislation review program and structural reforms to public monopolies).

To reflect this national, economy-wide focus, the intergovernmental agreements between the Australian Government and the state and territory governments that underpinned NCP contained a number of governance arrangements, including:

- agreeing to a set of competition principles, with each jurisdiction determining its own priorities and undertaking its own legislation review program;
- establishing the NCC to prepare public assessments of the performance of all governments in meeting their NCP commitments and advise the Australian Government Treasurer on competition payments to the States and Territories — the NCC also provides recommendations to Australian Government and state and territory Ministers in relation to third-party access to infrastructure; and

- the Australian Government making competition payments to the States and Territories in recognition that the Australian Government would gain more revenue than the States and Territories from the reforms.[746]

As the Productivity Commission (PC) noted in its 2005 *Review of National Competition Policy Reforms*:

> Distinguishing features of NCP were its national focus, extensive agenda, agreed framework of reform principles, commitments to timeframes, with contingent financial payments from the Australian Government to the States and Territories.[747]

A number of submissions state that an explicit institutional framework will again be necessary to progress the competition policy agenda (see for example, the Business Council of Australia (BCA), sub, Summary Report, page 26 and New South Wales Government, sub, page 10).

The Panel agrees that establishing institutional arrangements to implement the reform agenda coming out of this Review will be crucial to reinvigorating competition policy. The views put to the Panel are in general agreement that the lessons from NCP demonstrate the importance of an institutional framework to deliver competition policy reform.

25.3 A NATIONAL APPROACH TO COMPETITION POLICY

Submissions from businesses, consumers and governments argue that the national, intergovernmental approach adopted under NCP must be reinvigorated and that this requires an institutional competition policy advisor.

But, importantly, the national approach under NCP provided each jurisdiction with flexibility to determine its priorities consistent with the agreed competition policy principles.

The issues highlighted in this Report fall under the responsibility of all three levels of government: Commonwealth, state and territory and local government. There are also a number of areas that will require a cross-jurisdictional approach.

But the starting point for reform will be different across jurisdictions. Progress under NCP varied depending on the different structural features of the state and territory economies and different cultural and social priorities. This was reflected both in the issues that the jurisdictions sought to prioritise and their level of progress in achieving outcomes. These differences will also affect the priorities that the jurisdictions seek to pursue in future.

Successful competition policy reform will require commitment and effort from all three levels of government. Although the Australian Government may have a leadership role in addition to taking action in its own sphere, leadership will also be required from the States and Territories and local governments. As the Reform of the Federation White Paper: Issues Paper 3 points out, 'National interest does not mean Commonwealth interest'.[748]

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746 The last competition payments to the States and Territories were made in 2005-06. Since then, the role of the NCC has been limited to making recommendations on third-party access to infrastructure.

747 Productivity Commission 2005, *Review of National Competition Policy Reforms*, Canberra, page 127.

748 Australian Government 2014, *Reform of the Federation White Paper: Issues Paper 3: Roles and Responsibilities in Health*, Canberra, page 30.

25.4 INDEPENDENT COMPETITION POLICY ADVICE

The NCC's independence is seen as an important contributor to the success of NCP and identified as an equally important component of any institutional arrangements put in place to support future competition policy.

Submissions argue for a broad role to be performed by such a body. The New South Wales Government sets out a number of roles for an independent body:

- independent monitoring of progress in implementing reforms;
- periodically identifying areas for competition reform across all levels of government;
- making recommendations to governments on areas of reform; and
- playing an advocacy role (sub, pages 10-11).

All submissions made on this issue stress the need for independence: that the functions, irrespective of whether they are performed by existing bodies or by a specially created one, be separate from the policy and/or regulatory bodies that would carry out or regulate the specific reforms.

The Panel also considers that transparency is as important as independence. Transparency ensures that decisions and processes are open to public scrutiny. The PC discusses some of the benefits of a transparent process, including that it can aid public understanding of the benefits of reform:

> A properly constructed, transparent review process can generate stakeholder engagement and promote public awareness and acceptance of the need for reform, the issues and trade-offs associated with different policy approaches, and the resultant community wide benefits. (sub, page 10)

Drawing on its past experience in implementing NCP, the NCC notes that assessment and accountability processes, including transparency, were one of three main elements behind the NCP's success (sub, page 7).

Given the wide-ranging potential impacts of competition policy on both consumers and businesses, advocacy, education, and independent and transparent oversight of implementation will be important in helping governments meet targets, encouraging public understanding and engagement, and guarding against bias.

The NCC, as a national body, played a vital role as part of NCP. However, as noted in Chapter 10, the review and reform of legislation that may impede competition stalled following the conclusion of the NCC's role in reviewing legislation. The NCC now retains only a limited role in relation to advising ministers on infrastructure and gas access matters. It has not maintained the capacity to readily step into a broader role again.

25.5 COMPETITION PAYMENTS

Under the NCP, the Australian Government made competition payments to state and territory governments to recognise that the Australian Government received a disproportionate share of increased revenue from the larger national income resulting from NCP. This was highlighted in an analysis of NCP undertaken by the PC (then the Industry Commission) that estimated the potential gains from NCP and how it would be reflected in increased revenue at both the Australian

Government and state and territory government levels.[749] The payments were made, or withheld, by the Australian Government Treasurer following advice from the NCC.

The New South Wales Government comments that vertical fiscal imbalance:

> … means that the Commonwealth would receive the largest revenue benefit from the economic growth arising from competition-enhancing reforms (via the increase in tax revenue), though for many types of reform, the expense associated with undertaking reform is largely borne by State governments. (sub, page 12)

Over the course of the NCP from 1997-98 to 2005-06, $5.3 billion was paid to the States and Territories and $200 million was withheld.

A common theme in the Panel's meetings with representatives of the States and Territories was that competition payments contributed positively to their ability to implement reform. Although the quantum of the payments was not large compared to total state and territory revenues, representatives consistently argued that the payments provided an additional argument that could be used to support reform. In particular, it was put to the Panel that the possibility of payments being withheld was important to maintain support in the face of opposition to reform.

The NCC's assessment of competition payments is that they:

> ... in several cases stiffened governments' resolve to undertake reform. Fiscal penalties, in particular, focused attention on failed or excessively delayed reforms. (sub, page 8)

The message from all those making submissions to the Panel on the issue of competition payments is that they assisted governments in delivering their reform agendas. However, their effectiveness across the NCP agenda was limited by not applying to the Australian Government and not consistently being applied to local government.

At times, they also distorted the public message around the need for reform, creating a focus on withholding payments rather than the benefits that would flow from reform. This appears to underlie the position of many stakeholders that progress with competition policy reform waned when the competition payments ceased. Discerning whether this is the case is complicated by the introduction of the Seamless National Economy reform agreement that followed NCP. Although this also included incentive payments, it was overshadowed by the much larger changes in funding for human services.

A number of submissions call for competition payments to be a feature of any future institutional framework to recognise the potentially uneven distribution of reform effort and reward. In the Draft Report, the Panel recommended that competition payments form part of the reform process. Most submissions to the Draft Report that discussed competition payments supported the idea of payments.[750]

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749 Industry Commission 1995, *The Growth and Revenue Implications of Hilmer and Related Reforms: A report by the Industry Commission to the Council of Australian Governments*, Canberra.

750 See, for example: ACCC, DR sub, page 88; ACCI, DR sub, page 11; Australian Industry Group, DR sub, page 28; Australian Local Government Association, DR sub, page 3; Australian Motor Industry Federation, DR sub, page 14; Australian National Retailers Association, DR sub, page 14; Australian Newsagents' Federation, DR sub, page 23; Law Council of Australia — SME Committee, DR sub, page 24; National Competition Council, DR sub, page 11; National Farmers' Federation, DR sub, page 16; New South Wales Government, DR sub, page 8; South Australian Government, DR sub, page 22; Spier Consulting Legal, DR sub, page 24; Western Australia Local Government Association, DR sub, page 10; and Woolworths Limited, DR sub, page 24.

The NCC notes:

> Based on its experience under the NCP, the Council considers that the inclusion of a type of 'reform payment' for achievement of reform objectives is desirable and the application of these payments to the Commonwealth is a worthwhile extension. (DR sub, page 11)

The New South Wales Government notes:

> As the Panel has acknowledged [in its Draft Report], competition payments play a critical enabling role in this institutional framework by encouraging jurisdictions to undertake important reforms where they may otherwise face disincentives from unilateral action. Competition payments are critical as they:
>
> - Redress the misalignment between reform costs and benefits…
> - Contribute to the implementation costs of reform that are borne by the States, which are typically upfront while the benefits accrue over time…
> - Assist in securing national reform where the benefits of reform are not shared evenly between the States. (DR sub, page 8)

The South Australian Government agrees:

> ... there is merit in the Commonwealth Government making competition payments to the States and Territories for genuine productivity enhancing reforms...[but there] is the possibility that slow reforming states would benefit from competition payments at the expense of states that have been early adopters of reforms. (DR sub, page 22)

The BCA also argues:

> A proposed new incentive model is for a new intergovernmental agreement to be structured essentially as a joint venture where all jurisdictions contribute to the cost of reforms but all share more evenly in the fiscal benefits through productivity payments. (sub, Main Report, page 106)

The focus on sharing benefits was a crucial feature of the NCP payments, which should be reinstated in any future arrangements. The payments should not be misrepresented as an 'incentive' or a 'bribe' for the States and Territories (and local government) to undertake reform. Such an approach has the potential to direct the focus away from the benefits of reform.

However, as with the NCP reforms, the benefits of reform will not necessarily flow in proportion to the effort expended in pursuing and implementing reform. It is therefore reasonable to facilitate a process to rebalance any such revenue effects.

The PC's argument (sub, page 24) that any effects of vertical fiscal imbalance are better addressed directly than remediated through a competition policy payments process is laudable. However, the Panel wants to avoid vertical fiscal imbalance acting as a barrier to a set of reforms that have the potential to significantly enhance the long-term interests of consumers.

The PC should be tasked to undertake a study of reforms agreed to by the Australian Government and state and territory governments to estimate their effect on economic activity and on revenue in each jurisdiction. Payment of any compensation would be contingent on an independent assessment of whether reforms had been undertaken to a sufficient standard. That assessment would be based on actual implementation of reforms, not on the basis of undertaking reviews or other processes.

25.6 MARKET STUDIES

The competition laws serve an important purpose in discouraging anti-competitive behaviour. However, there are occasions where competition concerns arise within a market that do not fall within the bounds of the law. In these cases, a comprehensive review of the market can help policymakers better understand the competitive landscape and determine whether policy changes are needed.

A market study is one means though which policymakers can delve deeper into the workings of a market in an effort to identify changes that would lead to more competitive outcomes. In its guidance on market studies, the former UK Office of Fair Trading noted that market studies are:

> ... examinations into the causes of why particular markets are not working well for consumers, leading to proposals as to how they might be made to work better. They take an overview of regulatory and other economic drivers in a market and patterns of consumer and business behaviour...
>
> As well as taking a look at particular markets, market studies can relate to practices across a range of goods and services, for example, doorstep selling.[751]

In addition to observing businesses operating in a market, market studies can play an important role in examining the role of government. The former UK Office of Fair Trading also noted:

> As well as investigating adverse effects on competition caused by business and consumer behaviour, market studies can also examine restrictions on competition that can arise through Government regulation or public policy.
>
> ...
>
> As government regulation and policy are not typically susceptible to enforcement action, market studies can be the best response to concerns regarding markets where public restrictions may be distorting a market or chilling competition.[752]

The absence of a formal market studies power in Australia is generally in contrast with other comparable economies. When looking at overseas comparisons, it is possible to make some generalisations:

- Market studies are most often undertaken by the competition regulator, as a complement to its broader competition enforcement and education priorities.
- Most market studies bodies possess mandatory information-gathering powers — there will usually be policies about how the information collected as part of a market study will be used.
- Most market studies are published, allowing for a broader public discussion of the policy and recommendations relating to the market in question.
- A common outcome of market studies is recommendations for changes to legislation or government policies — as is the case with PC inquiry recommendations and state and territory regulator recommendations.

Submissions generally support introducing a market studies power;[753] however, the Panel heard differing views as to whether the ACCC or a different body is best placed to undertake market

751 Office of Fair Trading 2010, *Market Studies: Guidance on the OFT Approach*, London, page 2.

752 Ibid., pages 2-4.

studies. Some submitters, including the ACCC (DR sub, page 88), CHOICE (DR sub, page 34), the Consumer Action Law Centre (DR sub, page 21) and the Australian Communications Consumer Action Network (DR sub, page 6) favour vesting market studies powers with the ACCC.

Reflecting overseas experience, the ACCC notes that it would like the ability to initiate market studies for various reasons:

- as a lead-in to competition or consumer protection enforcement action when anti-competitive behaviour is suspected in a sector but the exact nature and source of the problem is unknown;
- to identify a systemic market failure (instead of ad hoc compliance action against individual firms) and to better target a response (whether, for example, [through] enforcement action or compliance education);
- to identify market problems where affected parties are disadvantaged and either have difficulty making a complaint to the ACCC or accessing the legal system to take private action;
- to address public interest or concern about markets not functioning in a competitive way; the market study could either confirm such concerns, and propose some solutions, or reveal them to be unfounded; or
- to fact-find to enhance the ACCC's knowledge of a specific market or sector, particularly where a market is rapidly changing, and raises issues across the ACCC's functions. (sub 1, page 138)

CHOICE's submission points out 'The international experience overwhelmingly supports aligning market studies with the ACCC' (DR sub, page 34), while the ACCC adds:

> A 2003 OECD report found that close to all of the respondent competition authorities conducted general sector investigations or economic studies; a 2012 ICN [International Competition Network] report found that 40 ICN member authorities were using market studies. The performance by the ACCC of a market study function should therefore not be regarded as an unusual suggestion; rather it is a mainstream one. (DR sub, page 91)

Although the market studies function resides with the competition regulator in some countries, the Panel believes that this approach may lead to conflicts between policy and regulation/enforcement functions. As the Monash Business Policy Forum states, 'separation of policy design and implementation is key to effective regulatory agencies … regulators should be explicitly excluded from policy development' (sub, pages 13 and 17).

Submissions to the Draft Report also recognise potential conflicts of interest. For example, Spier Consulting Legal notes, 'There are potential issues of conflict of roles of the ACCC and [a market study function] diverts the ACCC from its core roles' (DR sub, page 23), while Australian Industry Group submits that it 'understands and supports the separation of Government policy formulation from Government policy implementation, as a general principle of good policy governance' (DR sub, page 26).

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753 See, for example: Australian Chamber of Commerce and Industry, DR sub, page 17; Australian Newsagents' Federation, DR sub, page 22; Consumer Action Law Centre, DR sub, page 21; Australian Communications Consumer Action Network, DR sub, page 6; Peter Mair, DR sub, page 1; Australian Automotive Aftermarket Association, DR sub, page 18; Spier Consulting Legal, DR sub, page 23; National Farmers' Federation, DR sub, page 16; Law Council of Australia — SME Committee, DR sub, page 23; Law Council of Australia– Competition and Consumer Committee, DR sub, page 29; and Retail Guild of Australia, DR sub, page 7.

The Panel favours an approach to market studies that is clearly separate from the enforcement function. The market studies function would therefore be separate from the necessarily adversarial nature of enforcement under the CCA. It would seek instead to focus on understanding the range of factors — government or otherwise — that shape the level of competition in a market.

A market study should consider the framework, structure and rules that govern a market. This is broader than issues relating to the CCA and could include advice to governments on issues relating to market stewardship and procurement policies. Recommendations could be made to implement changes in any of these areas, either through changes to regulation that directly determine the shape of the market or to regulation that has the unintended consequence of reducing competition in the market; for example, by affecting entry into or exit from the market.

A market study is not necessarily a precursor to enforcement action. Rather, where there are conduct concerns, the market studies body could refer its concerns to the ACCC for appropriate investigation.

Australia has no dedicated market studies body to examine the competitive dynamics of particular markets in a systematic way. Currently, inquiries into these issues are conducted on an ad hoc basis by, for example, the ACCC, the PC or state and territory regulators, but none of these bodies is specifically designed to conduct market studies.

The ACCC's submission notes its role in market studies:

> The ACCC currently has some scope to conduct market studies. Under section 28 of the CCA, the ACCC has functions in relation to dissemination of information, law reform and research although the information gathering powers set out in the CCA do not apply to this section. Under Part VIIA of the CCA, the Minister may require the ACCC or another body to hold a price inquiry. The ACCC may also hold such inquiries with the Minister's approval. (sub 1, page 139)

The Panel notes that the ACCC will continue to investigate particular markets as part of its routine assessments. However, allowing the ACCC to conduct formal market studies as described here could encourage the perception that such studies are a precursor to enforcement action. The Panel is keen to avoid creating such a perception.

The usefulness of a market study will depend on the information acquired. Most market studies bodies in other jurisdictions have mandatory information-gathering powers. The rationale for mandatory powers is that they help to ensure that a market study builds an accurate picture of the market.

However, mandatory information-gathering powers are a significant legal imposition and there is a presumption that they should be used sparingly.

The PC has information-gathering powers in relation to its inquiries under section 48 of the *Productivity Commission Act 1998* but generally chooses not to use them, relying instead on information voluntarily submitted by interested parties. That said, the ability of the PC to draw upon these powers if required may act as an incentive for parties to provide information voluntarily.

Submissions are generally in favour of a market studies body having access to information-gathering powers, but note that these powers should be used judiciously. For example, the BCA submits, 'Information gathering should be voluntary in the first instance, with any subsequent use of mandatory powers subject to a test of reasonableness' (DR sub, page 4), while the Australian Chamber of Commerce and Industry (ACCI) states, 'ACCI also supports the [proposed Australian

Council for Competition Policy] being granted similar data collection powers to those granted to the Productivity Commission' (DR sub, page 17) and the Consumer Action Law Centre notes that information-gathering powers have proved useful in competition investigations (DR sub, page 21).

The approach adopted by the PC — inviting interested parties to comment on issues and undertaking independent research, while having the power to compel production of information — appears to achieve desired outcomes.

Outcomes of studies

The former UK Office of Fair Trading guidance material notes that options available at the conclusion of its market studies include:

- improving the quality and accessibility of information for consumers;
- encouraging businesses in the market to self-regulate;
- making recommendations to the Government to change regulations or public policy;
- taking competition or consumer enforcement action; or
- making a market investigation reference to the relevant authority.[754]

Importantly, findings and recommendations presented to government allow the market studies body to dispel myths about the market and determine the effects on consumers without limiting the reform options for government. Ultimately, this provides government with valuable information about the nature and extent of any problems but leaves maximum flexibility for policy responses.

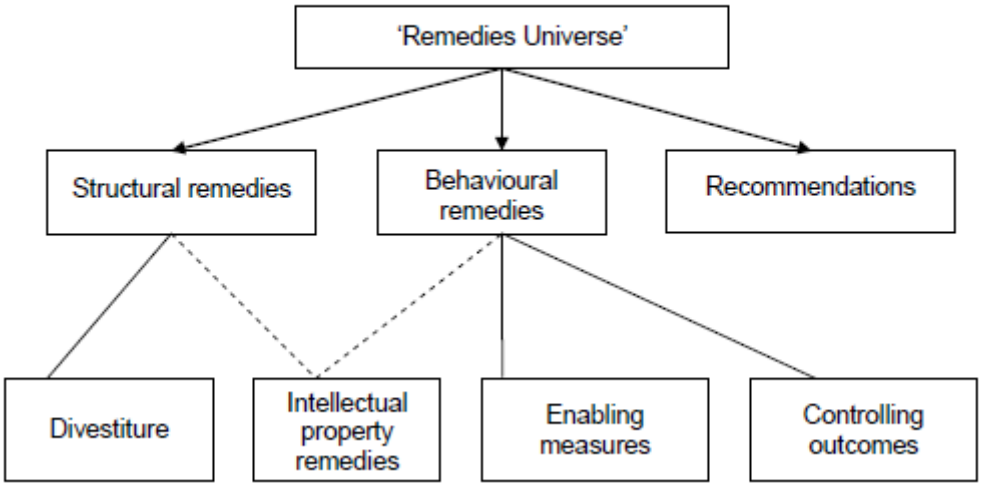
The Panel notes an important distinction between market studies and market investigations as undertaken in the UK. Although market studies generally result in recommendations and/or findings, market investigations go a step further by allowing the market investigation body to impose a wide range of legally enforceable remedies.

The former UK Competition Commission guidelines provide an overview of the possible outcomes from a market investigation:[755]

754 Office of Fair Trading 2010, *Market Studies: Guidance on the OFT Approach*, London, page 3.

755 Competition Commission 2013, *Guidelines for market investigations: Their role, procedures, assessment and remedies*, London, page 79.

Overview of the universe of possible remedies



CHOICE's submission supports an additional market investigations function (sub, page 56). However, the ACCC disagrees, noting that it does not support the ability of a market investigations body to impose legally enforceable remedies (sub 1, page 139). The Panel believes the ACCC's view is preferable, as it is consistent with Australia's Constitution, which gives the Australian Parliament the power to make laws and the judiciary the power to impose remedies.

A wide range of parties may be interested in commissioning a particular market study, including governments (jointly or individually), market participants (including businesses and consumers) and regulators. Business SA notes that it is:

> ... pleased that the Panel's proposed [institutional arrangements] will allow small business to raise issues they wish to be the focus of market studies. It is imperative that this mechanism be formally embedded into the governing legislation ... and that genuine requests from small business, including its representative bodies, are given proper consideration. (DR sub, page 11)

The Panel favours an open process where all market participants have the capacity to request market studies. The body vested with a market studies power will have to prioritise requests for studies based on its assessment of where the potential public benefit is greatest.

25.7 Ex-post evaluation of some merger decisions

A number of submissions call for ex-post evaluation of ACCC merger decisions and/or monitoring of market outcomes.[756] An evaluation process of this kind would assess the validity and effectiveness of past merger decisions; specifically, whether mergers that were allowed to proceed subsequently resulted in substantial damage to competition, and whether the assessment of markets and entry barriers, on the basis of which mergers were prevented, subsequently proved to be erroneous.

Such evaluations use quantitative and sometimes qualitative techniques to look back on selected past merger decisions to assess whether the conclusions were correct in light of the available

756 See, for example: BCA DR sub, page 37; Retail Guild DR sub, page 8; and Australian Automobile Association DR sub, page 3.

evidence at the time of the decision.[757] This may also assist in determining whether the ACCC's processes were effective and improve the quality of future decisions. The Panel supports review of previous merger decisions but considers it important that there be no ability to overturn past ACCC, Tribunal or court decisions based on such evaluations.

25.8 A NEW COMPETITION POLICY INSTITUTION

The Panel believes that reinvigorating competition policy requires leadership from an institution specifically constituted for the purpose. Leadership encompasses advocacy for competition policy, driving implementation of the decisions made and conducting independent, transparent reviews of progress. The Panel believes that no existing institution is able to undertake the functions detailed above. Their importance necessitates creating a new body.

The NCC, which oversaw the NCP, now has a considerably diminished role. It has been put to the Panel that the NCC no longer has the capacity to provide leadership in this domain. Recommendation 50 proposes that the remaining functions of the NCC, associated with the National Access Regime, be transferred to a national Access and Pricing Regulator. The NCC could then be dissolved.

The PC is the only existing body with the necessary credibility and expertise to undertake this function, given its role as an independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. But the PC's work is driven by the Australian Government and, if it were to have a national competition policy function as well, its legislation and governance would need significant change.

The Panel considers that a new national competition body, the Australian Council for Competition Policy (ACCP), should be established with a mandate to provide leadership and drive implementation of the evolving competition policy agenda.

The ACCP cannot be accountable to just one jurisdiction, but must be accountable to them all. This suggests an agreement between governments and oversight by a Ministerial Council. Given the economy-wide nature of competition issues, this responsibility should be assigned to Treasurers. Governments should agree the functions of the ACCP and the process of appointing its members and funding. Although there should be scope for members to be nominated and appointed by all governments, their role would not be to represent a jurisdictional interest but rather to view competition policy from a national perspective.

25.9 FUNCTIONS OF THE ACCP

The ACCP should have a broad role. In particular, the ACCP should advise governments on how to adapt competition policy to changing circumstances facing consumers and business. The ACCP should therefore develop an understanding of the state of competition across the Australian economy and report on it regularly.

The competition policy environment is not static. New technologies can raise new issues and resolve older ones. The Panel considers that governments would benefit from an annual analysis of developments in the competition policy environment.

757 OECD 2011, *Impact Evaluation of Merger Decisions*, Policy Roundtable, Paris, pages 47 and 97.

This would include more detail on the specific priority issues or markets that should receive greater attention. It could also include recommending review mechanisms, particularly for more heavily regulated markets, to ensure more burdensome or intrusive regulatory frameworks remain fit for purpose.

Commenting on best practice and international developments would provide opportunities for governments to consider whether the outcomes of different approaches to reform in other jurisdictions apply within their own.

A clear advocate for competition policy is needed in Australia's institutional structure. Too often this has fallen by default to the ACCC, which can be an uneasy role for a regulator to fulfil. Advocacy on particular issues may be seen to prejudice the outcome of investigations. Competition policy advocacy and advice will cover market design and stewardship advice in areas such as human services, which are beyond the scope of the CCA. The ACCP's independence and accountability to all governments, as well as its broader policy mandate and lack of enforcement powers, would make it the ideal body to undertake those advocacy functions. The Panel sees advocacy for competition as a central function of the ACCP.

The ACCP should also act as an independent assessor of progress on reform, holding governments at all levels to account. The ACCP would be well placed to assess whether reforms have been undertaken to a sufficient standard to warrant competition payments.

Australian Industry Group notes some concerns in creating the new body, particularly in relation to confusion related to state and territory government and Australian Government responsibilities, as well as potentially complex governance arrangements. Australian Industry Group notes:

> Complex governance structures run the risk of ensuring government engagement, at the expense of business engagement. That is, a COAG-based structure might help to attract and engage state government stakeholders in long-term national competition policy, but its complexity might also risk the engagement and support of business and community stakeholders. (DR sub, page 25-26)

It also queries whether responsibility would be better allocated to the Treasury, the PC or the ACCC.

Similarly, a number of submissions to the Draft Report propose that the functions in question be assigned to existing institutions. The Australian Communications Consumer Action Network notes, 'Given the advisory nature of the functions of the proposed national body we do not see a problem with these tasks residing with an existing Commonwealth institution' and goes on to recommend that the market studies power be conferred on the ACCC, for example (DR sub, page 6).

The national, non-regulatory nature of the ACCP provides a unique position to guide competition policy reform for all three levels of government in Australia compared with an Australian Government body or one that also has regulatory functions. Rather than confusing the policy landscape, the ACCP would provide a single focal point for competition reform in Australia.

However, the BCA notes that it is:

> … always conscious of the need to avoid establishing new public bodies without a clear justification. On this occasion the case for the ACCP is strong. We believe the most important outcome of the draft report is recognition of the need for a substantial microeconomic reform agenda. The evidence of past reforms is that a powerful independent body drove the success of those reforms.

> The panel's proposal for a new ACCP deals directly with the lack of a strong institution today charged with providing incentives and sanctions to all Australian governments to encourage ongoing reform. There is no obvious alternative institution in Australia to perform this function. (DR sub, page 26)

The ACCP's effectiveness would be enhanced by assigning it a market studies function, which would create a convenient, consistent, effective and independent way for governments to seek advice and recommendations on recurrent and emerging competition policy issues.

Given the potential for conflicts between the ACCC's investigation and enforcement responsibilities and the scope of a market studies function, the Panel believes it is appropriate to vest such a power with the ACCP rather than the ACCC. As previously discussed, the ACCC already undertakes some market research functions under section 28 of the CCA. The Panel recognises the importance of the ACCC continuing to undertake this research to inform its day-to-day operations but considers the proposed market studies function fulfils a very different role and should be vested in the ACCP. Market studies should not be undertaken for the purposes of informing the compliance and enforcement work of the ACCC; instead, they should inform the broader debate on competition policy.

The market studies function would have a competition policy focus and complement but not duplicate the work of other bodies such as the PC. For example, States and Territories could call upon the ACCP to undertake market studies of the provision of human services in their jurisdiction as part of implementing the choice and competition principles set out in Recommendation 2.

Mandatory information-gathering powers can help to ensure that a market study builds an accurate picture of the market, as suggested by the New South Wales Government (DR sub, page 7), and will provide flexibility for the ACCP to conduct its inquiries in the manner best suiting the particular circumstances.

The NCP recognised the principle that the different circumstances in different jurisdictions could lead to different approaches to either the scope or timing of reform. In agreeing with this principle, the Panel considers that the ACCP should be able to receive referrals from jurisdictions collectively as well as individually.

This would ensure that each jurisdiction has the freedom to identify its own concerns, while allowing the ACCP the flexibility to consider whether those concerns have broader or cross-jurisdictional impacts.

In addition, the Panel considers that all market participants, including small business, consumers and regulators, should have the opportunity to raise issues they would like to see become the subject of market studies. Funding could be set aside in the ACCP budget to undertake studies in addition to those referred by the Ministerial Council. The decision would rest with the ACCP as to which of these outside requests it might take up, and it would not be obliged to agree to all requests.

The Ministerial Council would need to oversee priorities and resourcing so that the ACCP has the capacity to focus on the priorities of governments and market participants.

Ex-post evaluations of merger processes are relatively common in overseas jurisdictions and are often performed by competition bodies themselves or consultants engaged by those firms. Although internal or consultant evaluations might be expected to assist the ACCC, the Panel envisages that such a function should be performed by the ACCP. This would have the additional benefit of being clearly independent of the ACCC, improving public confidence in the findings.

25.10 Governance of the ACCP

The governance arrangements of an institution should reflect the functions that institution undertakes. The functions of the ACCP include advocacy, education, oversight of reform progress and undertaking independent market studies. As the Australian Corporate Lawyers Association notes:

> ... structure, accountability and resourcing will be critical in ensuring the ACCP can appropriately discharge its duties and achieve the stated objectives of providing competition advocacy and leadership and driving implementation of the evolving competition and policy agenda. (DR sub, page 4)

Another feature of the ACCP is that it will be 'national' and so accountable to the Australian Government and state and territory governments.

Into the future, each level of government will continue to have responsibility for implementing economic reforms. The establishment of governance arrangements to implement reforms must be undertaken in the context of Australia's federal structure. Many of the competition policy reforms outlined in this Report are overseen by state and territory governments. All Australian governments must have confidence in the governance arrangements for a reinvigorated round of competition policy reform to succeed. For example, both the Australian Government and the States and Territories fund, regulate and provide human services. While the allocation of responsibilities across the Federation may change as a result of the Reform of the Federation White Paper, it is reasonable to assume that all levels of government will continue to have some role in the provision of human services.

A national body

The ACCP will be a 'national' body — this means that it is not 'owned' by any level of government, Commonwealth, State or Territory — but is created through legislation passed in one State and by application in all other jurisdictions. A national body can oversee implementation of the reform agenda by all governments (individually and collectively) as it would not potentially be seen as one government telling another what to do. However, it does require the authority to consider issues in all jurisdictions.

The NCC, which was created by Australian Government legislation, was seen as an Australian Government body, despite the Australian Government needing the agreement of the majority of States and Territories to appoint Commissioners. The Australian Government effectively managed the appointments process and the NCC reported to the Australian Government on state progress in implementing NCP reforms for the purpose of the Australian Government making competition payments.

Similarly, the ACCC is seen as owned by the Australian Government, notwithstanding the States' role in appointing Commissioners.

In the Draft Report, the Australian Energy Market Commission (AEMC) is cited as an example of a 'national' body — it is created by state legislation, the South Australian *Australian Energy Market Commission Establishment Act 2004*.

The AEMC was created to be the rule maker for the national energy market. Like the participating States and the Australian Capital Territory, the Commonwealth is a jurisdiction in the National Electricity Market. Governance of the AEMC is shared by jurisdictions.

The AEMC is also required to comply with a number of South Australian, New South Wales and Commonwealth laws relating to such matters as record-keeping, information disclosure, financial reporting and employment-related matters. For example, the AEMC complies with the *Fair Work Act 2009* (Cth), New South Wales work health and safety laws and South Australian laws such as the *Freedom of Information Act 1991*, the *Public Finance and Audit Act 1987* and the *State Records Act 1997*.

These requirements can impose some limitations on the governance structure; for example whether an individual officeholder is accountable for the expenditure of monies, rather than a board. However, establishing the ACCP under its own legislation does remove some potential limitations on the role of a governing board.

Members of the ACCP

As noted above, consultation between the Australian and state and territory governments on appointments would not be sufficient for an agency to be seen as national rather than Commonwealth.

Given the ACCP involves all nine jurisdictions, requiring each jurisdiction to appoint members would create a governing body that was too large. It could also result in the board members regarding themselves (and being regarded by others) as representing the interests of their jurisdictions rather than the national interest. A potentially more desirable structure would be a limited number of members with all States and Territories having the opportunity to nominate members.

In the 'national' AEMC, the Chair is nominated for appointment by state and territory energy Ministers. There are two other Commissioners, one of whom is appointed by state and territory energy Ministers and the other appointed by the Australian Government energy Minister. The Commissioners are supported by a Chief Executive.

Once nominated by the States and Territories, Commissioners are required to be part of a selection panel process. This can reduce the risk of members being seen as state representatives first rather than members of a national body.

A similar process could be used to appoint Commissioners to the ACCP. Each state and territory government could nominate members for state and territory positions on the ACCP Board, and all nominees would then be required to undergo a selection process under an approved appointment protocol. Ministers would then sign off on the recommended appointments.

The Panel's view is that the ACCP should be governed by a five-member board that would include two state and territory nominees, chosen through a merit selection process, two members selected by the Australian Government and a Chair. The Panel recommends that nomination of the Chair be rotated between the Australian Government and the States and Territories combined.

The nature of its functions also means that the ACCP Board should not require full-time members. As a result, the governance requirements should be met with part-time members. The advocacy role, though, would require a full-time Chair. Funding of the ACCP should be shared among all jurisdictions. The Australian Government should provide half of the funding and States and Territories the remainder proportional to their population size.

The Panel's view

The Panel believes that reinvigorating competition policy reform requires leadership from an institution specifically constituted for the purpose. The Panel therefore proposes establishing the Australian Council for Competition Policy (ACCP) with a mandate to provide leadership and drive implementation of the evolving competition policy agenda. Establishing governance arrangements to implement reforms must be undertaken in the context of Australia's federal structure.

The Panel sees advocacy for competition as a central function of the ACCP. It should also act as an independent assessor of progress on reform and be a place for collaboration.

The effectiveness of the ACCP would be enhanced by assigning it a market studies function, which would create a convenient, consistent, effective and independent way for governments at all levels to seek advice and recommendations on recurrent and emerging competition policy issues.

The competition policy environment is not static. New technologies can raise new issues and resolve older ones. The Panel considers that governments would benefit from an annual analysis of developments in the competition policy environment, which could be undertaken by the ACCP.

The benefits of reform, including any fiscal dividend, should be commensurate with the reform effort made. The differing revenue bases of the Australian Government and the States and Territories mean that revenue may not flow in proportion to reform effort. The PC should be tasked to undertake a study of reforms agreed to by the Australian Government and state and territory governments to estimate their effect on the economy and revenue in each jurisdiction.

The ACCP could assess whether reforms had been undertaken to a sufficient standard to warrant compensation payments. That assessment would be based on actual implementation of reforms, not merely undertaking reviews or other processes.

The ACCP must have appropriate governance arrangements in place from its inception. The Panel's view is that the ACCP should be governed by a five-member board, with the Chair serving on a full-time basis and other members on a part-time basis.

As a national body, the ACCP Board should be composed of two state and territory members, drawn from nominations made by state and territory governments, and then formalised by Ministers following a selection process. The two Australian Government members would be directly appointed by the Australian Government.

Funding would be shared by all jurisdictions, with half of the funding to be provided by the Australian Government and the remainder by the States and Territories, calculated according to their population size.

Implementation

Implementation of the ACCP will require an agreement between the Australian Government and all States and Territories. As the Reform of the Federation White Paper will discuss mechanisms under which the Australian Government and the States and Territories will take forward joint initiatives, the Panel does not offer detailed recommendations on the mechanisms or processes to achieve agreement on establishing the ACCP.

However, the ACCP will be crucial to implementing a number of this Review's recommendations. The Panel therefore recommends that the Australian Government and the States and Territories agree implementation arrangements for the ACCP within six months.

Recommendation 43 — Australian Council for Competition Policy — Establishment

The National Competition Council should be dissolved and the Australian Council for Competition Policy (ACCP) established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda.

The ACCP should be established under legislation by one State and then by application in all other States and Territories and at the Commonwealth level. It should be funded jointly by the Australian Government and the States and Territories.

The ACCP should have a five-member board, consisting of two members nominated by state and territory Treasurers and two members selected by the Australian Government Treasurer, plus a Chair. Nomination of the Chair should rotate between the Australian Government and the States and Territories combined. The Chair should be appointed on a full-time basis and other members on a part-time basis.

Funding should be shared by all jurisdictions, with half of the funding provided by the Australian Government and half by the States and Territories in proportion to their population size.

Recommendation 44 — Australian Council for Competition Policy — Role

The Australian Council for Competition Policy should have a broad role encompassing:

- advocacy, education and promotion of collaboration in competition policy;
- independently monitoring progress in implementing agreed reforms and publicly reporting on progress annually;
- identifying potential areas of competition reform across all levels of government;
- making recommendations to governments on specific market design issues, regulatory reforms, procurement policies and proposed privatisations;
- undertaking research into competition policy developments in Australia and overseas; and
- ex-post evaluation of some merger decisions.

Recommendation 45 — Market studies power

The Australian Council for Competition Policy (ACCP) should have the power to undertake competition studies of markets in Australia and make recommendations to relevant governments on changes to regulation, or to the ACCC for investigation of potential breaches of the CCA.

The ACCP should have mandatory information-gathering powers to assist in its market studies function; however, these powers should be used sparingly.

Recommendation 46 — Market studies requests

All governments, jointly or individually, should have the capacity to issue a reference to the Australian Council for Competition Policy (ACCP) to undertake a competition study of a particular market or competition issue.

All market participants, including small business and regulators (such as the ACCC), should have the capacity to request market studies be undertaken by the ACCP.

The work program of the ACCP should be overseen by the Ministerial Council on Federal Financial Relations to ensure that resourcing addresses priority issues.

Recommendation 47 — Annual competition analysis

The Australian Council for Competition Policy should be required to undertake an annual analysis of developments in the competition policy environment, both in Australia and internationally, and identify specific issues or markets that should receive greater attention.

Recommendation 48 — Competition payments

The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Australian Government and state and territory governments to estimate their effect on revenue in each jurisdiction.

If disproportionate effects across jurisdictions are estimated, competition policy payments should ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform.

Reform effort should be assessed by the Australian Council for Competition Policy based on actual implementation of reform measures, not on undertaking reviews.

25.11 Australian Government policy on the creation of new bodies

The Panel notes the Australian Government's preference that the creation of new government bodies be limited.[758] The policy states that, among other considerations:

- Before establishing a new body, it must be asked whether the activity can be pursued, in whole or in part, from within an existing Australian Government entity or Australian Government company. Regulatory functions can be performed from within an existing entity, with legislation providing such independence as is necessary for the regulatory activity.
- It is a strong preference of the Government that new activities should, where appropriate, be undertaken by public service departments. It is also the preference of the Government that functions that are related should be consolidated into the minimum necessary number of bodies, to speed up timeframes and improve the experience of clients who have to interact with any administrative processes.
- Where the activity requires the creation of a new body, an analysis of costs and benefits, risks and potential alternatives to the proposed governance structure will need to be undertaken,

758 Cormann, M (Minister for Finance) 2014, *Smaller Government — Towards a Sustainable Future*, Ministerial Paper, Commonwealth of Australia, Canberra, page 26.

and brought forward to Cabinet for approval. The analysis should compare a minimum of three alternative governance structures for the proposed body.

- As a general principle, where a new body is warranted, an appropriate sunset or reassessment date must be agreed (must be 10 years or less).

The Panel believes that the ACCP meets the above criteria — rather than an Australian Government body, it is intended to be truly national in character, with shared governance and funding. There are no bodies that currently exist that are capable of taking on the ACCP's functions. The need for this body to have strong ties to state and territory governments means that it would not be acceptable for its functions to be undertaken within an Australian Government Department. The ACCP's strength derives from its independence, particularly insofar as it relates to the need to provide independent assessment of jurisdictions' progress against agreed reforms.

The Panel has also considered whether there is an existing body that could perform the functions envisaged for the ACCP. The ACCC is not an appropriate agency to undertake the proposed functions. As an enforcement agency, the ACCC is not best placed to advocate for reform, nor to undertake market studies. While the PC could undertake the functions of advocacy and market studies, it is an Australian Government body and to be effective, a body covering competition across the jurisdictions needs to be accountable to all jurisdictions.

26 Enforcement of Competition Law

Enforcement of competition law is crucially important to consumers and therefore to the performance of the economy.

The primary enforcement body is the Australian Competition and Consumer Commission (ACCC), which was created in 1995 by merging the Prices Surveillance Authority and the Trade Practices Commission, and adding some functions from the telecommunications regulator, Austel. The ACCC retained the Trade Practices Commission's Commonwealth consumer protection enforcement functions and subsequently acquired the Australian Energy Regulator (AER) as a constituent component.

Many submissions comment on the role, structure and effectiveness of the ACCC as the central regulatory body for competition law. Issues raised in submissions include:

- whether the ACCC should be responsible for enforcing both competition law and consumer protection law or whether those responsibilities should be separated;
- whether ACCC decision making would be improved by changes to its governance structure;
- whether access and pricing regulatory functions should be undertaken by a body separate from the ACCC; and
- whether the ACCC uses the media responsibly.

26.1 Competition and consumer protection functions

The ACCC argues that one of the core strengths of Australian competition policy is that competition enforcement, consumer protection and economic regulation are combined within a single, economy-wide agency with the objective of making markets work to enhance the welfare of Australians (sub 1, page 130). Having a single body fosters a pro-market culture, facilitates co-ordination and depth across the functions, ensures small businesses do not fall between the cracks, provides a source of consistent information to business and consumers about their rights, and provides administrative savings and skills enhancement through the pooling of information, skills and expertise (ACCC sub 1, page 131).

Linking competition and consumer functions has been described as competition law keeping the options open, while consumer protection laws protect the ability of consumers to make informed choices among those options.[759]

However, the Monash Business Policy Forum argues that the competition and consumer functions should be separate:

> ... combining competition and consumer protection in a single regulatory agency is inconsistent with best practice design of regulatory institutions. (sub, page 33)

Competition regulation is argued to be 'neutral', with the regulator an umpire in day-to-day market activities, while consumer protection re-balances the market towards consumers. In particular, the Monash Business Policy Forum notes that consumer protection matters can be used to raise the

759 Netherlands Competition Authority 2010, *Competition Enforcement and Consumer Welfare: Setting the Agenda* Preamble, Den Haag, page 3.

agency's public profile to the detriment of competition enforcement and that there are likely to be internal divisions of culture. It quotes Bill Kovacic, a former Chairman and Commissioner of the US Federal Trade Commission:

> During the [Federal Trade Commission's] deliberations over Google's merger, some Commission officials and staff advocated that the agency use the merger review process to exact concessions from the merging parties concerning their privacy policies and data protection practices. (sub, page 33)

The Panel acknowledges that there are synergies in having competition and consumer functions in the one institution. Within the current structure of the ACCC, the market investigation skills of staff are relevant to a range of the organisation's roles and functions, from the general competition and consumer protection, compliance and enforcement roles to specific competition functions such as mergers, authorisations and notifications. This facilitates staff movement across the agency, the building up of expertise and a common approach to issues.

The Organisation for Economic Co-operation and Development (OECD) identifies three major advantages of retaining the competition and consumer functions in one institution:

- gains from treating competition and consumer policy as instruments that can be flexibly combined and more generally managed within a single portfolio of policy instruments;
- gains from developing and sharing expertise across these two areas; and
- gains in terms of the wider visibility to the community, and understanding in the community, of competition and consumer issues.[760]

Various consumer groups support retaining a combined competition and consumer body, focusing on the ACCC's record of being an active competition and consumer regulator.

Submissions to the Draft Report generally agree that the ACCC's competition and consumer functions should be retained within the one agency. The Consumer Action Law Centre notes, 'competition and consumer policy should be considered by the one body because they are so intertwined as to be essentially two elements of the same area of policy' (DR sub, page 22).

The Australian Communications Consumer Action Network submits that it sees the competition and consumer protection roles of the ACCC as complementary and those roles 'as inextricably linked and important to maintain within the same organisation' (sub, page 9).

CHOICE notes one of the benefits of having a combined competition and consumer regulator is avoiding regulatory over-capture (sub, page 55).

The question for the Panel is whether the claimed cultural benefits of separate regulators outweigh the synergy benefits from combining competition and consumer functions. The Panel is not satisfied, on balance, that separating the competition and consumer functions would deliver an overall benefit. Small businesses, in particular, which sometimes display the characteristics of businesses and at other times of consumers, could 'fall through the cracks'.

For example, currently the ACCC can assess a complaint of anti-competitive behaviour against the misuse of market power provisions, the business unconscionable conduct provisions or the operation of a relevant code. Having these considerations split across different agencies could lead to

760 OECD 2008, *The Interface between Competition and Consumer Policies*, Policy Roundtables, Paris.

additional administrative complexity or, far worse, to duplicate prosecutions of the same conduct under separate parts of the *Competition and Consumer Act 2010* (CCA) by separate agencies.

The Panel's view

The Panel considers that the ACCC should continue to combine competition and consumer regulation.

There are synergies from having the competition and consumer functions within the one regulator. For example, fair trading issues may raise concerns about misuse of market power, unconscionable conduct or unfair contract terms. Having one regulator overseeing all of these functions allows the different courses of action to be considered simultaneously. It also encourages the building of expertise.

Recognising that these synergies come with tensions, the Panel notes that the ACCC should maintain an appropriate balance between its competition-related functions and its consumer protection role.

Recommendation 49 — ACCC functions

Competition and consumer functions should be retained within the single agency of the ACCC.

26.2 ACCC ACCOUNTABILITY AND GOVERNANCE

The ACCC is established under the CCA as a statutory authority. It is governed by a Chairperson and other persons appointed as members of the Commission (usually called Commissioners). Decisions are made by the Chairperson and Commissioners meeting together (or as a division of the Commission), save where a power has been delegated to a Commissioner. The Commission is assisted by its staff. The Chairperson and Commissioners are appointed on a full-time basis and effectively perform an executive role.

The ACCC is subject to external parliamentary scrutiny through the Senate Economics References Committee, which examines the operations and performance of all Treasury portfolio agencies as part of the Senate Estimates process that occurs up to three times each year. The ACCC's annual report is also tabled in the Australian Parliament.

Other bodies reviewing the ACCC's activities include tribunals and courts and the Commonwealth Ombudsman. The ACCC and its staff must also comply with a range of other general rules and guidance, such as the *Public Governance, Performance and Accountability Act 2013*, Legal Services Directions,[761] Commonwealth freedom of information framework[762] and general obligations on public service employees.[763]

The ACCC, like other executive institutions, is issued with a Statement of Expectations by the Australian Government, most recently in 2014.[764] This sets out the Government's expectations about the role and responsibilities of the ACCC, its relationship with the Government, issues of

761 Legal Services Directions 2005.

762 *Freedom of Information Act 1982*.

763 *Public Service Act 1999*.

764 Australian Government 2014, Statement of Expectations to the ACCC, Canberra.

transparency and accountability and operational matters. The ACCC has responded with its Statement of Intent.[765]

The ACCC was constituted in 1995 following the implementation of the Hilmer Review. Since that time the ACCC has had three Chairs and a number of Commissioners. Over that period the economy has become increasingly complex and the ACCC's role has expanded significantly. While the ACCC has been a successful agency, the question for the Panel is whether its governance structure can be enhanced to ensure that it continues to perform well into the future.

The Review's remit includes considering the governance structure of the ACCC and whether improvements may be made to strengthen decision making. Given the fundamental role that 'checks and balances' play in good governance structures, it is appropriate to consider whether checks and balances currently in place are sufficient.

The Panel notes comments by the Chair of the ACCC since the release of the Draft Report that:

> ... [the ACCC] will closely consider the Draft Report's analysis of institutional issues and look forward to the community discussion it will generate. In this area, we will be particularly interested in better understanding the problems the recommendations are directed towards addressing.[766]

The Panel sees a number of problems with the Commission's current governance. Commissioners appear to be too enmeshed in the ACCC's day-to-day decision making and so act like senior managers of the ACCC rather than independent directors. The Panel notes the ACCC's comments that Commissioners cannot direct staff recommendations (DR sub, page 100); however, this is not the nub of the Panel's concern. The Panel is concerned that enforcement decisions under the CCA are currently susceptible to 'group think' given the strong internal focus induced by the full-time nature of appointments to the Commission. The Panel is also concerned about the emergence of 'silos' in the ACCC's structure, which further narrows the focus of individual Commissioners.

In the Draft Report, the Panel proposed two options to widen the diversity of views available to the ACCC in its decision making:

- replace the current Commission with a Board, comprising a number of members akin to the current Commissioners, who would work full-time in the operations of the ACCC, and a number of independent non-executive members with business, consumer and academic expertise, who would not be involved in the day-to-day functions of the ACCC; and
- impose an Advisory Board without decision-making powers.

The Panel notes general support for improving the ACCC's governance arrangements. For example, in his submission,[767] John Dahlsen states:

> Governance arrangements could clearly be improved to establish a chain of accountability superior to what currently exists. It is possible that the strong, independent and non-conflicting influence of directors with clearly mandated powers could improve the situation. (sub, page 131)

765 Australian Competition and Consumer Commission 2014, Statement of Intent, Canberra.

766 Sims, R 2014, *Food and grocery and Australia's competition law*, Presentation to the Australian Food and Grocery Council Industry Leaders Forum, Canberra, 1 October.

767 John Dahlsen provided a confidential submission to the Review but gave permission for this part of his submission to be quoted in this Report.

The BCA:

> ... strongly supports the option to introduce a board, but recommends that the board be constituted on similar lines to a commercial board set up under the Corporations Act rather than replicating the current commission structure as proposed in the Draft Report. (DR sub, page 29)

However, the board option receives limited support. Submissions mostly reject one or both of the Panel's proposed options for change. CHOICE is quite direct, stating 'in the absence of evidence of problems with the existing arrangements it is not clear that either of the options presented by the Panel is warranted' (DR sub, page 39).

The Panel accepts concerns raised in submissions. Again, CHOICE notes that the 'proposal to add an advisory board appears to duplicate consultative structures that already exist within the ACCC' (DR sub, page 39). However, the Panel remains concerned that, as currently structured, the ACCC is too internally focused and that a wider range of outside views should be incorporated into its decision making. It is therefore proposed that half of the ACCC Commissioners be appointed on a part-time basis. These part-time positions should be occupied by people who hold other roles in business, consumer advocacy and academia that allow them to bring a contemporary and broader view to the ACCC's decision making. The Chair could be appointed on either a full-time or a part-time basis.

The Panel accepts that this arrangement may give rise to concerns of conflicts of interest arising between the day-to-day roles of the part-time Commissioners and their responsibilities as Commissioners. The ACCC currently manages conflicts of interest through members being required to declare any actual or apparent conflicts of interest. ACCC members are required to provide the Chair with an annual statement of personal interests. The Panel is satisfied that this approach remains sufficient to ensure that conflicts of interest are either avoided or sufficiently declared, even with the addition of part-time Commissioners.

The Panel considers that there should be no Deputy Chairs to avoid the perception that Commissioners are actively engaged in managing the agency. The Chair can nominate a Commissioner to preside as Chair in his or her absence.

Sectoral Commissioners

The Panel notes that the ACCC currently has sectoral Commissioners (both of whom also happen to be Deputy Chairs): a small business Commissioner and a consumer Commissioner. However, these Commissioners are not confined to deciding on matters related to those areas of expertise but are responsible for decision making across the full range of ACCC activities. The Panel notes that these Commissioners are not required by the CCA to represent sectoral interests. Subsection 7(4) of the CCA requires that at least one of the members of the Commission should have knowledge of, or experience in, consumer protection and subsection 10(1B) requires that one of the Deputy Chairs should have knowledge of, or experience in, small business matters.

However, they may in practice be expected to represent sectoral interests. The then Assistant Treasurer's press release announcing a re-appointment to the Commission stated that it 'guarantees

that the Government will continue to deliver on its commitment to ensuring that there is a permanent voice for small business at the ACCC'.[768]

The Panel acknowledges that consumer protection and small business knowledge and experience are important to the ACCC. However, the expectation that these Commissioners represent a particular sector is not congruent with the actual role Commissioners perform. Instead, all Commissioners are involved in all decisions of the Commission. At the same time, the presence of sectoral Commissioners could let other Commissioners 'off the hook' from having to consider the interests of small business and consumers in their decision making.

The Panel is of the view that small business and consumer issues are too important to be 'siloed' and should be the joint responsibility of all Commissioners.

The CCA already requires, at subsection 7(3), the Minister to be satisfied that a person qualifies for appointment because of his or her 'knowledge of, or experience in, industry, commerce economics, law, public administration or consumer protection' and must also 'consider whether the person has knowledge of, or experience in, small business matters'. Accordingly, the Commission is well positioned to consider small business and consumer issues without the need for sectoral Commissioners.

Accountability

The ACCC should also report regularly to a broad-based committee of the Parliament, such as the House of Representatives Standing Committee on Economics, to build profile and credibility for the agency as well as to subject it to additional accountability to the Parliament. In its submissions, the ACCC indicates its support for this proposal (DR sub, page 9).

The Panel's view

ACCC decision making is sound, but the Panel considers there are benefits from further strengthening the ACCC's governance and accountability.

The Panel believes that incorporating a wider range of viewpoints through adopting part-time Commissioners would improve the ACCC's governance. Part-time Commissioners would enrich the ACCC's decision making by adding the perspectives of members whose responsibilities extend beyond the ACCC, including but not limited to roles in business, consumer advocacy and academia.

The Panel proposes abolishing sectoral Commissioners. The Panel believes that, in making appointments to the Commission, the current requirements considered by the Minister — for experience and knowledge of small business and consumer protection — are sufficient to represent these interests in ACCC decision making. The Panel also notes that, in any event, all Commissioners are required to make decisions across the full range of the ACCC's operations.

The ACCC should also make regular appearances to a committee of Parliament, such as the House of Representatives Standing Committee on Economics.

Implementation

Changes to the ACCC's governance to create part-time Commissioners and to abolish the positions of Deputy Chair will require the CCA to be amended.

768 Bradbury, D (Assistant Treasurer) 2013, *Australian Government announces appointments to the Australian Competition and Consumer Commission*, media release 12 April, Canberra.

This should be done in a staged manner to ensure minimum disruption to current arrangements. For example, every second appointment, from adoption of this proposal, could be converted into a part-time appointment until such time as half of the Commissioners, and if the Government chooses the Chair, are part-time appointees.

Recommendation 51 — ACCC governance

Half of the ACCC Commissioners should be appointed on a part-time basis. This could occur as the terms of the current Commissioners expire, with every second vacancy filled with a part-time appointee. The Chair could be appointed on either a full-time or a part-time basis, and the positions of Deputy Chair should be abolished.

The Panel believes that current requirements in the CCA (paragraphs 7(3)(a) and 7(3)(b)) for experience and knowledge of small business and consumer protection, among other matters, to be considered by the Minister in making appointments to the Commission are sufficient to represent sectoral interests in ACCC decision-making.

Therefore, the Panel recommends that the further requirements in the CCA that the Minister, in making all appointments, be satisfied that the Commission has one Commissioner with knowledge or experience of small business matters (subsection 10(1B)) and one Commissioner with knowledge or experience of consumer protection matters (subsection 7(4)) be abolished.

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

26.3 ACCC AND THE MEDIA

The ACCC has a long history of using the media to raise awareness of competition issues. However, this important educative role can cross over into advocacy of particular policy positions. An advocacy role can compromise stakeholders' perceptions of the ACCC's impartiality in its enforcement of the law. This is reflected in the BCA's comment:

> ... business remains concerned about the potential of investigations being prejudiced by the media conduct of interested parties, including the ACCC. (BCA sub, Summary Report, page 24)

As discussed previously, there is a role for competition policy advocacy. The Panel considers it desirable that this function not be undertaken by the ACCC. The ACCC undertaking such an advocacy role can compromise stakeholders' perceptions of the impartiality of the agency in administering and enforcing the competition law.

However, the ACCC should continue to have a role in communicating to the public through the media, including explaining enforcement priorities, educating business about compliance with the legislation and publishing enforcement outcomes.

The Dawson Review recommended that the ACCC develop a media code of conduct and the Panel notes a reference in the Dawson Review that 'The ACCC was conscious of the concerns expressed

and supported the introduction of such a code in order to address them'.[769] The Panel understands that this recommendation has not been adopted.

The Panel believes that the ACCC should establish, publish and report against a media code of conduct. This should counter the perception of partiality on the part of the ACCC or individual Commissioners or the Chair, especially in enforcement actions.

In supporting the development of a media code of conduct, the BCA suggests that the Dawson Review principles guide its development (DR sub, page 33).

Those principles are:

12.1.1 the public interest is served by the ACCC disseminating information about the aims of the Act and the ACCC's activities in encouraging and enforcing compliance with it. This extends to information about proceedings instituted by it, but an objective and balanced approach is necessary to ensure fairness to individual parties;

12.1.2 the code should cover all formal and informal comment by ACCC representatives;

12.1.3 whilst it may be necessary for the ACCC to confirm or deny the existence of an investigation in exceptional circumstances, the ACCC should decline to comment on investigations;

12.1.4 with the object of preserving procedural fairness, commentary on the commencement of court proceedings by the ACCC should only be by way of a formal media release confined to stating the facts; and

12.1.5 reporting the outcome of court proceedings should be accurate, balanced and consistent with the sole objective of ensuring public understanding of the court's decision.[770]

The Panel's view

The Panel is of the view that the ACCC should not undertake competition policy advocacy as this may compromise stakeholder perceptions of its impartiality. These functions should be undertaken by the ACCP.

The Dawson Review's recommendation that the ACCC develop a media code of conduct remains appropriate to strengthen the perception of the ACCC's impartiality in enforcing the law.

Implementation

The ACCC should develop and publish a media code of conduct within 12 months.

769 Trade Practices Act Review Committee 2003, *Review of the Competition Provisions of the Trade Practices Act*, Recommendations 12.1 and 12.2, Canberra, page 182.

770 Ibid., page 190.

Recommendation 52 — Media Code of Conduct

The ACCC should establish, publish and report against a Code of Conduct for its dealings with the media with the aim of strengthening the perception of its impartiality in enforcing the law. The Code of Conduct should be developed with reference to the principles outlined in the 2003 *Review of the Competition Provisions of the Trade Practices Act*.

27 Access and Pricing Regulation

Economic regulation of monopoly or other infrastructure where there is limited, or no, competition among providers seeks to protect, strengthen and supplement competitive market processes to improve the efficiency of the economy and increase the welfare of Australians.

Economic regulatory functions are currently undertaken by the Australian Competition and Consumer Commission (ACCC) and by state and territory regulators. The ACCC regulates access to and pricing of national infrastructure services, such as telecommunications, energy (through the Australian Energy Regulator (AER) which is a separate but constituent part of the ACCC) and bulk water, and monitors pricing in other infrastructure markets where there is limited competition.

27.1 A separate Access and Pricing Regulator

The Panel sees benefit in focusing the ACCC on its competition and consumer functions and separating out its current access and pricing functions into a separate, dedicated regulator. Amalgamating all Australian Government price regulatory functions into a single body will sharpen focus and strengthen analytical capacity in this important area of regulation.

The ACCC points to the benefits of having access and pricing regulation undertaken by the competition and consumer regulator. However, the Panel considers that, although synergies between the competition and consumer functions are strong, synergies between competition enforcement and access and pricing regulation are weaker.

The culture and analytical approach required to regulate an industry differ from those typically characteristic of a competition law enforcement agency. For example, the former is required to have an ongoing and collaborative relationship with the industry it regulates, while the latter is more likely to involve adversarial interactions.

There is also a risk that an industry regulator's views about the structure of a particular market could influence a merger decision. The latter is required to be based on the likelihood of a particular transaction resulting in a substantial lessening of competition, not on a view of what a particular market structure should be.

The Monash Business Policy Forum proposes the creation of an 'Australian Essential Services Commission' to bring all pricing and access regulation into one agency. The body would:

> ... bring together the current regulatory functions of the ACCC, ACMA [Australian Communications and Media Authority], the regulatory functions of the Murray-Darling Basin Authority, and groups such as the Australian Energy Regulator (AER). (sub, page 36)

The Monash Business Policy Forum stresses the importance of co-locating functions by similarity of analytical approach rather than by industry:

> Colocation by industry increases the likelihood of capture. It creates regulatory inflexibility as 'industry specialists' rather than 'analytical generalists' dominate regulators. It risks the creation of a regulatory culture that views the particular industry that is the focus of regulation as 'special' and 'separate' from broader economic and social considerations. (sub, page 17)

States and Territories have called for the AER to be separated out of the ACCC. The 1 May 2014 Council of Australian Governments (COAG) Energy Council meeting communique notes 'state and

territory Ministers reiterated their support for separation of the AER from the Australian Competition and Consumer Commission. The Chair agreed to communicate these views to the Australian Government'.[771]

The Energy Networks Association argues:

> ... the separation of the AER into a stand-alone independent industry-specific regulatory body would assist it in having the flexibility to further develop its specialist expertise in the energy sector, provide greater autonomy and give better scope for development of an organisation culture focused on providing appropriate, predictable and credible long-term signals for efficient investment … (sub, page 6)

On the other hand, the ACCC advocates that the AER should be retained within the ACCC's current structure, arguing that locating the AER within the ACCC creates efficiencies, particularly in relation to sharing corporate functions such as legal resources.

The Consumer Action Law Centre supports this view, submitting:

> … there are significant benefits from keeping the ACCC and AER together. Not only are there operational efficiencies in the AER and the ACCC sharing resources (the two regulators share many functions and it means that the AER is able to be represented in a number of state capital cities), it is also our view that regulators that focus narrowly on one industry are at significant risk of becoming 'captured' by industry interests. (sub, page 27)

Other submissions, without speaking directly to the issue of separating the AER, note the need for greater clarity in respect of the AER's role within the ACCC. The Australian Energy Market Operator states that it is important to maintain the AER's market functions (DR sub, page 3).

In its Draft Report, the Panel suggests that only the AER's roles in the National Electricity Law and the National Gas Law would transfer to the proposed national Access and Pricing Regulator (APR). The AER points out that most of the National Energy Retail Law's functions are regulatory, rather than consumer or competition functions (DR sub, page 6), so also transferring them to the APR would be consistent with the Draft Report's preference for the APR to have a regulatory focus.

Nevertheless, under this approach, some residual consumer functions (for example, in relation to energy customer hardship programs) would also transfer to the APR. It would be overly complex to separate out these residual consumer functions from the APR and, accordingly, the Panel proposes moving the AER into the APR as an integrated unit.

The Department of Communications notes, 'the Vertigan Panel expresses the view, shared by the Department, that "the need for industry-specific regulation will not diminish, at least in the near to medium term"' (DR sub, page 6). The Panel does not disagree with this view (though addresses whether there is an ongoing need for Part XIB of the *Competition and Consumer Act 2010* (CCA) in Section 19.1) but notes the Vertigan Report's view:

> These factors do not suggest reverting to an industry-specific regulator. Even though many aspects of telecommunications regulation will remain 'bespoke', there are now sufficient commonalities between regulated industries — for instance, the reliance on

771 Council of Australian Governments Energy Council 2014, Meeting Communique, 1 May, Brisbane.

> what amounts to a 'building blocks' model of price-setting — as to create opportunities for economies of scale and scope in network access regulation.'[772]

The Panel agrees with the Vertigan Panel that the case has not been made for an industry-specific regulator for telecommunications. Industry-specific regulators are at risk of capture, or perceptions of capture, by the regulated industry, which undermines their independence. An industry-specific regulator may become resistant to change or may be perceived as unduly favouring incumbents (or new entrants) to the detriment of competition.

The Panel considers that access and pricing regulation would be best performed by a single independent agency. The benefits of such an arrangement include that a single agency:

- will have the scale of activities that enables it to acquire broad expertise and experience across a range of industries, and acquire and retain staff who have that expertise;
- regulating a range of infrastructure industries reduces the risk of capture; and
- will reduce the costs associated with multiple regulators and regulatory frameworks and promote consistency in regulatory approaches.

The Panel's proposal would see the following regulatory functions transfer to the APR:

- those currently undertaken by the ACCC in energy (through the AER), water and telecommunications; and
- those currently undertaken by the NCC in relation to the National Access Regime and the National Gas Law.

Most consumer protection and competition functions associated with regulatory functions would remain with the ACCC — the exception being residual consumer functions undertaken by the AER under the National Energy Retail Law, which would transfer to the APR.

Including the NCC's functions under the National Access Regime and the National Gas Law within the APR would allow the NCC to be dissolved. This would result in the APR undertaking both the declaration functions under the National Access Regime and the National Gas Law and the current ACCC role in arbitrating the terms and conditions where a facility is declared, but where terms and conditions are not able to be commercially negotiated.

The Panel notes the APA Group's concerns (DR sub, page 2) about potential conflicts of interest where a single body undertakes the declaration and arbitration functions. The PC has also noted that there is 'a need for particular caution in guarding against any potential for unwarranted extension of the scope of the [National Access] Regime' and that separating the advisory and regulatory functions provides 'an important safeguard'.[773] The Panel does not foresee any conflict in a single regulator performing both functions and anticipates there may be benefits. The Panel also notes that, under the telecommunications access regime (in Part XIC of the CCA), the ACCC currently performs both the declaration and arbitration functions.

The Panel also notes the Department of Communications' concerns (DR sub, page 8) regarding the number of regulators with which the telecommunications sector may need to engage as a result of this change. However, the Panel considers that it is not so much the number of regulators but the

772 Australian Government 2014, *NBN Market and Regulation Report, Volume 1 –NBN Market and Regulatory Report*, Canberra, page 141.

773 Productivity Commission 2013, *National Access Regime*, Inquiry Report No.66, Canberra, page 291.

presence of significant gaps or overlaps among regulators that imposes the greater burden on business. The Panel also notes that it is not unusual for businesses to face a number of regulators.

Further functions which could, over time, be conferred upon the national access and pricing regulator include rail regulation. Asciano notes that it:

> ... operates its above rail operations under six different access regimes with multiple access providers and multiple access regulators. This multiplicity of regimes adds costs and complexity to rail access for no benefit, particularly as many of the access regulation functions are duplicated across states. (DR sub, page 7)

27.2 GOVERNANCE

As outlined previously in relation to the ACCC and the proposed ACCP, the governance arrangements instituted for the APR will need to be appropriate to its functions. The APR will be undertaking functions of a legislative and analytical nature and require an ongoing engagement between it and the industries it is intended to regulate.

The governance arrangements would further need to reflect that the APR would administer Commonwealth functions, such as telecommunications, and functions contained in state and territory legislation, such as energy.

The Department of Communications submits that:

> … the Constitution prescribes communications services as a Commonwealth responsibility (section 51(v)). An industry-specific communications sector regulator would avoid potential governance issues arising from combining telecommunications with other network industries where responsibility is shared or resides with the states or territories. (DR sub, pages 7–8)

The Panel acknowledges this concern but notes that the ACCC has managed such issues since the establishment of the AER — a constituent component of the ACCC with functions conferred upon it by state and territory legislation. The composition of the members should be able to address these issues and effectively ensure national decision making is retained along the division of Constitutional responsibilities.

The Business Council of Australia (BCA) notes that it:

> … considers that the quality of substantive decision making by the new regulator would be most improved by:
>
> - the establishment of a board, for the same reasons outlined for the ACCC
> - the re-introduction of full merits review for final decisions
> - the establishment of a new requirement that the access and pricing regulator consult upon, and periodically publish, a strategy document. This document would set out its regulatory objectives, including how it plans to reduce regulatory burdens. (DR sub, page 36)

The Panel recommends that the APR be constituted as a five-member board. The board should comprise two Australian Government-appointed members, two state and territory-nominated members and an Australian Government-appointed Chair. Two members (one Australian Government appointee and one state and territory nominee) would be appointed on a part-time basis.

The Chair and the Australian Government-appointed members would have responsibility for telecommunications and other Commonwealth-only functions. The Chair and the state and territory-nominated members would have responsibility for energy functions, largely reflecting current arrangements of the AER as it currently operates within the ACCC. The creation of the APR will allow staff more easily to share experience in regulating networks and ways to engage with industry.

The APR will be an Australian Government body within the portfolio of the Treasurer, with functions currently performed in the ACCC and NCC being transferred to it. The role of the Treasurer would largely relate to the administrative functions of the body, with sector-specific legislation and functions (such as energy) still being conferred on the regulator through the relevant Commonwealth, state and territory legislation.

27.3 State and territory access and pricing regulation

Each State and Territory has a regulator that undertakes access and pricing regulation analogous to that proposed to be undertaken by the APR. These regulators perform various functions, such as determining regulated prices for retail energy, water and transport services and access to essential services or infrastructure. Some of these regulators also provide economic policy advice to governments. For example, the Western Australian Economic Regulation Authority recently completed an inquiry into microeconomic reform.[774]

State or Territory	Regulator
New South Wales	Independent Pricing and Regulatory Tribunal
Victoria	Essential Services Commission
Queensland	Queensland Competition Authority
Western Australia	Economic Regulation Authority
South Australia	Essential Services Commission
Tasmania	Office of the Tasmanian Economic Regulator
Australian Capital Territory	Independent Competition and Regulatory Commission
Northern Territory	The Utilities Commission of the Northern Territory

Submissions note that, when state access and pricing regulators are added in, Australia has 11 separate competition-related regulators (BCA sub, Main Report, page 20). Australia's seven water regulators serve a population of 23 million while, by comparison, the UK's single water regulator (Ofwat) serves more than 60 million people.

The multiplicity of regulators results in fragmented regulatory oversight. For example, IPART identifies that:

- IPART regulates 3 valleys for State Water. The Murray-Darling basin is regulated by the ACCC.

774 Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia: Final Report,* Perth.

- IPART regulates around 21km of the Hunter Valley Coal rail network. The ACCC regulates the remaining 650km of track. (sub, page 30)

A multiplicity of regulators can also be administratively costly, and lead to gaps and overlaps in regulatory responsibility. Business may have to engage with more than one regulator.

The Panel believes that state and territory agencies should continue to have responsibility for those sectors with which they are, by geography and institutional arrangements, better placed to deal. But, as with the Murray-Darling agreement and the energy legislative regime, States can refer regulation to a national body to ensure consistent regulation across Australia.

The subsidiarity principle that no higher-level agency should assume responsibility for functions which a lower-level agency may be better placed to undertake means that a national body should not necessarily assume responsibility for all access and pricing functions undertaken in Australia. For example, regulation of public transport fares may be better dealt with by state and territory agencies but the regulation of rail networks may be better undertaken by a national regulator.

This need not mean that all access and pricing regulation will be done nationally.

If national markets are established in the future, they should move to a national regulator under the same conditions as energy functions have transferred previously to the AER — the functions would remain in state and territory applied legislation, which recognises necessary jurisdictional differences, but be administered by an Australian Government agency.

The Panel received a number of submissions naming particular sectors which could be transferred to a national framework, including rail regulation (see Asciano, DR sub, page 7) and water (see BCA, DR sub, page 35). The Panel supports States and Territories transferring those functions as and when national frameworks are developed. The Panel notes other submissions arguing that transfer to a national regulator may be premature, including the Water Services Association of Australia (DR sub, page 7) and IPART (DR sub, page 2). The Panel agrees that immediate transfer is premature but notes that it may still be a desirable objective over the longer term.

The Panel's view

The Panel proposes the creation of an Access and Pricing Regulator (APR) to oversee all industries currently regulated for the Australian Government by the ACCC, noting the energy functions in question are conferred by state and territory legislation.

The following regulatory functions would be transferred from the ACCC and the NCC and be undertaken within the APR:

- the telecommunications access and pricing functions of the ACCC;
- price regulation and related advisory roles of the ACCC under the *Water Act 2007* (Cth);
- the powers given to the ACCC under the National Access Regime;
- the functions undertaken by the AER under the National Electricity Law, the National Gas Law and the National Energy Retail Law;
- the powers given to the NCC under the National Access Regime; and
- the powers given to the NCC under the National Gas Law.

While consumer protection and competition functions would largely remain with the ACCC, the Panel accepts that some of those functions, particularly those performed by the AER, should move to the APR for pragmatic governance reasons.

Price surveillance and price monitoring functions should remain with the ACCC as these are often conducted on an economy-wide basis.

The Panel recommends that the APR be constituted as a five-member board. The board should comprise two Australian Government-appointed members, two state and territory-nominated members and an Australian Government-appointed Chair. Two members (one Australian Government appointee and one state and territory appointee) would be appointed on a part-time basis.

The APR should be established with a view to it gaining further functions as other sectors are transferred to national regimes. The Panel supports a continuing role for state and territory economic regulators. However, a move to national regulation as national markets are established should be encouraged, including, for example, in the case of water.

Implementation

The Australian Government should create the APR within 12 months of accepting the Panel's recommendation. This should be achieved through amending the CCA to create the APR (in similar fashion to the provisions establishing the AER within the CCA), noting that the energy functions would continue to be contained within state and territory applied legislation.

The Panel notes the COAG Energy Council's announcement[775] of a Review of Governance Arrangements for Energy Markets to commence in 2015. The review should be undertaken with regard to the recommendations of this Report and consider how best the new APR could interact with the other energy market institutions.

A separate process could be undertaken in parallel to the creation of the regulator to determine which functions States and Territories may agree to confer.

775 Council of Australian Governments Energy Council 2014, Meeting Communique #2, 11 December, Adelaide.

Recommendation 50 — Access and Pricing Regulator

The following regulatory functions should be transferred from the ACCC and the NCC and be undertaken within a single national Access and Pricing Regulator:

- the telecommunications access and pricing functions of the ACCC;
- price regulation and related advisory roles of the ACCC under the *Water Act 2007* (Cth);
- the powers given to the ACCC under the National Access Regime;
- the functions undertaken by the Australian Energy Regulator under the National Electricity Law, the National Gas Law and the National Energy Retail Law;
- the powers given to the NCC under the National Access Regime; and
- the powers given to the NCC under the National Gas Law.

Other consumer protection and competition functions should remain with the ACCC. Price monitoring and surveillance functions should also be retained by the ACCC.

The Access and Pricing Regulator should be constituted as a five-member board. The board should comprise two Australian Government-appointed members, two state and territory-nominated members and an Australian Government-appointed Chair. Two members (one Australian Government appointee and one state and territory appointee) should be appointed on a part-time basis.

Decisions of the Access and Pricing Regulator should be subject to review by the Australian Competition Tribunal.

The Access and Pricing Regulator should be established with a view to it gaining further functions if other sectors are transferred to national regimes.

27.4 Australian Government Policy on the Creation of New Bodies

As discussed in Section 25.11, the Australian Government has set out a policy for creating new bodies. The Panel is strongly of the view that the APR be created as a new body. To strengthen both the ACCC and the APR, it is essential that they be independent bodies to focus on their particular remits. The Panel notes that continuing regulation of the energy functions within the ACCC would not satisfy energy Ministers' expressed preference for the AER to be a stand-alone body.[776] Furthermore, the Panel considers it is not appropriate for regulatory functions to be undertaken within a policy Department.

776 Council of Australian Governments Energy Council 2014, Meeting Communique, 1 May, Brisbane.

28 Review of Competition and Regulatory Decisions

28.1 Federal Court of Australia

Australia's competition law is enforced through proceedings in the Federal Court of Australia. Proceedings may be brought by the Australian Competition and Consumer Commission (ACCC) or by a person harmed by contraventions of the law.

The Federal Court has jurisdiction to determine whether a contravention of the competition law has occurred. The Federal Circuit Court also has jurisdiction to determine matters arising under section 46.

Competition law proceedings frequently involve disputes about the dimensions and attributes of markets within which particular businesses trade and the nature and extent of the sources of competition within those markets. It is often relevant for the court to hear from expert economic witnesses about those issues. For that reason, it is appropriate that competition law proceedings be determined in courts that, over time, can develop expertise in the types of issues that must be resolved.

The Panel received limited feedback on potential procedural practices that would be beneficial in resolving competition law proceedings in a just and cost-effective manner. The ACCC submits that, although complex competition law proceedings present significant procedural challenges to the court and to parties, Federal Court judges have the tools at their disposal to direct procedures competently (DR sub, pages 104-105).

In other jurisdictions, notably New Zealand, the court is able to draw on the assistance of an economist who presides over the proceeding alongside the trial judge.

Although innovative and well regarded, the New Zealand approach may not be possible in Australia. In a workshop presentation *The Judicial Disposition of Competition Cases*,[777] the Chief Justice of the Federal Court[778] notes the constitutional constraints preventing Australia from appointing lay court members in the same manner as New Zealand — namely, that judicial power must be exercised by a judge, and federal judges under section 72 of the Constitution cannot be part-time or acting.[779]

Chief Justice Allsop notes that, instead, Australian courts can use 'referees' (including expert economists) to inquire into and report on one or more questions arising in court proceedings.[780] The relatively recent *Federal Justice System Amendment (Efficiency Measures) Act (No. 1) 2009* provides for rules in relation to the use of referees in the Federal Court. The Chief Justice notes that the referee system has been used very successfully in the Supreme Court of New South Wales.

The Panel supports the use of referees to assist the court in resolving questions, including complex economic issues, in competition cases.

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777 Allsop, J 2009, *The judicial disposition of competition cases*, paper presented at the 7th Annual University of South Australian Trade Practices Workshop, Adelaide, 17 October.

778 Then President of the New South Wales Court of Appeal.

779 *WWF v TW Alexander Ltd* (1918) 25 CLR 434.

780 *Federal Court of Australia Act 1976* (Cth), section 51A.

28.2 The Australian Competition Tribunal

The Australian Competition Tribunal (the Tribunal) is created by Part III of the *Competition and Consumer Act 2010* (CCA). Various powers have been conferred on it to review competition and economic decisions, including:

- decisions of the ACCC under the CCA to grant authorisations or withdraw notifications;
- decisions of the Minister to declare or not to declare an infrastructure service under Part IIIA of the CCA;
- decisions of the ACCC to arbitrate terms and conditions of services declared under Part IIIA; and
- pricing regulatory decisions of the Australian Energy Regulator (AER) made under the National Energy Law and the National Gas Law.

Accordingly, the Tribunal performs a very significant role in Australia's competition and regulatory framework.

The particular strength of the Tribunal lies in its composition. For the purposes of hearing and determining a matter before it, the Tribunal must be constituted by a presidential member (who is a Federal Court judge) and two members who are not presidential members. A person appointed as a member of the Tribunal must be qualified by virtue of his or her knowledge of, or experience in, industry, commerce, economics, law or public administration. In practice, the Tribunal is usually constituted with at least one member who is an economist.

In its first submission, the ACCC recognises the important role of the Tribunal:

> The ACCC supports the OECD assessment that: 'The Australian Competition Tribunal plays an important role as a merits review body, and the economic content in its determinations has made a significant contribution to both the legislative and judicial development of the law.' (sub 1, page 139)

The Tribunal currently has a role as a first-instance decision maker in authorising mergers, in addition to its review functions. First-instance decision making requires an investigative role that the Tribunal, with its predominant review function, is not well placed to deliver. The Panel considers that the Tribunal would be more effective if it were constituted solely as a review body. This is discussed further in Chapter 18.

The nature and scope of the review function performed by the Tribunal varies and is dependent upon the powers granted to it in respect of different review tasks. In reviewing the ACCC's authorisation decisions, the Tribunal is able to hear directly from business people concerned in the application and expert economists.

However, in respect of the review of access pricing decisions, the Tribunal's powers are often confined to considering the materials before the original decision maker; the Tribunal is unable to hear from the business people and expert economists who authored those materials. Although these restrictions enable reviews to be conducted more quickly, they also reduce the depth of the review the Tribunal is able to undertake.

In a merger review context, BHP Billiton supports the Tribunal being able to hear directly from relevant witnesses rather than only being able to rely on the material before the ACCC (DR sub, page 2). This approach is generally supported by the ACCC, which also notes that the ability to call

further evidence should be balanced against the risk that parties may fail to provide relevant information up-front (DR sub, page 62-63).

The Panel notes trade-offs in deciding how limited the merits review process ought to be in competition contexts. A more limited review provides faster, less costly decisions and better incentives to provide all information at first instance; whereas, a full review provides greater scope for considering all available evidence and may increase the likelihood of a correct decision.

The Panel's view

The Panel considers that the Tribunal performs an important role in administering the competition law. Although it is important that review processes be conducted within restricted timeframes, the value of the review process would be greatly enhanced if the Tribunal were empowered to hear from relevant business representatives and economists responsible for reports relied upon by original decision makers.

The Panel considers that a merits review process should maintain incentives to ensure all relevant material is provided to the first-instance decision maker, with the ability for the Tribunal to receive further information that materially bears on the Tribunal's review. This is discussed in greater detail in Section 18.5.

PART 6 — IMPLEMENTATION

29 IMPLEMENTING THE REVIEW

The Panel's recommended agenda of competition reform is ambitious, encompassing Australia's competition policy, laws and institutions. As noted in Part 1, a need for a new round of microeconomic reform persists, much like the extended reform horizon associated with the earlier National Competition Policy (NCP) reforms. It is vital for not only our standard of living but also our quality of life.

However, to succeed, as the Business Council of Australia (BCA) notes, a clear plan for implementing the reform agenda is required:

> The panel has put forward a very large reform program. Implementation of each reform will be complex and take time so prioritisation will be important. A clear plan on how to implement the agenda will be required for the community to accept it. (DR sub, page 5)

During consultation, many people pointed to the successful implementation of the NCP reforms as an example to emulate. This chapter begins by considering important features of the NCP, especially the time interval between completion of the Hilmer Review and governments agreeing to the NCP reform agenda.

A distinguishing feature of the current environment is that the roles and responsibilities of the Australian Government and state and territory governments are currently being reconsidered through the White Paper on the Reform of the Federation and the White Paper on Reform of Australia's Tax System (the White Papers).

Although a number of the Panel's recommendations can be implemented by jurisdictions acting independently, in many cases reform outcomes will be enhanced through co-operation or collaboration across jurisdictions. Which level of government leads implementation of reforms across jurisdictions will reflect outcomes of the White Papers.

Against this background, this Report sketches a 'road map' for implementation that identifies pathways forward, without pre-empting decisions that sit appropriately with governments and that will be subject to further consideration through the White Papers.

29.1 IMPLEMENTING NATIONAL COMPETITION POLICY FOLLOWING THE HILMER REVIEW

In considering how a review with recommendations ranging from high-level statements of principle to more specific policy and legislative change evolves into a program of reform, many stakeholders pointed to the Hilmer Review and the subsequent NCP reform agenda. The Hilmer Review's recommendations were generally couched as statements of principle, from which emerged a successful and long-standing program of reform. Like this Review, the Hilmer Review made recommendations on competition policy, laws, and institutions and, also like this Review, recommendations on the laws and institutions were spelt out in greater detail than many of the policy recommendations, which were often expressions of principle.

Again like this Review, the recommendations on competition policy in the Hilmer Review drew on and extended reforms that were already being developed, often independently, by the Commonwealth, States and Territories. For instance, electricity reform commenced in Victoria and New South Wales essentially without the Commonwealth's involvement.[781]

The Hilmer Review also noted the importance of nationally consistent approaches to competition reform. Hilmer pointed to a 'series of significant cooperative ventures by Australian Governments',[782] including the National Rail Corporation, road transport regulation, regulation of non-bank financial institutions and the Corporations Law.

Hilmer supported policy developments in individual jurisdictions but made recommendations for co-ordinated action to be taken by governments collectively. Nevertheless, NCP allowed jurisdictions to tailor reforms to reflect local conditions.

This Review is similar to the Hilmer Review, but it has two important differences. First, the policy context for the Hilmer Review was very different from that applying today. Second, unlike this Review, which is addressed to a single Australian Government Minister, the Hilmer Review was addressed to the heads of all Australian governments.

As set out in Box 29.1, the mechanics of implementing NCP were agreed by governments over an 18-month period subsequent to the Hilmer Review. During that time, the Council of Australian Governments (COAG) added further detail that guided subsequent implementation of NCP by individual jurisdictions.

781 The Hilmer Review noted a number of other examples of competition reform in various jurisdictions, including reform of statutory agricultural marketing arrangements in New South Wales and Queensland; and reform of professional services and occupations in several jurisdictions, including relaxation of advertising restrictions in the legal profession and the removal of the monopoly over conveyancing services (Commonwealth of Australia 1993, *National Competition Policy*, Canberra, pages 12-13).

782 Commonwealth of Australia 1993, *National Competition Policy*, Canberra, page 14.

Box 29.1: Implementation timetable for NCP

The Hilmer Review was presented to governments in August 1993.

On 25 February 1994, COAG agreed on the need for a more extensive microeconomic reform agenda and established a standing committee of officials (the COAG Working Group on Microeconomic Reform) to manage this process and develop detailed proposals for reform.[783]

COAG agreed to the principles of competition policy as set out in the Hilmer Review and to (among other things) governments reporting to the next COAG meeting on the practicalities of applying the Hilmer recommendations and the Australian Government providing assistance to the States and Territories.

In August 1994, COAG agreed 'in general' to a package of reform, which was then released for public comment. COAG also requested the former Industry Commission to assess the benefits to economic growth and revenue from implementing Hilmer and related reforms. This assessment was completed in March 1995.

The Competition Policy Reform Bill was introduced into the Australian Parliament on 29 March 1995.

In April 1995 COAG agreed to a national competition policy legislative package with the Prime Minister, Premiers and Chief Ministers signing three Intergovernmental Agreements to implement the package. (More information on these agreements is in Box 8.1).

29.2 IMPLEMENTING NATIONAL COMPETITION POLICY TODAY

NCP established a forward agenda for competition policy reform that guided governments for around a decade. In this chapter, the Panel proposes an updated competition policy agenda that can, if supported by all Australian governments, guide reform of Australia's competition policy, laws and institutions into the future.

Drawing on reform underway across the Australian Federation

This Report identifies examples of competition policy reforms that are already in progress within individual jurisdictions.

- **Human services** — Chapter 12 summarises the range of developments in contracting out, contestability and commissioning of human services across the Federation.
- **Planning and zoning** — Section 10.1 notes that a number of jurisdictions are reviewing planning and zoning rules.
- **Heavy vehicles** — Section 11.3 cites the considerable work undertaken by the Heavy Vehicle and Investment Reform project in progressing both user-charging and institutional reform options.

These developments in competition policy have informed the Panel's recommendations in this Report. Importantly, they also demonstrate the potential for jurisdictions to share reform ideas as well as information about the outcomes of reform.

783 Council of Australian Governments 1994, *Communique 25 February 1994*, Council of Australian Governments (COAG) — Archive, viewed on 5 February 2015, http://archive.coag.gov.au/coag_meeting_outcomes/1994-02-25/.

The Panel's view

In the wake of this Review, governments should decide whether the next step includes an agreement on the reform agenda by all governments or whether jurisdictions independently consider and act on the Review's recommendations. The NCP set a forward agenda for competition policy reform that guided governments for around a decade. The Panel endorses co-operation and collaboration across jurisdictions as generally more likely to produce better outcomes for Australians.

A future national competition reform agenda

The Panel recognises that the architecture of Australia's Federation is being reviewed in the White Paper on the Reform of the Federation. Among other important issues, the Federation White Paper is considering appropriate principles to determine when national action — that is, action involving all governments, rather than just the Australian Government — is justified, and how best to achieve it when it is justified.[784]

The Panel agrees with the view expressed in the Federation White Paper (Issues Paper 1) that:

> Sometimes a national approach is more appropriate than pursuing different approaches across the States and Territories. For example, economic considerations might require national regulation to make it easier for businesses to operate in more than one State or Territory. However, uniformity and consistency may come at the expense of diversity and competition between the States and Territories.[785]

A number of recommendations in this Report can be implemented by jurisdictions acting independently of each other and may even benefit from a diversity of approaches. But the Panel considers that competition reforms are a prime candidate for a national approach. The Productivity Commission (PC) notes:

> A broadly-based reform program can make it easier for governments to progress a set of individual reforms that might be difficult to implement on a stand-alone basis. A broadly-based and integrated reform agenda — as was the case for NCP — improves the prospect that those who might lose from one specific reform can benefit from others and gain overall. As such, a broadly-based program can moderate adverse distributional effects. (sub, page 24)

The Panel's reform priorities have economy-wide impacts, and taken together are of national significance. This is discussed further in Chapter 30.

Recommendations in this Report fall into three categories:

- those that can be fully or largely implemented by the Australian Government or individual States and Territories acting alone;
- those that benefit from being implemented jointly by the Australian Government and the States and Territories; and
- those that create mechanisms to support reform at any jurisdictional level.

784 Australian Government 2014, Reform of the *Federation White Paper: Issues Paper 1: A Federation for Our Future,* Canberra, page 22.

785 Ibid., page 22.

Recommendations for implementing the Panel's Recommendations are set out in a road map in Section 29.3.

Australian Government law and policy

The Panel recommends both simplification of, and specific changes to, the competition provisions of the *Competition and Consumer Act 2010* (CCA) (see Recommendations 22–42). The CCA is Commonwealth legislation and can be amended by the Australian Parliament. However, under the Conduct Code Agreement 1995,[786] the Australian Government must consult with, and seek agreement from, the States and Territories before amending Part IV of the CCA.

The Panel has prepared an updated 'model law' (see Appendix A) incorporating its recommended changes to Part IV of the CCA. This should assist in clarifying the changes the Panel is recommending. It should also assist the Australian Government to move directly to consultation with the States and Territories and other stakeholders on proposed changes to the law.

Repeal of Part X of the CCA (see Recommendation 4) can also be initiated by the Australian Government, as can repeal of coastal shipping cabotage restrictions (part of Recommendation 5), which reside in Commonwealth legislation (that is, the *Coastal Trading (Revitalising Australian Shipping) Act 2012)*.

As outlined in Section 10.7, pharmacy location rules arise from the Australian Community Pharmacy Agreement between the Australian Government and the Pharmacy Guild of Australia. Accordingly, negotiations towards the next Australian Community Pharmacy Agreement, due to commence in July 2015, provide the opportunity to introduce transitional arrangements for removing pharmacy location rules (see Recommendation 14). Such transitional arrangements could include incorporation of a community service obligation covering retail pharmacy services.

The Panel's recommendation that the PC undertake a review of intellectual property (see Recommendation 6) can be implemented by the Australian Government without delay.

Australian Government and state and territory policy and regulations

A number of recommendations can be implemented at both Commonwealth and state and territory levels, either by jurisdictions acting independently or in co-operation or collaboration with other jurisdictions.

For example, introducing choice and diversity in the provision of human services (see Recommendation 2) and incorporating competition considerations in planning and zoning rules (see Recommendation 9) can be implemented by jurisdictions individually and do not require national co-ordination. Similarly, the Australian Government and all States and Territories can undertake their own reviews of regulatory restrictions on competition (see Recommendation 8); competitive neutrality policy (see Recommendation 15); and government policies governing commercial arrangements (see Recommendation 18).

Nevertheless, the Panel recommends collaboration and co-ordination across jurisdictions as more likely to deliver lasting benefits to Australians (see Box 29.2).

786 Council of Australian Governments, *Conduct Code Agreement*, National Competition Policy.

Box 29.2: Collaboration and co-ordination: the example of the National Disability Insurance Scheme (NDIS)

Notwithstanding that disability services were the province of state and territory governments, in 2011 'all governments recognised that addressing the challenges in disability services will require shared and co-ordinated effort'.[787] The NDIS was created to provide insurance cover for all Australians in the event of significant disability.

Implementing the NDIS will be informed by a number of trial sites around Australia. The NDIS trial in Western Australia is unique because two different disability service models will be tried in separate locations. The Australian Government NDIS trial site (in the Perth Hills region) will run in parallel with two Western Australian Government trial sites (the Lower South West region and the Cockburn/Kwinana region).

The trial arrangements will:

> … allow for the assessment and comparison of the merits of the different approaches to disability services and help determine and inform the national roll-out of disability reform.[788]

The Western Australian and Australian governments have established a jointly-chaired steering committee to share information and provide advice on the comparative evaluation of the two trial models.

In recognition of the work already undertaken by Western Australia, the bilateral agreement establishes that an aim of parallel trials is to 'preserve and enhance the investments that WA has made in its disability sector'.[789] This example illustrates how progress towards a national agenda need not entail individual jurisdictions compromising their existing policies and can incorporate different approaches.

Cost-reflective road user–charges (see Recommendation 3) can be introduced by jurisdictions unilaterally. However, the Panel's recommended approach of revenue-neutrality would require co-ordination to secure the Australian Government's agreement to reduce fuel excise.

The recommended review of potentially anti-competitive regulation against a public interest test (see Recommendation 8) is a key area for collaboration and co-operation among jurisdictions. Priority areas for review will differ across jurisdictions and their identification should remain the responsibility of each government. COAG is currently engaged in a process of regulatory review and jurisdictions should benefit from continued collaboration.

The Australian Council for Competition Policy (ACCP) (see Recommendation 43) will provide a forum for all governments to share and learn from their respective experiences.

The Panel recommends that the Australian Government discuss the Panel's Final Report with the States and Territories as soon as practicable to enable all governments to make considered

787 Council of Australian Governments Meeting 2011, *Communique 19 August 2011,* Canberra, page 4.

788 Council of Australian Governments 2014, *National Partnership Agreement on Trial of My Way Sites*, Canberra, page 2.

789 Council of Australian Governments 2014, *Bilateral Agreement for NDIS Trial between the Commonwealth and Western Australia*, Canberra, page 3.

responses. This would also allow governments to consider aspects of the reform agenda where they might see value in collaboration.

It will also be important for progress on implementing reforms to be monitored and further analysis to be available to jurisdictions as they initiate plans, develop pilots and assess the results of trials. The ACCP should provide a formal mechanism for encouraging and assisting collaboration.

Recommendation 55 — Implementation

The Australian Government should discuss this Report with the States and Territories as soon as practicable following its receipt.

Mechanism for progressing reform

Progress in priority areas of reform across the Commonwealth and the States and Territories will benefit from a number of ancillary processes:

- advocacy for, and education, in competition policy;
- independent monitoring and public reporting of progress in implementing agreed reforms;
- independent analysis and advice on potential areas of competition reform across all levels of government;
- continual review of regulations and regulatory compliance arrangements to ensure they meet the public interest test (as set out in Chapter 10), particularly with regard to barriers to entry for new competitors;
- orchestrating co-ordination and co-operation on projects;
- making recommendations to governments on specific market design and regulatory issues; and
- undertaking research into competition policy developments in Australia and overseas.

The Panel recommends that these responsibilities be assigned to its proposed ACCP (see Recommendation 44), which would be accountable to the Australian Government and state and territory governments. In the Panel's view, early establishment of the ACCP would catalyse the reform agenda.

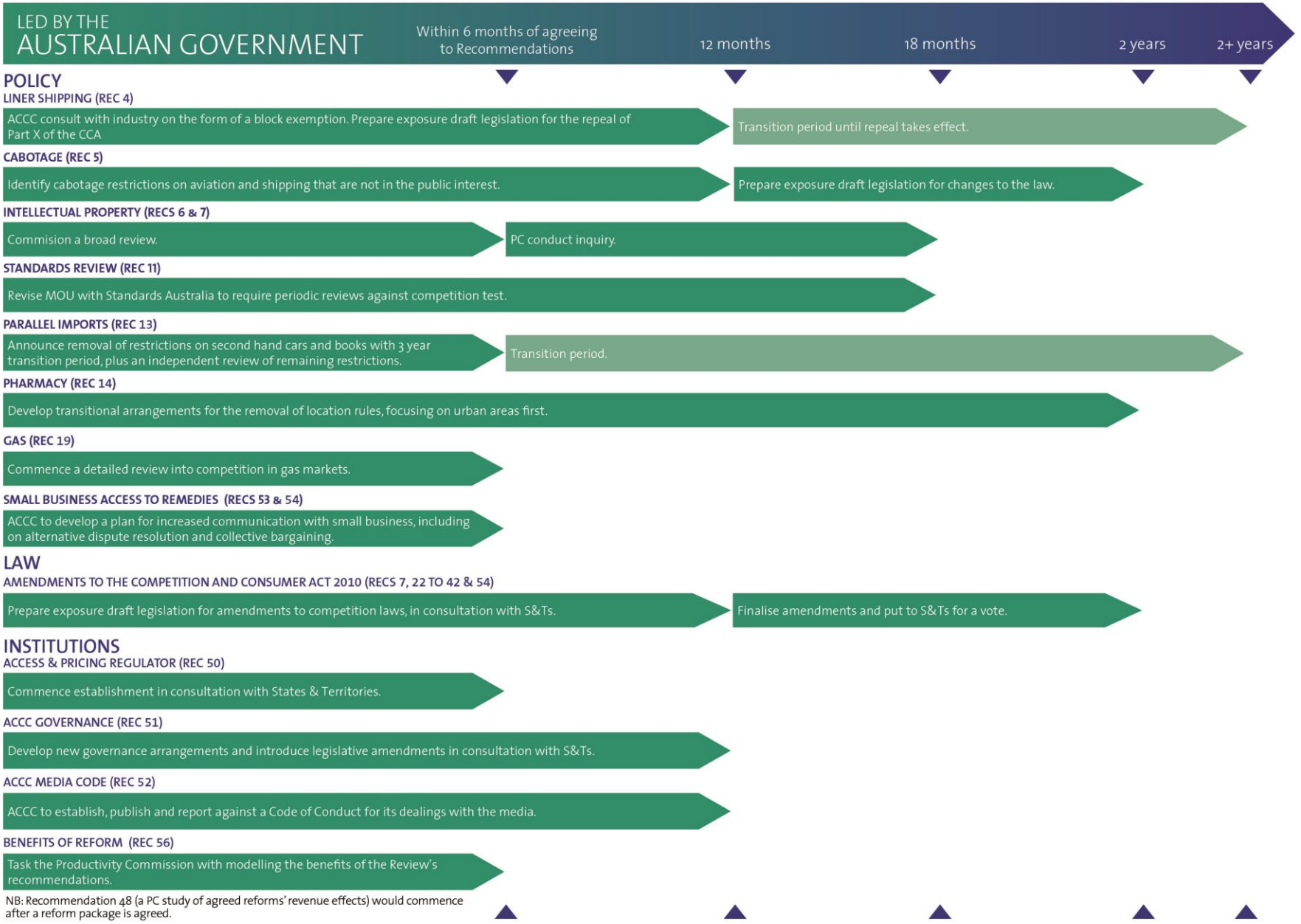
Once each jurisdiction has developed its implementation plan, the PC should be tasked with modelling the benefits of proposed reforms to determine whether the benefits enjoyed by each jurisdiction are commensurate with its reform effort. The ACCP might then be invited to recommend the mechanism for competition payments with a view to matching reform effort with the benefits of reform across jurisdictions (see Recommendation 48).

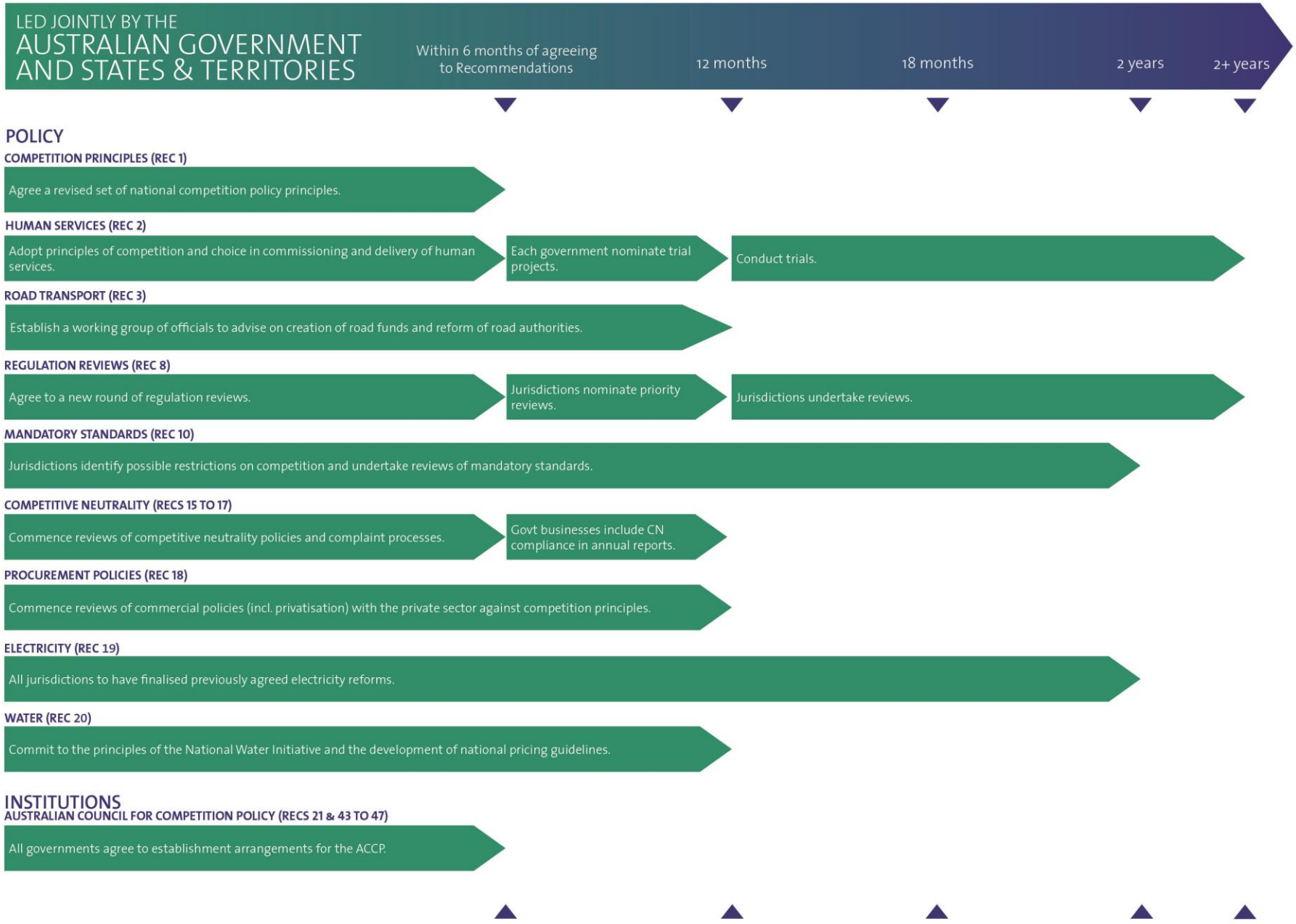
The 'road map' in Section 29.3 illustrates recommendations that fall into one of three categories: recommendations that can be led by the Australian Government; recommendations that can be led by state and territory governments individually; or recommendations that would most benefit from the Australian Government and state and territory governments working in collaboration.

The Panel's view

Although a number of the Panel's recommendations can be implemented in large part by individual jurisdictions, in many cases their benefits will be enhanced by co-operation or collaboration across jurisdictions. The proposed Australian Council for Competition Policy (ACCP) should provide a formal mechanism for encouraging and assisting co-operative and collaborative reform effort. Early establishment of the ACCP would catalyse the reform agenda.

29.3 A ROAD MAP




LED JOINTLY BY THE
AUSTRALIAN GOVERNMENT AND STATES & TERRITORIES
Within 6 months of agreeing to Recommendations
12 months
18 months
2 years
2+ years
POLICY
COMPETITION PRINCIPLES (REC 1)
Agree a revised set of national competition policy principles.
HUMAN SERVICES (REC 2)
Adopt principles of competition and choice in commissioning and delivery of human services.
Each government nominate trial projects.
Conduct trials.
ROAD TRANSPORT (REC 3)
Establish a working group of officials to advise on creation of road funds and reform of road authorities.
REGULATION REVIEWS (REC 8)
Agree to a new round of regulation reviews.
Jurisdictions nominate priority reviews.
Jurisdictions undertake reviews.
MANDATORY STANDARDS (REC 10)
Jurisdictions identify possible restrictions on competition and undertake reviews of mandatory standards.
COMPETITIVE NEUTRALITY (RECS 15 TO 17)
Commence reviews of competitive neutrality policies and complaint processes.
Govt businesses include CN compliance in annual reports.
PROCUREMENT POLICIES (REC 18)
Commence reviews of commercial policies (incl. privatisation) with the private sector against competition principles.
ELECTRICITY (REC 19)
All jurisdictions to have finalised previously agreed electricity reforms.
WATER (REC 20)
Commit to the principles of the National Water Initiative and the development of national pricing guidelines.
INSTITUTIONS
AUSTRALIAN COUNCIL FOR COMPETITION POLICY (RECS 21 & 43 TO 47)
All governments agree to establishment arrangements for the ACCP.

LED BY
STATE AND TERRITORY GOVERNMENTS
Within 6 months of agreeing to Recommendations
12 months
2 years
2+ years
POLICY
PLANNING & ZONING (REC 9)
Assess planning & zoning rules against the public interest test.
TAXIS & RIDE-SHARING (REC 10)
Initiate reviews of taxi regulation.
RETAIL TRADING HOURS (REC 12)
Deregulate remaining trading hours restrictions.
PHARMACY (REC 14)
Introduce transitional arrangements for the removal of ownership rules.

30 Benefits of Reform

As noted in Section 25.5, the Panel recommends that the Productivity Commission (PC) be tasked with modelling the revenue effects, in each jurisdiction, of reforms agreed by the Australian Government and state and territory governments in the wake of this Review (see Recommendation 48). This modelling would help inform the need for, and magnitude of, any competition payments, including taking account of assessments of reform effort made by the Australian Council for Competition Policy (ACCP) based on actually implementing reform measures, not on undertaking reviews.

Prior to that modelling exercise, the Australian Government should task (within six months) the PC with modelling the proposed recommendations from this Review as a package (in consultation with jurisdictions) to support discussions on policy proposals to pursue (see Recommendation 56).

Economic modelling of the impact of competition reform can serve various purposes. Attempts to quantify the impact of reform can provide guidance to the general community about the relative significance of particular reforms, giving a sense of magnitude and priority to particular reforms. Modelling can also address concerns about reforms, such as whether they are likely to have positive or negative regional or distributional effects.

The Panel recognises that modelling the Review's proposals will, in some instances, require adopting a range of alternative assumptions about implementation. For example, the Panel's recommendation on delivery of human services envisages further work by governments, including developing implementation plans that reflect the unique characteristics of providing human services in each jurisdiction.

Economic modelling is only one tool that can be used to illustrate the relative significance and priority attaching to particular reforms. By its nature, modelling requires making assumptions and judgments, which may not capture the finer detail and specifics of certain sectors or markets. In addition, economic modelling is often focused on measuring improvements in productivity and gross domestic product (GDP), which fail to capture the full range of benefits from reform.

GDP is a measure of the total monetary value of the goods and services that a country produces. Productivity measures how effectively a country uses resources (labour and capital) to produce goods and services. Productivity will improve if we are able to produce more goods and services using the same (or fewer) resources. The benefits of productivity improvements flow into higher living standards for Australians.

GDP and productivity are both important aspects of a country's capability and progress, and they are generally chosen for modelling tasks because they are well-defined and measurable. But these concepts fail to capture some important benefits flowing from increased choice and competition, such as increases in convenience, satisfaction and personal wellbeing. They also fail to capture reduced inequality and/or improved access to goods and services that may flow from reforms. These potential improvements in people's lives are crucial in building public acceptance of the case for reform.

In addition, productivity is often poorly measured in the services sector, particularly in human services where there is significant government provision and most of the outputs produced are not sold at market prices. This may make it especially difficult to quantify the benefits of reforms to human services, such as those proposed in Recommendation 2, pertaining to improved quality and responsiveness of service provision. However, the improvement in people's lives that can be

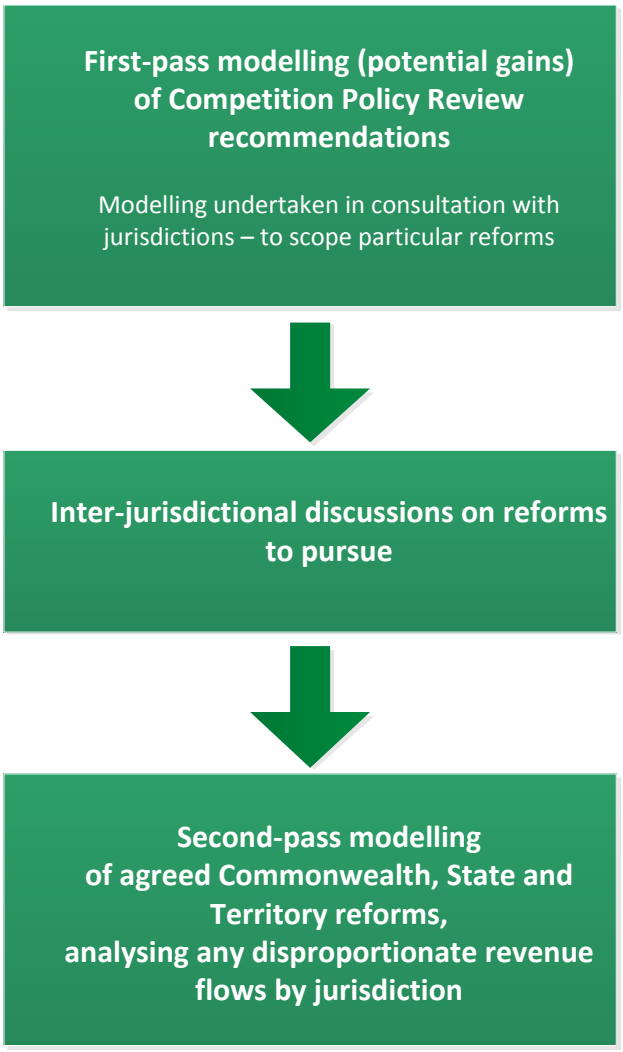
generated by better services, including better healthcare, education and disability care, is a major reason for pursuing reform, even if it is not possible to measure these benefits precisely.

The Panel's view

The Panel considers that modelling the impact of the Review's recommendations can provide guidance as to the relative significance of particular reforms, giving a sense of magnitude and priority for policy decision making. The Panel recognises that modelling the Review's proposals will, in some instances, require a range of assumptions about implementation and, for this reason, modelling options should be specified in consultation with jurisdictions.

Implementation

The Australian Government should task (within six months) the PC with modelling the Review's package of recommendations (in consultation with jurisdictions) to support discussions on policy proposals to pursue. The timing of this first-pass modelling exercise, and its links with modelling associated with Recommendation 48 on competition payments, is outlined below.



Recommendation 56 — Economic modelling

The Productivity Commission should be tasked with modelling the recommendations of this Review as a package (in consultation with jurisdictions) to support discussions on policy proposals to pursue.

Economic impacts of NCP reforms

The impacts of the economic reforms flowing from the last major review of competition policy, the 1993 Hilmer Review, were modelled at the request of governments on three occasions.

First, in 1994 COAG requested that the then Industry Commission (the predecessor to the PC) assess the benefits to economic growth and revenue from implementing the Hilmer and related reforms. This was partly to assist in determining the magnitude and direction of competition payments.

The Industry Commission reported in 1995, suggesting that, in the long run, the Hilmer reforms would lead to a gain in real GDP of 5.5 per cent.[790] This was an 'outer envelope' or 'maximum effects' estimate, which assumed that the proposed reforms were fully implemented and the economy had fully adjusted to the reforms.

Importantly, the PC's 1995 report noted that modelling is one way to provide support for reforms, but it is not the only way, and modelling cannot provide a complete measure of the worth of reforms:

> … it is clear that no single number can be produced to capture accurately the full benefits and costs of these reforms — no matter how much time might have been made available. Some of the reforms being considered are broad strategies rather than specific policy changes; or may even have the important but intangible effect of locking in gains from changes that have already been introduced. Moreover, some of the big gains from reform are likely to be of the dynamic kind that are difficult to predict, let alone measure…
>
> The best they [technical modelling exercises] can do is provide general indications of the direction and magnitude of the benefits that flow from these reforms of different sectors of Australian society.[791]

Second, in 1999, the PC modelled a smaller sub-set of NCP reforms to determine their likely regional impacts. This report found that, at the regional level, implementing NCP reform was estimated to raise output higher than otherwise in all of the 57 regions tested, except one (Gippsland in Victoria). The report also found that, although the estimated impact of NCP differed across regions, there was no apparent bias against rural and regional areas, at least in output terms.[792]

Third, in 2005, 12 years after the Hilmer Review, the PC completed another modelling exercise, which calculated that some selected reforms delivered under NCP were estimated to have raised GDP by around 2.5 per cent.[793] The reforms modelled covered major parts of the infrastructure sector (including utilities, telecommunications and parts of transport) but did not pick up dynamic efficiency gains. The PC noted that the implication of this was that 'the total boost to GDP from the reforms will ultimately be considerably larger than the [2.5 per cent] figure emerging from this particular modelling exercise'.[794]

The PC's 2005 report also included a distributional analysis, which showed that the benefits from the reforms flowed broadly among Australians, with real incomes rising across all income brackets. It also noted some of the specific changes brought about by NCP, such as:

- directly reducing the prices of goods and services, such as electricity and milk; and
- stimulating business innovation, customer responsiveness and choice.[795]

790 Industry Commission 1995, *The Growth and Revenue Implications of Hilmer and Related Reforms*, Final Report, Canberra, page 53.

791 Ibid.

792 Productivity Commission 1999, *Impact of Competition Policy Reforms on Rural and Regional Australia: Modelling the Regional Impacts of National Competition Policy Reforms*, Canberra, pages 9-10.

793 Productivity Commission 2005, *Review of National Competition Policy Reforms*, Report no. 33, Canberra, page XVII.

794 Ibid., page XVIII.

795 Ibid., page XII.

A study of the impacts of the Panel's recommendations in this Final Report as proposed, could allow specific policy proposals to be quantified using appropriate assessment tools. This could be helpful in determining the gains available from implementing proposals and the prioritisation of reforms.

Overall benefits of competition policy reform

As noted by the Organisation for Economic Co-operation and Development (OECD), it can be challenging to measure and find evidence of the link between competition policy and macroeconomic outcomes, such as productivity, innovation and growth as well as other determinants of wellbeing, such as inequality and employment.[796]

In addition, productivity alone is insufficient to guide attention to areas where prospective gains to the economy are large and growing. For example, while it is difficult to measure productivity in industries such as health and education, given their size and share of the economy, and their likely growth over time, even relatively modest gains to productivity in these sectors could yield large gains to the economy. Also, if we allow productivity in these sectors to stagnate, their growing share of the economy will mean that Australian living standards decline over time.

Another aspect of a sector's contribution to the economy is its capacity to affect the performance of other industries. Some industries supply important inputs to other businesses, which are necessary for them to operate. While these sectors often supply directly to end-point consumers or for export, since they provide inputs to other businesses, they can also cascade good or poor performance through many other sectors of the economy.

Many infrastructure and utilities industries are instrumental to the performance of other sectors that draw upon their inputs in the production process. Increasingly, service industries such as professional services (accounting/legal) or human services (health care and life-long education) also have a significant role to play in the productivity of other sectors of the Australian economy.

Participants in consultations also suggested that there are many sectors, particularly in the services industries, where exposure to competition has been limited. This is in contrast to many goods industries, which have been increasingly opened to competition over the past decade or two and will be further exposed as globalisation continues.

Technology and increasing use of global supply chains in the provision of services (e.g., incorporating offshore inputs such as outsourced call-centre functions or early-stage engineering services) is beginning to expose more services industries to competition. However, many services that require domestic contact with customers, including where regulatory restrictions limit domestic or international competition through various standards or professional certifications, may dampen Australia's productivity and living standards over time if they are not exposed to greater competitive forces.

There is also a range of sectors where unfinished business remains from earlier reforms proposed under the NCP framework. These include key markets with extensive interface with end-point consumers, such as taxis, pharmacies and book importers. These remain areas of keen interest to a wide range of consumers, with considerable potential for improvements in convenience, pricing and accessibility.

796 OECD 2014, *Factsheet on how competition policy affects macro-economic outcomes*, OECD, Paris.

Existing estimates of the benefits of specific competition reforms

While the Panel suggests that the PC undertakes modelling of this Report's recommendations, this section notes some previous work to quantify the benefits of various proposed competition reforms.

These estimates are included for illustrative purposes only. The Panel does not endorse, nor has it verified, the results or findings from these studies. The studies do not represent a quantification of the likely impact of implementing any of the recommendations. Rather, they are included to give some sense of the gains which can flow from various competition reforms.

Overall, the OECD has noted that the quality of competition policy is positively linked to productivity, and a substantial easing in anti-competitive regulation can raise a country's productivity growth rate by over 1 per cent per annum.[797] Raising productivity growth and hence Australian living standards is an important area of focus for this Review.

In the area of **human services** (see Recommendation 2), it can be very difficult to measure productivity and to estimate the impact of policy changes on the economy. However, the benefits of reform are likely to be large and to extend beyond the individual — having a healthy, well-educated population benefits us all. At the individual level, having more choice and access to human services is likely to increase personal wellbeing, dignity and freedom, which is hard to measure but very important nonetheless. These services also make up a large and growing area of the economy. As an indication, the PC has noted that an efficiency improvement of 10 per cent in service delivery in the health care sector would deliver cost savings equivalent to around 1 per cent of GDP at the present time, and as much as 2 per cent by 2050.[798]

With regard to **road transport** (see Recommendation 3), modelling the costs of road congestion has been attempted by various organisations, including the Bureau of Infrastructure, Transport and Regional Economics (BITRE). BITRE estimates that the avoidable costs of road congestion were around $9.4 billion in 2005 (comprising $3.5 billion in private time costs, $3.6 billion in business time costs, $1.2 billion in extra vehicle operating costs and $1.1 billion in extra air pollution costs).[799]

With respect to the regulation of **coastal shipping**, a report commissioned by the Cement Industry Foundation modelled the impacts of the Shipping Reform Package introduced in 2012, which increased the regulatory burden on foreign ships in particular, including by imposing minimum voyage requirements and restricting the duration of certain licences. The report found that this regulation would reduce GDP by $242-466 million over the period from 2012 to 2025 and lead to an increase in freight rates of up to 16 per cent.[800] In contrast, the Panel's recommendation (see Recommendation 5) seeks to reduce regulation around coastal shipping and boost competition in the sector.

In the area of **taxis** (see Recommendation 10), the Western Australian Economic Regulation Authority has estimated there would be a net benefit to the Perth community of up to $39 million per annum from reform of the Western Australian taxi industry (being a $70 million benefit to

797 OECD 2014, *Factsheet on how competition policy affects macro-economic outcomes*, OECD, Paris, page 22.

798 Productivity Commission 2005, *Review of National Competition Policy Reforms*, Report no. 33, Canberra, page XLIII.

799 Bureau of Infrastructure, Transport and Regional Economics 2007, *Estimating urban traffic and congestion cost trends for Australian cities*, Working paper 71, Canberra, page XV.

800 Report for the Cement Industry Foundation by Deloitte Access Economics 2012, *Economic Impacts of the Proposed Shipping Reform Package*, page iii, Cement Industry Federation.

consumers partly offset by a loss to taxi plate owners).[801] IPART has found that between 15 per cent and 20 per cent of Sydney taxi fares is received by taxi plate owners as economic rent (sub, page 7).

In respect of **parallel imports** (see Recommendation 13), the PC found that, in 2007-08, a selection of around 350 books sold in Australia were on average 35 per cent more expensive than like editions sold in the US. In many cases, the price difference was greater than 50 per cent.[802]

In regard to **planning and zoning** (see Recommendation 9), in New South Wales, a recent study commissioned by the state government into the potential benefits of comprehensively reforming planning and zoning in that state showed net benefits ranging between $569 million and $1,482 million per annum, depending on the reform option considered.[803]

In respect of **retail trading hours** (see Recommendation 12), the Queensland Competition Authority recommended full deregulation of retail trading hours in 2013. It found the net potential benefit to Queensland of removing the current restrictions was as much as $200 million per annum, noting that the 'potential benefits of the reform include an increase in retail productivity, more shopping convenience for the broader community and lower prices'.[804]

801 Western Australian Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia: Final report*, Perth, page 294.

802 Productivity Commission 2009, *Restrictions on the Parallel Importation of Books*, Research Report, Canberra, page XVIII.

803 Centre for International Economics 2013, *Reform of the NSW planning system,* Better Regulation Statement, prepared for NSW Planning and Infrastructure, Sydney, pages 6-7.

804 Queensland Competition Authority Office of Best Practice Regulation 2013, Measuring and Reducing the Burden of Regulation, Final Report, Brisbane, pages 33 and 39.

APPENDIX A — *COMPETITION AND CONSUMER ACT 2010* — MODEL LEGISLATIVE PROVISIONS

Part I—Preliminary

2A Application of Act to Commonwealth and Commonwealth authorities

Recommendation 24

(1) Subject to this section and sections 44AC, 44E and 95D, this Act binds the Crown in right of the Commonwealth in so far as the Crown in right of the Commonwealth engages in trade or commerce, either directly or by an authority of the Commonwealth.

(2) Subject to the succeeding provisions of this section, this Act applies as if:

(a) the Commonwealth, in so far as it engages in trade or commerce, otherwise than by an authority of the Commonwealth; and

(b) each authority of the Commonwealth (whether or not acting as an agent of the Crown in right of the Commonwealth) in so far as it engages in trade or commerce;

were a corporation.

(3) Nothing in this Act makes the Crown in right of the Commonwealth liable to a pecuniary penalty or to be prosecuted for an offence.

(3A) The protection in subsection (3) does not apply to an authority of the Commonwealth.

(4) Part IV does not apply in relation to the Commonwealth developing, and disposing of interests in, land in the Australian Capital Territory.

2B Application of Act to States and Territories

Recommendation 24

(1) The following provisions of this Act bind the Crown in right of each of the States, of the Northern Territory and of the Australian Capital Territory, so far as the Crown engages in trade or commerce, either directly or by an authority of the State or Territory:

(a) Part IV;

(b) Part XIB;

(c) the other provisions of this Act so far as they relate to the above provisions.

(2) Nothing in this Act renders the Crown in right of a State or Territory liable to a pecuniary penalty or to be prosecuted for an offence.

(3) The protection in subsection (2) does not apply to an authority of a State or Territory.

2BA Application of Part IV to local government bodies

Recommendation 24

(1) Part IV applies in relation to a local government body only to the extent that it engages in trade or commerce, either directly or by an incorporated company in which it has a controlling interest.

(2) In this section:

local government body means a body established by or under a law of a State or Territory for the purposes of local government, other than a body established solely or primarily for the purposes of providing a particular service, such as the supply of electricity or water.

2C Activities that are not in trade or commerce

Recommendation 24

(1) For the purposes of sections 2A, 2B and 2BA, the following do not amount to engaging in trade or commerce:

(a) imposing or collecting:

(i) taxes; or

(ii) levies; or

(iii) fees for licences;

(b) granting, refusing to grant, revoking, suspending or varying licences (whether or not they are subject to conditions);

(c) a transaction involving:

(i) only persons who are all acting for the Crown in the same right (and none of whom is an authority of the Commonwealth or an authority of a State or Territory); or

(ii) only persons who are all acting for the same authority of the Commonwealth; or

(iii) only persons who are all acting for the same authority of a State or Territory; or

(iv) only the Crown in right of the Commonwealth and one or more non-commercial authorities of the Commonwealth; or

(v) only the Crown in right of a State or Territory and one or more non-commercial authorities of that State or Territory; or

(vi) only non-commercial authorities of the Commonwealth; or

(vii) only non-commercial authorities of the same State or Territory; or

(viii) only persons who are all acting for the same local government body (within the meaning of section 2BA) or for the same incorporated company in which such a body has a controlling interest;

(d) the acquisition of primary products by a government body under legislation, unless the acquisition occurs because:

(i) the body chooses to acquire the products; or

(ii) the body has not exercised a discretion that it has under the legislation that would allow it not to acquire the products.

(2) Subsection (1) does not limit the things that do not amount to engaging in trade or commerce for the purposes of sections 2A, 2B and 2BA.

(3) In this section:

acquisition of primary products by a government body under legislation includes vesting of ownership of primary products in a government body by legislation.

enactment means an Act or an instrument (including rules, regulations or by-laws) made under an Act.

government body means the Commonwealth, a State, a Territory, an authority of the Commonwealth or an authority of a State or Territory.

licence means a licence, permission, authority or right granted under an enactment that allows the licensee to supply goods or services.

primary products means:

(a) agricultural or horticultural produce; or

(b) crops, whether on or attached to the land or not; or

(c) animals (whether dead or alive); or

(d) the bodily produce (including natural increase) of animals.

(4) For the purposes of this section, an authority of the Commonwealth or an authority of a State or Territory is ***non-commercial*** if:

(a) it is constituted by only one person; and

(b) it is neither a trading corporation nor a financial corporation.

4 Interpretation

(1) In this Act, unless the contrary intention appears:

competition includes competition from goods imported or capable of being imported into Australia, or from services rendered or capable of being rendered in Australia, by persons not resident or not carrying on business in Australia.

Recommendation 25

contract includes a covenant and a lease or licence of land or buildings.

Recommendation 23

5 Extended application of this Act to conduct outside Australia

Recommendation 26

Each of the following provisions:

(a) Part IV;

(b) Part XI;

(c) the Australian Consumer Law (other than Part 5-3);

(d) the remaining provisions of this Act (to the extent to which they relate to any of the provisions covered by paragraph (a), (b) or (c));

extends to the engaging in conduct outside Australia by any person in so far as the conduct relates to trade or commerce.

Note: Section 4 defines **trade or commerce** to mean trade or commerce within Australia or between Australia and places outside Australia.

Part IV—Anti-competitive conduct

Recommendation 27

Note: This Division includes proposed re-numbering, to replace the current complex numbering.

Division 1—Cartel conduct

Subdivision A—Introduction

45 Simplified outline [currently section 44ZZRA]

The following is a simplified outline of this Division:

- This Division sets out parallel offences and civil penalty provisions relating to cartel conduct.
- A corporation must not make, or give effect to, a contract, arrangement or understanding that contains a cartel provision.
- A cartel provision is a provision relating to:
  - (a) price-fixing; or
  - (b) restricting outputs in the production and supply chain; or
  - (c) allocating customers, suppliers or territories; or
  - (d) bid-rigging;

  by parties that are, or would otherwise be, in competition with each other.

45A Definitions [currently section 44ZZRB]

In this Division:

annual turnover, of a body corporate during a 12-month period, means the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during the 12-month period, other than:

(a) supplies made from any of those bodies corporate to any other of those bodies corporate; or

(b) supplies that are input taxed; or

(c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*); or

(d) supplies that are not made in connection with an enterprise that the body corporate carries on; or

(e) supplies that are not connected with Australia.

Expressions used in this definition that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning as in that Act.

benefit includes any advantage and is not limited to property.

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

production includes research, development, manufacture, processing, treatment, assembly, disassembly, renovation, restoration, growing, raising, mining, extraction, harvesting, fishing, capturing and gathering.

45B Cartel provisions [currently section 44ZZRD]

(1) For the purposes of this Act, a provision of a contract, arrangement or understanding is a ***cartel provision*** if:

(a) (**price fixing**) the provision has the purpose, or has or is likely to have the effect, of fixing, controlling or maintaining the price for, or a discount, allowance, rebate or credit in relation to, goods or services that are supplied or acquired by any party to the contract, arrangement or understanding in competition with any other party;

(b) (**restricting output**) the provision has the purpose of preventing, restricting or limiting:

(i) the production or the supply by any party to the contract, arrangement or understanding of goods or services that are supplied by that party in competition with any other party;

(ii) the acquisition by any party to the contract, arrangement or understanding of goods or services that are acquired by that party in competition with any other party;

(c) (**market allocation**) the provision has the purpose of allocating to or from any party to the contract, arrangement or understanding:

(i) the persons or classes of persons to whom that party may supply, or from whom that person may acquire, goods or services in competition with any other party; or

(ii) the geographical areas in which that party may supply or acquire goods or services in competition with any other party;

(d) (**bid rigging**) the provision has the purpose of restricting whether, or the terms on which, or the extent to which, any party to the contract, arrangement or understanding may bid in competition with any other party in response to a request for bids for the supply or acquisition of goods or services.

Competition

(2) For the purposes of subsection (1), a party to a contract, arrangement or understanding supplies goods or services in competition with another party if and only if:

(a) those parties or any of their respective related bodies corporate are, or are likely to be, in competition with each other; or

(b) but for the provision of any contract, arrangement or understanding, those parties or any of their respective related bodies corporate would be, or would be likely to be, in competition with each other,

in relation to the supply of the goods or services in trade or commerce.

Note: Section 4 defines **trade or commerce** to mean trade or commerce within Australia or between Australia and places outside Australia.

(3) For the purposes of subsection (1), a party to a contract, arrangement or understanding acquires goods or services in competition with another party if and only if:

(a) those parties or any of their respective related bodies corporate are, or are likely to be, in competition with each other; or

(b) but for the provision of any contract, arrangement or understanding, those parties or any of their respective related bodies corporate would be, or would be likely to be, in competition with each other,

in relation to the acquisition of the goods or services in trade or commerce.

Note: Section 4 defines **trade or commerce** to mean trade or commerce within Australia or between Australia and places outside Australia.

(4) For the purposes of subsection (1), a party to a contract, arrangement or understanding does not supply or acquire goods or services in competition with another party if those parties are related bodies corporate.

Immaterial whether particular circumstances or particular conditions

(5) It is immaterial whether the cartel provision only applies in particular circumstances or on particular conditions.

Considering related provisions

(6) For the purposes of this Division, a provision of a contract, arrangement or understanding is taken to have the purpose, effect or likely effect mentioned in subsection (1) if the provision, when considered together with:

(a) the other provisions of the contract, arrangement or understanding; or

(b) the provisions of another contract, arrangement or understanding to which at least one of the parties to the first-mentioned parties is a party,

has that purpose, effect or likely effect.

Subdivision B—Offences etc.

45C Making a contract etc. containing a cartel provision [currently section 44ZZRF]

Offence

(1) A corporation commits an offence if:

(a) the corporation makes a contract or arrangement, or arrives at an understanding; and

(b) the contract, arrangement or understanding contains a cartel provision.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) The fault element for paragraph (1)(b) is knowledge or belief.

Penalty

(3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:

(a) $10,000,000;

(b) if the court can determine the total value of the benefits that:

(i) have been obtained by one or more persons; and

(ii) are reasonably attributable to the commission of the offence;

3 times that total value;

(c) if the court cannot determine the total value of those benefits—10% of the corporation's annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence.

Indictable offence

(4) An offence against subsection (1) is an indictable offence.

45D Giving effect to a cartel provision [currently section 44ZZRG]

Offence

(1) A corporation commits an offence if:

(a) a contract, arrangement or understanding contains a cartel provision; and

(b) the corporation gives effect to the cartel provision.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) The fault element for paragraph (1)(a) is knowledge or belief.

Penalty

(3) An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:

(a) $10,000,000;

(b) if the court can determine the total value of the benefits that:

(i) have been obtained by one or more persons; and

(ii) are reasonably attributable to the commission of the offence;

3 times that total value;

(c) if the court cannot determine the total value of those benefits—10% of the corporation's annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence.

Pre-commencement contracts etc.

(4) Paragraph (1)(a) applies to contracts or arrangements made, or understandings arrived at, before, at or after the commencement of this section.

Indictable offence

(5) An offence against subsection (1) is an indictable offence.

45E Determining guilt [currently section 44ZZRH]

(1) A corporation may be found guilty of an offence against section 45C or 45D even if:

(a) each other party to the contract, arrangement or understanding is a person who is not criminally responsible; or

(b) subject to subsection (2), all other parties to the contract, arrangement or understanding have been acquitted of the offence.

(2) A corporation cannot be found guilty of an offence against section 45C or 45D if:

(a) all other parties to the contract, arrangement or understanding have been acquitted of such an offence; and

(b) a finding of guilt would be inconsistent with their acquittal.

45F Court may make related civil orders [currently section 44ZZRI]

If a prosecution against a person for an offence against section 45C or 45D is being, or has been, heard by a court, the court may:

(a) grant an injunction under section 80 against the person in relation to:

(i) the conduct that constitutes, or is alleged to constitute, the offence; or

(ii) other conduct of that kind; or

(b) make an order under section 86C, 86D, 86E or 87 in relation to the offence.

Subdivision C—Civil penalty provisions

45G Making a contract etc. containing a cartel provision [currently section 44ZZRJ]

A corporation contravenes this section if:

(a) the corporation makes a contract or arrangement, or arrives at an understanding; and

(b) the contract, arrangement or understanding contains a cartel provision.

Note: For enforcement, see Part VI.

45H Giving effect to a cartel provision [currently section 44ZZRK]

(1) A corporation contravenes this section if:

(a) a contract, arrangement or understanding contains a cartel provision; and

(b) the corporation gives effect to the cartel provision.

Note: For enforcement, see Part VI.

(2) Paragraph (1)(a) applies to contracts or arrangements made, or understandings arrived at, before, at or after the commencement of this section.

Subdivision D—Exceptions

45I Joint ventures [currently section 44ZZRO]

(1) Sections 45C, 45D, 45G, and 45H do not apply in relation to a contract, arrangement or understanding containing a cartel provision if:

(a) the parties to the contract, arrangement or understanding are in a joint venture for the production, supply, acquisition or marketing of goods or services; and

(b) the cartel provision:

(i) relates to goods or services that are acquired, produced, supplied or marketed by or for the purposes of the joint venture;

(ii) is reasonably necessary for undertaking the joint venture; or

(iii) is for the purpose of the joint venture.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code*) and subsection (2) of this section.

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45G or 45H bears an evidential burden in relation to that matter.

45J Restrictions in supply and acquisition agreements [currently section 44ZZRS]

(1) Sections 45C, 45D, 45G and45H do not apply in relation to a contract, arrangement or understanding containing a cartel provision in so far as the cartel provision:

(a) is imposed by a person (the ***supplier***) in connection with the supply of goods or services to another person (the ***acquirer***) and relates to:

(i) the supply of the goods or services by the acquirer to the acquirer;

(ii) the acquisition by the acquirer of goods or services that are substitutable for or otherwise competitive with the goods or services from others; or

(iii) the supply by the acquirer of the goods or services or goods or services that are substitutable for or otherwise competitive with the goods or services;

(b) is imposed by a person (the ***acquirer***) in connection with the acquisition of goods or services from another person (the ***supplier***) and relates to:

(i) the acquisition of the goods or services from the supplier; or

(ii) the supply by the supplier of the goods or services, or goods or services that are substitutable for or otherwise competitive with the goods or services, to others.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code*) and subsection (2) of this section.

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45G or 45H bears an evidential burden in relation to that matter.

45K Collective supply or acquisition of goods or services by the parties to a contract, arrangement or understanding [currently section 44ZZRV]

(1) Sections 45C, 45D, 45G and 45H do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as:

(a) the cartel provision has the purpose, or has or is likely to have the effect, mentioned in paragraph 45B(1)(a); and

(b) either:

(i) the cartel provision relates to the price for goods or services to be collectively acquired, whether directly or indirectly, by the parties to the contract, arrangement or understanding; or

(ii) the cartel provision is for the joint advertising of the price for the re-supply of goods or services so acquired.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45G or 45H bears an evidential burden in relation to that matter.

45L Acquisition of shares or assets [currently section 44ZZRU]

(1) Sections 45C, 45D, 45G and 45H do not apply in relation to a contract, arrangement or understanding containing a cartel provision, in so far as the cartel provision provides directly or indirectly for the acquisition of:

(a) any shares in the capital of a body corporate; or

(b) any assets of a person.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1) (see subsection 13.3(3) of the *Criminal Code* and subsection (2) of this section).

(2) A person who wishes to rely on subsection (1) in relation to a contravention of section 45G or 45H bears an evidential burden in relation to that matter.

Division 2—Other provisions

Recommendations 28, 29

Note: Section 45 has been renumbered 45M, as a consequence of renumbering Division 1.

45M Prohibited conduct [currently section 45]

(1) A corporation shall not:

(a) make a contract or arrangement, or arrive at an understanding, if a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition;

(b) give effect to a provision of a contract, arrangement or understanding if that provision has the purpose, or has or is likely to have the effect, of substantially lessening competition; or

(c) engage in a concerted practice with one or more other persons if the concerted practice has the purpose, or has or is likely to have the effect, of substantially lessening competition.

(2) For the purposes of paragraphs (1)(a) and (b), ***competition*** means competition in any market in which a corporation that is a party to the contract, arrangement or understanding or would be a party to the proposed contract, arrangement or understanding, or any body corporate related to such a corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the provision of the contract, arrangement or understanding or the proposed contract, arrangement or understanding, supply or acquire, or be likely to supply or acquire, goods or services.

(3) For the purposes of the application of paragraphs (1)(a) and (b) in relation to a particular corporation, a provision of a contract, arrangement or understanding or of a proposed contract, arrangement or understanding shall be deemed to have or to be likely to have the effect of substantially lessening competition if that provision and any one or more of the following provisions, namely:

(a) the other provisions of that contract, arrangement or understanding or proposed contract, arrangement or understanding; and

(b) the provisions of any other contract, arrangement or understanding or proposed contract, arrangement or understanding to which the corporation or a related body corporate is or would be a party;

together have or are likely to have that effect.

(4) For the purposes of paragraph (1)(c), ***competition*** means competition in any market in which a corporation that is a party to the concerted practice, or any body corporate related to the corporation, supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the practice, supply or acquire, or be likely to supply or acquire, goods or services.

(5) This section does not apply to or in relation to a contract, arrangement or understanding in so far as the contract, arrangement or understanding provides, or to or in relation to a proposed contract, arrangement or understanding in so far as the proposed contract, arrangement or understanding would provide, directly or indirectly for the acquisition of any shares in the capital of a body corporate or any assets of a person.

(6) This section does not apply to or in relation to a contract, arrangement or understanding, or a proposed contract, arrangement or understanding, or a concerted practice, the only parties to which are or would be bodies corporate that are related to each other.

Recommendation 37

Note: Section 45E has been renumbered 45X, as a consequence of renumbering Division 1

45X Prohibition of contracts, arrangements or understandings affecting the supply or acquisition of goods or services [currently section 45E]

Prohibition in a supply situation

(1) A person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:

(a) preventing or hindering the person from supplying goods or services to a second person; or

(b) preventing or hindering the person from supplying goods or services to a second person, except subject to a condition:

(i) that is not a condition to which the supply of such goods or services by the person to the second person has previously been subject because of a provision in a contract between those persons; and

(ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

Prohibition in an acquisition situation

(2) A person must not make a contract or arrangement, or arrive at an understanding, with an organisation of employees, an officer of such an organisation or a person acting for and on behalf of such an officer or organisation, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose, of:

(a) preventing or hindering the person from acquiring goods or services from a second person; or

(b) preventing or hindering the person from acquiring goods or services from a second person, except subject to a condition:

(i) that is not a condition to which the acquisition of such goods or services by the person from the

second person has previously been subject because of a provision in a contract between those persons; and

(ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

Situations to which section applies

(3) This section does not apply unless the first or second person is a corporation or both of them are corporations.

No contravention if the other person gives written consent to written contract etc.

(4) Subsections (1) and (2) do not apply to a contract, arrangement or understanding if it is in writing and was made or arrived at with the written consent of the second person.

Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(7A).

45Y Provisions contravening section 45X not to be given effect [currently section 45EA]

Recommendation 37

Note: Section 45EA has been renumbered 45Y, as a consequence of renumbering Division 1.

A person must not give effect to a provision of a contract, arrangement or understanding if, because of the provision, the making of the contract or arrangement, or the arriving at the understanding, by the person:

(a) contravened subsection 45X(1) or (2); or

(b) would have contravened subsection 45X(1) or (2) if:

(i) section 45X had been in force when the contract or arrangement was made, or the understanding was arrived at; and

(ii) the words "is in writing and" and "written" were not included in subsection 45X(4).

Note: Conduct that would otherwise contravene this section can be authorised under subsection 88(7A).

46 Misuse of market power

Recommendation 30

(1) A corporation that has a substantial degree of power in a market shall not engage in conduct if the conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.

(2) Without limiting the matters that may be taken into account for the purposes of subsection (1), in determining whether conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in a market, the court must have regard to:

(a) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of increasing competition in the market including by enhancing

efficiency, innovation, product quality or price competitiveness in the market; and

(b) the extent to which the conduct has the purpose, or would have or be likely to have the 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.

(3) If:

(a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of power in a market; or

(b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in a market;

the corporation shall be taken for the purposes of this section to have a substantial degree of power in that market.

(4) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:

(a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or

(b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.

(5) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court may have regard to the power the body corporate or bodies corporate has or have in that market that results from any contracts, arrangements or understandings, or proposed contracts, arrangements or understandings, that the body corporate or bodies corporate has or have, or may have, with another party or other parties.

(6) Subsections (4) and (5) do not limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.

(7) For the purposes of this section, a body corporate may have a substantial degree of power in a market even though:

(a) the body corporate does not substantially control the market;

(b) the body corporate does not have absolute freedom from constraint by the conduct of:

(i) competitors, or potential competitors, of the body corporate in that market; or

(ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market;

(c) one or more other bodies corporate have a substantial degree of power in that market.

(8) In this section:

(a) a reference to power is a reference to market power;

(b) a reference to a market is a reference to a market for goods or services; and

(c) a reference to power, or to conduct, in a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

47 Exclusive dealing

Recommendation 32

(1) Subject to this section, a corporation shall not, in trade or commerce, engage in exclusive dealing conduct.

(2) A corporation (**supplier**) engages in exclusive dealing conduct if the corporation supplies, or offers to supply, goods or services to another person (**acquirer**), or does so at a particular price or with a particular discount, allowance, rebate or credit, subject to a condition (**supplier condition**):

(a) relating to the supply of those or other goods or services by the supplier to the acquirer; or

(b) preventing, restricting or limiting:

(i) the acquisition by the acquirer of goods or services from others; or

(ii) the supply by the acquirer of goods or services to others.

(3) A corporation (**supplier**) also engages in exclusive dealing conduct if the corporation refuses to supply goods or services to another person (**acquirer**), or refuses to do so at a particular price or with a particular discount, allowance, rebate or credit, for the reason that:

(a) the acquirer has not agreed to a supplier condition referred to in subsection (2); or

(b) the acquirer has previously acted inconsistently with a supplier condition referred to in subsection (2).

(4) A corporation (**acquirer**) engages in exclusive dealing conduct if the corporation acquires, or offers to acquire, goods or services from another person, or does so at a particular price or

with a particular discount, allowance, rebate or credit, subject to a condition (**acquirer condition**):

(a) relating to the acquisition of those or other goods or services by the acquirer from the supplier; or

(b) preventing, restricting or limiting the supply by the supplier of goods or services to others.

(5) A corporation (**acquirer**) also engages in exclusive dealing conduct if the corporation refuses to acquire goods or services from another person (**supplier**), or refuses to do so at a particular price or with a particular discount, allowance, rebate or credit, for the reason that:

(a) the supplier has not agreed to an acquirer condition referred to in subsection (4); or

(b) the supplier has previously acted inconsistently with a acquirer condition referred to in subsection (4).

(6) Subsection (1) does not apply to exclusive dealing conduct unless:

(a) the engaging by the corporation in that conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market; or

(b) the engaging by the corporation in that conduct, and the engaging by the corporation, or by a body corporate related to the corporation, in other conduct of the same or a similar kind, together have or are likely to have the effect of substantially lessening competition in a market.

(7) Subsection (1) does not apply to exclusive dealing conduct if the only parties to the conduct are related bodies corporate.

(8) In this section:

(a) a reference to a condition shall be read as a reference to any condition, whether direct or indirect and whether having legal or equitable force or not, and includes a reference to a condition the existence or nature of which is ascertainable only by inference from the conduct of persons or from other relevant circumstances;

(b) a reference to competition shall be read as a reference to competition in any market in which:

(i) the corporation engaging in the conduct or any body corporate related to that corporation; or

(ii) any person whose business dealings are restricted, limited or otherwise circumscribed by the conduct or, if that person is a body corporate, any body corporate related to that body corporate;

supplies or acquires, or is likely to supply or acquire, goods or services or would, but for the conduct, supply or acquire, or be likely to supply or acquire, goods or services.

Part VI—Enforcement and remedies

83 Finding or admission of fact in proceedings to be evidence

Recommendation 41

In a proceeding against a person under section 82 or in an application under subsection 51ADB(1) or 87(1A) for an order against a person, a finding of any fact by a court or an admission of any fact by that person made in proceedings under section 77, 80, 81, 86C, 86D or 86E, or for an offence against section 45C or 45D, in which that person has been found to have contravened, or to have been involved in a contravention of, a provision of Part IV or IVB, or of section 60C or 60K, is *prima facie* evidence of that fact and the finding or admission may be proved by production of:

(a) a document under the seal of the court from which the finding or admission appears; or

(b) a document in which the admission was made.

Part VII—Authorisations, notifications and block exemptions

Division 1—Authorisations

Recommendations 35 and 38

87ZP Definitions

In this Division:

merger authorisation means an authorisation under subsection 88(1) to a person to:

(a) acquire shares in the capital of a body corporate or to acquire assets of a person to which section 50 would or might apply; or

(b) acquire a controlling interest in a body corporate within the meaning of section 50A,

but does not include an authorisation where the conduct specified in the application includes conduct to which one or more provisions other than section 50 or 50A would apply.

88 Power of Commission to grant authorisations

(1) Subject to this Part, the Commission may, upon application by or on behalf of a person, grant an authorisation to the person to engage in conduct specified in the application to which one or more provisions of Part IV would or might apply.

Effect of authorisation

(2) While an authorisation under subsection (1) remains in force the provisions of Part IV do not apply to the applicant and any person referred to in subsections (8) and (9) engaging in the conduct specified in and in accordance with the authorisation.

Note: The references to conduct and engaging in conduct in subsection 89(1) include the actions set out in subsection 4(2).

Authorisation test

(3) Subject to subsections (4) and (5), the Commission must not make a determination granting an authorisation under subsection (1) to engage in conduct specified in the application unless the Commission is satisfied in all the circumstances:

(a) that the conduct would not have the effect, or be likely to have the effect, of substantially lessening competition; or

(b) that the conduct would result, or be likely to result, in a benefit to the public and that the benefit would outweigh the detriment to the public that would result, or be likely to result, from engaging in the conduct.

(4) Paragraph 3(a) does not apply to an application for authorisation for conduct to which [*the cartel provisions*], [*the secondary boycott provisions*] and the [*resale price maintenance provisions*] would apply.

(5) In respect of a merger authorisation, in determining what amounts to a benefit to the public for the purposes of paragraph (3)(b):

(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

(i) a significant increase in the real value of exports;

(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Single application may deal with more than one type of conduct

(6) The Commission may grant a single authorisation in respect of all conduct specified in an application for authorisation or may grant separate authorisations in respect of any of the conduct.

Conditions

(7) The Commission may grant an authorisation subject to such conditions as are specified in the authorisation.

Other and future parties

(8) An authorisation granted by the Commission to a person to engage in conduct has effect as an authorisation in the same terms to every other person named or referred to in the application for authorisation as a party or proposed party to the conduct.

(9) An authorisation may be expressed so as to apply to particular persons or classes of persons who become a party to the conduct as specified in the authorisation.

Past conduct

(10) The Commission does not have power to:

(a) grant an authorisation to a person in respect of any conduct undertaken before the Commission makes a determination in respect of the application; and

(b) in respect of a merger authorisation, grant authorisation in respect of an acquisition that has occurred.

Withdrawal of application

(11) An applicant for authorisation may at any time, by writing to the Commission, withdraw the application.

Division 2—Notifications

93 Notification of exclusive dealing or resale price maintenance

Recommendation 34

(1) Subject to subsection (2), a corporation that engages, or proposes to engage, in conduct of a kind referred to in sections 47 or 48 or both may give to the Commission a notice setting out particulars of the conduct or proposed conduct.

(2) Where a corporation has given notice under subsection (1), section 47 or section 48 (as the case may be) does not prevent the corporation from engaging in the conduct referred to in the notice, unless:

(a) the Commission has given notice under subsection (3) and the conduct takes place more than 30 days (or such longer period as the Commission by writing permits) after the day on which the Commission gave the notice; or

(b) the notice has been withdrawn and the conduct takes place after the notice was withdrawn.

(3) If the Commission is satisfied in all the circumstances that a corporation engaging in conduct of a kind described in section 47 and referred to in a notice given by the corporation under subsection (1):

(a) has, or would have or be likely to have, the effect of substantially lessening competition; and

(b) would not result, or is not likely to result, in a benefit to the public that would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from engaging in the conduct,

the Commission may at any time give notice in writing to the corporation stating that the Commission is so satisfied including a statement setting out its reasons for being so satisfied.

(4) If the Commission is satisfied in all the circumstances that a corporation engaging in conduct of a kind:

(a) described in section 48; or

(b) described in both section 47 and 48,

and referred to in a notice given by the corporation under subsection (1) would not result, or is not likely to result, in a benefit to the public that would outweigh the detriment to the public from engaging in the conduct, the Commission may at any time give notice in writing to the corporation stating that the Commission is so satisfied including a statement setting out its reasons for being so satisfied.

Division 3—Block exemptions

Recommendation 39

@XX Block exemptions

(1) The Commission may exempt particular conduct or categories of conduct from the provisions of Part IV (a **block exemption**) if the Commission is satisfied that:

(a) the conduct would not have the effect, or be likely to have the effect, of substantially lessening competition; or

(b) the conduct would result, or be likely to result, in a benefit to the public and that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, from engaging in the conduct.

(2) A block exemption may apply generally or be limited such that it applies:

(a) to specified persons or classes of persons;

(b) in specified circumstances; or

(c) on specified conditions.

(3) A block exemption must provide that the exemption is to cease to have effect at the end of a specified period.

(4) While the block exemption is in force, the provisions of Part IV do not apply to a person to whom the block exemption applies engaging in conduct to which the block exemption applies in accordance with the terms of the block exemption.

(5) The Commission must maintain a public register that includes all block exemptions that have been granted, including those that are no longer in operation.

(6) In this Division "specified" means specified in a block exemption.

APPENDIX B — INTERNATIONAL COMPARISONS OF COMPETITION LAW

	Australia	USA	Canada	UK	EU	New Zealand
Extraterritoriality: Ministerial consent Is a private party required to obtain Ministerial consent before commencing an action based on extraterritorial conduct?	Yes.	No.	No.	No.	No.	No.
Extraterritoriality: 'Market' and cartel provisions Is there a territorial limit on the extent of the laws regulating cartel conduct?	The cartel laws do not have an express territorial restriction. However, a connection between the entity engaging in the extraterritorial cartel conduct and Australia is required.	Section 1 of the Sherman Act (which covers cartel conduct) does not have an express territorial restriction. The conduct of foreign entities acting wholly within foreign jurisdictions may be caught if the conduct affects trade or commerce in the US.	The key cartel provision (section 45) and bid rigging provision (section 47) do not have an express territorial restriction. However, there needs to be a real and substantial link between the cartel conduct and Canada. A separate cartel offence targeted specifically at international cartel activity affecting Canada is set out in section 46. Relevantly, this offence requires the implementation of a foreign directive in whole or in part in Canada.	The cartel laws may apply to conduct by non-UK companies or agreements concluded outside the UK, subject to the following territorial limits: Under the civil prohibition, cartel agreements are those that may affect trade in the UK and are, or are intended to be, implemented in the UK. Under the criminal provision, the relevant cartel conduct must relate to the supply of a product or service in the UK.	The cartel laws apply to agreements which may affect trade between Member States. This is the case irrespective of where the agreement is concluded or where the participants are located.	The cartel laws have an express territorial restriction. Extraterritorial cartel conduct must affect a market in New Zealand. Furthermore, the Commerce Act only applies extraterritorially to entities resident or carrying on business in New Zealand. The new proposed cartel laws (if enacted) will contain a further territorial restriction, requiring that cartel conduct be in relation to the supply or acquisition of goods or services in New Zealand.

	Australia	USA	Canada	UK	EU	New Zealand
Price signalling provisions How is price signalling conduct dealt with? Is it treated under the general competition provisions or is regulation applied to specific industries?	Specific provisions relating to private and public disclosures, which at present apply only to the banking sector.	There are no specific price signalling provisions. The general provisions in section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act have been used to bring actions involving price signalling conduct (for example, the *Ethyl case* and the *Petroleum Products case*).	There are no specific price signalling provisions. The general provisions in subsection 45(1) of the Competition Act dealing with cartel conduct and section 90.1 dealing with agreements that prevent or lessen competition substantially in the market are relevant. The Competition Bureau has noted that an agreement may be inferred in circumstances where there is unilateral information exchange together with parallel conduct.	There are no specific price signalling provisions. The general Chapter I prohibition, which includes the concept of 'concerted practice', can be relied on to capture price signalling conduct.	There are no specific price signalling provisions. The general Article 101 prohibition, which includes the concept of 'concerted practice', can be relied on to capture price signalling conduct.	There are no specific price signalling provisions. The general provisions in the Commerce Act applying to contracts, arrangements or understandings containing price fixing provisions (section 30) and which have the purpose, effect of likely effect of substantially lessening competition (section 27) apply. In New Zealand, a contract, arrangement or understanding requires a meeting of the minds. Therefore, it is unlikely that one-way information sharing (including in relation to prices) will be caught by section 27 or section 30.

	Australia	USA	Canada	UK	EU	New Zealand
Misuse of market power What tests are applied when assessing unilateral anti-competitive conduct?	Purpose-focused test. A corporation with a substantial degree of power in a market will only be held to have taken advantage of that power in that or any other market if it does so for one of three proscribed purposes.	Conduct-focused test. Section 2 of the Sherman Act prohibits monopolisation, where such power is obtained by means other than market forces. Attempted monopolisation is also prohibited, even if monopoly is not ultimately achieved. The party alleged to have breached this prohibition must also have engaged in anti-competitive or predatory conduct.	Effects-based test. An abuse of dominance will be established if there is a dominant firm, which engages in anti-competitive conduct and this conduct has the effect, or likely effect, of substantially lessening competition.	The UK adopts an approach that is in practice identical to the EU.	The European Commission has released guidance that is viewed as advocating an effects based test. However, the courts and Commission are not bound by these guidelines and may apply different tests depending on the type of conduct.	Purpose-focused test, which is in essence identical to the Australian prohibition.
Vertical arrangements: Third-line forcing Is third-line forcing conduct prohibited without consideration of the anti-competitive effects?	Yes.	No. There are no specific provisions addressing exclusive dealing or third line forcing in the US. Conduct would be assessed using a rule of reason analysis, weighing the anti-competitive and pro-competitive effects.	No. Third-line forcing conduct is covered by the prohibition on tied selling under the Competition Act. Tied selling will only be prohibited where competition is or is likely to be lessened substantially.	No.	No. There are no specific provisions addressing exclusive dealing or third line forcing in the EU. Tying arrangements are assessed either under Article 101 or 102 of the Treaty on the Functioning of the European Union.	No. There are no specific provisions addressing exclusive dealing or third line forcing in New Zealand. Tying arrangements (such as third line forcing) are generally analysed under the general anti-competitive and market power provisions of the Commerce Act.

	Australia	USA	Canada	UK	EU	New Zealand
Vertical arrangements: Resale price maintenance (RPM) Is RPM conduct prohibited without consideration of the anti-competitive effects?	Yes.	Varies depending on jurisdiction. At a federal level, RPM is not per se prohibited and is likely to be subject to a form of rule of reason analysis. Some US States (for example, California) treat minimum RPM as a per se contravention under their antitrust laws.	No. RPM conduct is competition tested. RPM conduct must have or be likely to have an adverse effect on competition in a market.	Yes.	Yes.	Yes.
Exceptions: Licensing and assignment of IP rights How is the licensing and assignment of IP rights treated under the competition law?	Specific exemptions to the restrictive trade practices provisions (other than misuse of market power and RPM) exist under the CCA.	The licensing and assignment of IP rights are considered under the general antitrust provisions. US regulators have established antitrust safety zones. If certain conditions are met, regulators will not challenge a licensing arrangement despite its potential anti-competitive effects.	No specific exemptions apply. The licensing and assignment of IP are considered under the general competition provisions, as well as a specific provision relating to the exercise of an IP right only.	The same as the position in the EU.	The licensing and assignment of IP are considered under the general competition provisions. Parties may rely on the EU technology transfer block exemption regulation which provides a safe-harbour for IP licensing arrangements where certain conditions are met.	Specific exemptions to the restrictive trade practices provisions (other than misuse of market power and RPM) exist under the Commerce Act.

APPENDIX C — TERMS OF REFERENCE

OVERVIEW

An effective competition framework is a vital element of a strong economy that drives continued growth in productivity and living standards. It promotes a strong and innovative business sector and better outcomes for consumers.

The Government has commissioned an independent 'root and branch' review of Australia's competition laws and policy in recognition of the fact that the Australian economy has changed markedly since the last major review of competition policy in 1993.

The key areas of focus for the review are to:

- identify regulations and other impediments across the economy that restrict competition and reduce productivity, which are not in the broader public interest;
- examine the competition provisions of the *Competition and Consumer Act 2010* (CCA) to ensure that they are driving efficient, competitive and durable outcomes, particularly in light of changes to the Australian economy in recent decades and its increased integration into global markets;
- examine the competition provisions and the special protections for small business in the CCA to ensure that efficient businesses, both big and small, can compete effectively and have incentives to invest and innovate for the future;
- consider whether the structure and powers of the competition institutions remain appropriate, in light of ongoing changes in the economy and the desire to reduce the regulatory impost on business; and
- review government involvement in markets through government business enterprises, direct ownership of assets and the competitive neutrality policy, with a view to reducing government involvement where there is no longer a clear public interest need.

SCOPE OF THE REVIEW

1. The Review Panel is to inquire into and make recommendations on appropriate reforms to improve the Australian economy and the welfare of Australians, not limited to the legislation governing Australia's competition policy, in regard to achieving competitive and productive markets throughout the economy, by identifying and removing impediments to competition that are not in the long-term interest of consumers or the public interest, having regard to the following principles and the policy priorities:
    1.1. no participant in the market should be able to engage in anti-competitive conduct against the public interest within that market and its broader value chain;
    1.2. productivity boosting microeconomic reform should be identified, centred on the realisation of fair, transparent and open competition that drives productivity, stronger real wage growth and higher standards of living;
    1.3. government should not be a substitute for the private sector where markets are, or can, function effectively or where contestability can be realised; and

1.4. the need to be mindful of removing wherever possible, the regulatory burden on business when assessing the costs and benefits of competition regulation.

2. The Review Panel should also consider and make recommendations where appropriate, aimed at ensuring Australia's competition regulation, policy, and regulatory agencies are effective in protecting and facilitating competition, provide incentives for innovation and creativity in business, and meet world's best practice.

3. The Review Panel should also consider whether the CCA and regulatory agencies are operating effectively, having regard to the regulatory balance between the Commonwealth and the States and Territories, increasing globalisation and developments in international markets, changing market and social structures, technological change, and the need to minimise business compliance costs, including:

3.1. considering whether Australia's highly codified competition law is responsive, effective and certain in its support of its economic policy objectives;

3.2. examining whether the operations and processes of regulatory agencies are transparent, efficient, subject to appropriate external scrutiny and provide reasonable regulatory certainty;

3.3. ensuring that the CCA appropriately protects the competitive process and facilitates competition, including by (but not limited to):

3.3.1. examining whether current legislative provisions are functioning as intended in light of actual experience and precedent;

3.3.2. considering whether the misuse of market power provisions effectively prohibit anti-competitive conduct and are sufficient to: address the breadth of matters expected of them; capture all behaviours of concern; and support the growth of efficient businesses regardless of their size;

3.3.3. considering whether areas that are currently uncertain or rarely used in Australian law could be framed and administered more effectively;

3.3.4. considering whether the framework for industry codes of conduct (with reference to State and Territory codes where relevant) and protections against unfair and unconscionable conduct, provide an adequate mechanism to encourage reasonable business dealings across the economy—particularly in relation to small business;

3.3.5. whether existing exemptions from competition law and/or historic sector-specific arrangements (e.g. conditional offers between related businesses and immunities for providers of liner shipping services) are still warranted; and

3.3.6. considering whether the National Access Regime contained in Part IIIA of the CCA (taking into account the Productivity Commission's recent inquiry) is adequate; and,

3.4. whether competition regulations, enforcement arrangements and appeal mechanisms are in line with international best practice, and:

3.4.1. foster a productive and cost-minimising interface between the Australian Competition and Consumer Commission (ACCC) and industry (for instance, through applications for immunity or merger clearances) that is simple, effective and well designed;

3.4.2. provide appropriate mechanisms for enforcement and seeking redress including:

- whether administration and enforcement of competition laws is being carried out in an effective, transparent and consistent way;
- whether enforcement and redress mechanisms can be effectively used by people to enforce their rights—by small businesses in particular; and
- the extent to which new enforcement powers, remedies or enhanced penalties might be necessary and appropriate to prohibit anti-competitive conduct, and

3.4.3. can adequately address competition issues in emerging markets and across new technologies, particularly e-commerce environments, to promote entrepreneurship and innovation.

4. The Review Panel should inquire into and advise on appropriate changes to legislation, institutional arrangements and other measures in relation to the matters below, having regard to the impact on long-term consumer benefits in relation to value, innovation, choice and access to goods and services, and the capacity of Australian business to compete both domestically and internationally. In particular, the Review Panel should:

4.1. examine the structure and behaviour of markets with natural monopoly characteristics with a view to determining whether the existing regulatory frameworks are leading to efficient outcomes and whether there are opportunities to increase competition;

4.2. examine whether key markets — including, but not limited to, groceries, utilities and automotive fuel — are competitive and whether changes to the scope of the CCA and related laws are necessary to enhance consumer, producer, supplier and retailer opportunities in those markets and their broader value chains;

4.3. consider alternative means for addressing anti-competitive market structure, composition and behaviour currently outside the scope of the CCA;

4.4. consider the impact of concentration and vertical integration in key Australian markets on the welfare of Australians ensuring that any changes to the coverage and nature of competition policy is consistent with national economic policy objectives;

4.5. identify opportunities for removing unnecessary and inefficient barriers to entry and competition, reducing complexity and eliminating administrative duplication; and

4.6. consider ways to ensure Australians can access goods and services at internationally competitive prices, including examining any remaining parallel import restrictions and international price discrimination.

5. The Review Panel should also examine whether government business activities and services providers serve the public interest and promote competition and productivity, including consideration of separating government funding of services from service provision, privatisation, corporatisation, price regulation that improves price signals in non-competitive segments, and competitive neutrality policy.

6. The Review Panel should consider and make recommendations on the most appropriate ways to enhance competition, by removing regulation and by working with stakeholders to put in place economic devices that ensure a fair balance between regulatory expectations of the community and self-regulation, free markets and the promotion of competition.

The Review Panel should consider overseas experience insofar as it may be useful for the review.

The Review Panel may, where appropriate, draw on (but should not duplicate or re-visit) the work of other recent or current comprehensive reviews, such as the Commission of Audit and the Cost-Benefit Analysis and Regulatory Review for the National Broadband Network.

The Review Panel should only consider the Australian Consumer Law (Schedule 2 of the CCA) and corresponding provisions in Part 2, Division 2 of the *Australian Securities and Investments Commission Act 2001*, to the extent they relate to protections (such as from unfair and unconscionable conduct) for small businesses.

PROCESS

The Review Panel is to ensure thorough engagement with all interested stakeholders. At a minimum, the Review Panel should publish an issues paper, hold public hearings and receive written submissions from all interested parties.

The Review Panel should subsequently publish a draft report and hold further public consultations, before providing a final report to the Government within 12 months.

Appendix D — List of Non-Confidential Submissions

All non-confidential submissions can be accessed at: http://competitionpolicyreview.gov.au.

Draft report submissions

ABB Australia	Abdulla, I	Accessible Publishing Systems Pty Ltd
ACM Parts	ACT Health	ACT Policing
Action for Public Transport NSW	Advisory Council on Intellectual Property	AGL Energy
Aguiar, A	AIPPI Australia	Aldi Stores
Alexander, D	Alinta Energy	Allen, R
ALM Group	Altman, G	American Bar Association
Anglican Church Diocese of Sydney	Anglicare Sydney	Anonymous
Anonymous Retailer	APA Group	Applied Medical
Arblaster, M	Argyropoulos, S	Arnold Bloch Leibler
Asciano	ASTRA	Ashurst
Australasian Association of Convenience Stores Limited	Australasian Performing Right Association Limited & Australasian Mechanical Copyright Owners' Society	Australasian Professional Society on Alcohol and other Drugs
Australian & International Pilots Association	Australian Automobile Association	Australian Automotive Aftermarket Association
Australian Automotive Dealer Association	Australian Booksellers Association Inc	Australian Chamber of Commerce and Industry
Australian Charities and Not-for-Profits Commission	Australian Chicken Growers Council	Australian Communications Consumer Action Network
Australian Competition and Consumer Commission	Australian Copyright Council	Australian Corporate Lawyers Association
Australian Council of Trade Unions	Australian Dairy Farmers	Australian Dental Association
Australian Diagnostic Imaging Association	Australian Digital Alliance & Australian Libraries Copyright Committee	Australian Drug Foundations
Australian Education Union	Australian Energy Market Commission	Australian Energy Market Operator
Australian Energy Regulator	Australian Food and Grocery Council	Australian Forest Products Association
Australian Health Promotion Association	Australian Imported Motor Vehicle Industry Association	Australian Industry Group
Australian Information Industry Association	Australian Institute of Company Directors	Australian Liquor Stores Association
Australian Local Government Association	Australian Logistics Council	Australian Motor Industry Federation
Australian National Retailers Association	Australian Newsagents Federation	Australian Peak Shippers Association

Australian Petroleum Production & Exploration Association	Australian Pipeline Industry Association	Australian Pork Limited
Australian Private Hospitals Association	Australian Property Institute (NSW Division)	Australian Publishers Association
Australian Rail Track Corporation	Australian Recording Industry Association	Australian Retailers Association
Australian Screen Association	Australian Society of Authors	Australian Sugar Milling Council
Australian Taxi Industry Association	Australian Union of Students	Australian United Retailers
Australian Unity	Australian Wagering Council	Australian Water Association
Auto Services Group	Bain, D	Baker & McKenzie
Baking Association of Australia	Ball, G	Beaton-Wells, C and Fisse, B
Benedetti, J	Bhagwati Australia	Bhela, A
BHP Billiton	Bi-Rite Roma	Board of Airline Representatives of Australia
Bond University	Boral	Brandrick, C
Bridge, H	Brimbank City Council	Brisbane City Council
Brooks, L	Brown, D	Brown, D C
Brown, J	Brown, P	Brown, T
Brownlie, P	Business Council of Australia	Business Council of Co-operatives and Mutuals
Business SA	Byrne, de Roos and Beaton-Wells	Caldwell, D
Cameron, S	Campervan and Motorhome Club of Australia	Cammarata, M
Camp, R	Cancer Council NSW	Canegrowers
Carr, E	Carter, R	Casper, Z
Catholic Social Services	Cement Industry Federation	Central Markets of Australia Association
Centre for International Finance and Regulation	Chamber of Commerce and Industry Queensland	Chemist Warehouse
Childers IGA	CHOICE	City of Melbourne
City of Port Phillip	City of Sydney Council	Clarke, J
Clarke, Professor P	Colac Otway Shire Council	Coles Group Limited
Colhoun, D	Comino, A	Commonwealth Director of Public Prosecutions
Communications Law Centre, UTS	Community and Public Sector Union	Community Employers WA
Consult Australia	Consumer Action Law Centre	Consumer Utilities Advocacy Centre
Consumers Federation of Australia	Consumers Health Forum	Copyright Agency
Corones, S	Costa, P	Council of Private Higher Education
Council of Small Business Australia	Council of Textile and Fashion Industries of Australia	Cowley, J
Cox, A	CPA Australia	Crawford, C

CropLife Australia	CSIRO	CSR Limited
CSR Limited (submission 2)	Cunningham, M	Customer Owned Banking Association
Daly, W	Davis, T	Denehy, M
Department of Communications	Department of Infrastructure and Regional Development	Djokov, A
Dodgshun, B	DomGas Alliance	Duke, A
Dunbar, A	eBay	Economic Regulation Authority
Edge, P	Electronic Frontiers Australia	EnergyAustralia
Energy Networks Association	Energy Supply Associations of Australia	Entwistle, B
Ergas, Professor H and Fels AO, Professor A	Ergas, Professor H & Pincus, Professor J	Family Business Australia
Federal Chamber of Automotive Industries	Financial Services Council	Ford Australia
Foundation for Alcohol Research and Education	Foxtel	Francis, A
Frontier Economics	G4S Australia	G&T Security
Garland, A	Glencore Coal Australia	Global Shippers' Forum
Goldsworthy, J	Google	Grain Producers SA
Greenpeace	Greeve, K	Growcom
Guppy, D	Hachette Australia	Hackett, M
Hamelink, F	Harper Collins Publishers Australia	Health Insurance Restricted and Regional Membership Association of Australia
Heaton, L	Heerey AM QC, P	Heiller, J
Helmore, B	Hoad, R	Hobson Bay Council
Hogg, N	Holden, A	Holiday and Short Term Rental Industry Association
Housing Industry Association of Australia	HoustonKemp	Ice Box Liquor
Iddon, K	IGA Cashmere	IGA Tugun Beach
IGA Walloon	IGA X-Press Alexandra Hills	IGA X-Press Kangaroo Point
iiNet	Independent Contractors Australia	Independent Schools Council of Australia
Independent Schools Victoria	Industry Super Australia	InfraShare Partners
Ingham Family Medical Practice	Institute of Patent and Trade Mark Attorneys of Australia	Institute of Public Accountants
Insurance Australia Group	Insurance Council of Australia	International Chamber of Shipping
IPART	Jacobs, A	Jemena
Jepson, P	Jepson, P (submission 2)	Jesuit Social Services
JMP Parties	Johnson, R	Joint Councils of Social Service
Jones Day	Jones, P	Just Vacuums
Just Vacuums (submission 2)	Justice & International Mission, Synod of Victoria & Tasmania, Uniting Church in Australia	Kay, D

Kemp, K	Kennedy, J	Kepnock Residents Action Group
Kiernan, T	King, T	Klerks, G
Kosta, P	Kouris, P	KPMG
Kypri, K	Lacey, J	Lanzon, R
Large Format Retail Association	Lateral Economics	Law Council of Australia — Competition & Consumer Committee
Law Council of Australia — IP Committee	Law Council of Australia — SME Committee	Lawrence, J
Lawrence, J (submission 2)	Leschen, R	Leslie, P
Local Government Association of Queensland	Local Government Association of Tasmania	Long, M
Long, P	Lynch Group QLD	Lynch, T
Mair, P	Maleli, V	Manly Council
Manson, A	Maribyrnong City Council	Marks Supa IGA
Marsden Jacob Associates	Master Builders Australia	Master Electricians Australia
Master Grocers Australia and Liquor Retailers Australia	MasterCard	Mattingley, R
McCusker Centre for Action on Alcohol and Youth	McDougall, G	McInnes, R
Mclean, G	McLeod, M	McManus, J
Medical Technology Association of Australia	Melbourne Airport	Menzies, G
Minter Ellison	Mitchelton IGA Express	Moir, H
Monash Business Policy Forum	Morgan, W	Morrison, C
Motor Trades Association of Queensland	Municipal Association of Victoria	Myer Holdings
National Alliance for Action on Alcohol	National Centre for Education and Training on Addiction	National Competition Council
National Disability Services	National Drug and Alcohol Research Centre	National Employment Services Association
National Farmers' Federation	National Insurance Brokers Association of Australia	National Irrigators' Council
National Organisation for Fetal Alcohol Spectrum Disorders	National Retail Association	National Roads and Motorists' Association
National Seniors Australia	Neal, J	New Generation Earthmoving Fabrications
New Zealand Commerce Commission	Nick's Supa IGA	Nolan, R
Noonans IGA Express/BP Ashgrove	Northern Territory Government	NSW Business Chamber
NSW Government	NSW Irrigators' Council	NSW Small Business Commissioner
NSW Taxi Council	O'Donnell, C	Office of the Australian Small Business Commissioner
Office of the Gene Technology Regulator	Om Mahalaxmii Pty Ltd	Optus

Origin Energy	Orr, K	Our Children, Our School
Packer, B	Palmer, M	Parrella, R
Partnering for Transformation	Pattenden, B	Pedersen, M
Penguin Random House	Pharmaceutical Society of Australia	Pharmacy Guild of Australia
Phibbs, P	Piercy, D	Planning Institute of Australia
Plastics and Chemicals Industries Association	Poulier, M	Pratap, R
Priestley, C	Prince Supermarkets	Printing Industries Association of Australia
Public Health Association of Australia	QBE	Queensland Competition Authority
Queensland Consumers Association	Queensland Government	Queensland Hotels Association
Queensland IGA State Retail Board	Queensland Law Society	Queensland Nurses' Union
Queensland Writers Centre	Quinn, N	Raitt, G
Ramsay Health Care	RAWS Association	RBB Economics
Real Estate Institute of Australia	Regional Victorian not-for-profit agencies	Retail Guild of Australia
Rio Tinto	Ritchies Stores	Robin Room
Rodger, I	Rose, G	Roseworne, D
Roy Hill Infrastructure	Royal Australasian College of Physicians	Rushbuey, G
Russell Family Fetal Alcohol Disorders Association	Ryans Supa IGA	Rykris Pty Ltd
SA Network of Drug and Alcohol Services	Sandeva, V	Sandeva, V (submission 2)
Sandham, J	Santos Retail	Seafood Industry Victoria
Seddon, N	Shipping Australia Limited	Shop Distributive and Allied Employees' Association
Shopping Centre Council of Australia	Sidney, J	Sigma Pharmaceuticals
Slaughter, T	Small Business Development Corporation	Smith, D
South Australian Freight Council Inc	South Australian Government	South Australian Independent Retailers
Spier Consulting Legal	Spinifex Press	Standards Australia Ltd
Stanley, M	Steensby, W	Steinwall, R
Stevenson, H	Stevenson, H (submission 2)	Stewart, I
Suncorp Group	Supa IGA Maryborough	Supa IGA Pialba
Surf Beach IGA	Sydney Alliance for Community Building	Tack, S
Tasmanian Government	Tasmanian Small Business Council	Taxi Council Queensland
Ted Noffs Foundation ACT	Telstra	Text Publishing Company
The Australian Chamber of Fruit and Vegetable Industries	Toys and Things	Thomas, R

Thompson, G	Thurley, D	Trad, K
Transport Reform Network	Tree Contractors Association Australia	Turner, I
Tyro Payments Limited	Uber	Unions NSW
Uniting Care Australia	UnitingCare Queensland	Urban Development Institute of Australia
Van de Zandt, A	Vector Limited	Vellenoweth, L
Ventura Health	Veryzer, J	VicHealth
Victorian Alcohol and other Drug Association	Victorian Caravan Parks Association	Victorian Local Governance Association
Victorian Small Business Commissioner	Virgin Australia	Vodafone Hutchison Australia
WA Independent Grocers Association	Walton, F	Water Services Association of Australia
Watson, T	Wesfarmers	Westbury's Mundingburra IGA
Western Australian Local Government Association	Western Australian Network of Alcohol and other Drug Agencies	White's Grocers
Whitehead, R	Whittaker, J	Whitten, M
Williams, S	Wilson, J	Woodward, L & Rubinstein, M
Woolley, K	Woolworths Limited	Wright, D
Wright, J	Wright, J (submission 2)	Wylie, I
Zodins, K		

ISSUES PAPER SUBMISSIONS

ABB Australia	Accountants and More	ADJ Consultancy Services
Agforce QLD	AIMIA Digital Policy Group	ALDI Stores
American Bar Association	AMMA Workplace Consultancy	Anglo American Metallurgical Coal
Anonomous, P	Anonymous childcare	Anonymous retailer
Appco Group Australia	Applied Medical	Arblaster, M
Arnold Bloch Leibler	Asciano	ASX
Aurizon Holdings Limited	AURL (FoodWorks)	AusBiotech
Australasian Association of Convenience Stores	Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners' Society	Australia Marketing Pty Ltd
Australian Airports Association	Australian Automobile Association	Australian Automobile Association (updated submission)
Australian Automotive Dealer Association	Australian Chamber of Commerce and Industry	Australian Chicken Growers' Council Limited
Australian Clinical Psychologists	Australian College of Theology	Australian Communications Consumer Action Network
Australian Competition and Consumer Commission	Australian Competition and Consumer Commission (submission 2)	Australian Competition and Consumer Commission (submission 3)
Australian Competition and Consumer Commission (submission 4)	Australian Conservation Foundation	Australian Copyright Council
Australian Corporate Lawyers Association	Australian Council of Trade Unions	Australian Dairy Farmers Limited
Australian Dental Association Inc.	Australian Dental Industry Association	Australian Diagnostic Imaging Association
Australian Digital Alliance and Australian Libraries Copyright Committee	Australian Education Union	Australian Energy Market Commission
Australian Energy Regulator	Australian Food and Grocery Council	Australian Forest Products Association
Australian Friendly Societies Pharmacies Association	Australian Healthcare and Hospitals Association	Australian Hotels Association
Australian Industry Group	Australian Information Industry Association	Australian Institute of Petroleum
Australian International Movers Association	Australian Lawyers for Human Rights	Australian Liquor Stores Association
Australian Motor Industry Federation	Australian National Retailers Association	Australian Network of Environmental Defender's Offices
Australian Newsagents' Federation	Australian Organisation for Quality	Australian Payments Clearing Association
Australian Peak Shippers Association Inc.	Australian Petroleum Production and Exploration Association	Australian Physiotherapy Association
Australian Pipeline Industry Association	Australian Prawn Farmers Association	Australian Private Hospitals Association

Australian Recording Industry Association	Australian Retailers Association	Australian Society of Authors
Australian Subscription Television and Radio Association	Australian Taxi Industry Association	Baker and McKenzie
Baxt, B AO	Beadman, B	Beaton-Wells, C
Beaton-Wells, C and Fisse, B	Beck, K R	Bendigo and Adelaide Bank, BOQ, ME Bank and Suncorp Bank
BHP Billiton (updated submission)	Birve, A	Board of Airline Representatives of Australia
Bond University	Border, A	Brewers Association of Australia and New Zealand Inc.
Bright, S	Bus Industry Confederation	Business Council of Australia
Business Council of Australia (submission 2)	Business Council of Cooperatives and Mutuals	Business SA
Cabfare	Callaghan, J	Caltex Australia Limited
Canegrowers	CBH Group	Cement Concrete and Aggregates Australia
Cement Industry Federation	Chamber of Commerce and Industry Queensland	Chamber of Commerce and Industry (WA)
Chemist Warehouse	Chi-X Australia	CHOICE
Cider Australia	City of Whittlesea	Clarke, G
Clean Energy Council	Coles Group Limited	Collins, C
Combined Small Business Alliance of WA	Community and Public Sector Union	Community Employers WA
Complementary Healthcare Council of Australia	Construction Material Processors Association	Consult Australia
Consumer Action Law Centre	Consumers Health Forum of Australia	Consumers Health Forum of Australia (supplementary)
Consumers SA	Consumers SA (updated submission)	Consumers' Federation of Australia
Copyright Agency	Council of Private Higher Education Inc.	Council of Small Business Organisations of Australia
CPA Australia	Credit Ombudsman Service Limited	CSR Limited
Customer Owned Banking Association	Direct Selling Association of Australia	Discover Murray River
Drakes Supermarkets	Duke, A	eBay
Edge, P	EnergyAustralia	Energy Networks Association
Energy Retailers Association of Australia	Energy Supply Association of Australia	Eqalex Underwriting Pty Ltd
Federal Chamber of Automotive Industries	Federation of National Associations of Ship Brokers and Agents	Fels AO, Professor A
Fels AO, Professor A, Taylor, N J and Smith, P J	Fletcher, M	Forest Industries Federation (WA)
Fortescue Metals Group Limited	Foundation for Alcohol Research and Education	Foxtel
Fraser, B	Friends of Hawker Village	Gale, N

Glencore Coal Australia	Global Shippers' Forum	Google Australia
Government of South Australia	GrainGrowers	Greenpeace Australia, Wilderness Society, OXFAM Australia, GetUp!, Voiceless, Friends of the Earth, AidWatch
Griffith and District Citrus Growers' Association	Griggs, L & Nielsen, J	Hawkins, M
Henderson MP, S	Herbert Smith Freehills	Housing Industry Association
Hutchison Ports Australia	in tempore Advisory	Independent Supermarket Retailers Guild of SA
Industry Super Australia	Institute of Chartered Accountants Australia	Institute of Public Accountants
Institute of Public Accountants (submission 2)	Insurance Australia Group	Insurance Council of Australia (updated submission)
International Bar Association (Antitrust Committee)	International Chamber of Shipping	International Container Lines Committee (NZ)
IPART	ITS Global	Jedlickova, B
Jewellers Association of Australia	Jones Day	Jones Day (submission 2)
Kagome Australia	Kelly, V	Kemp, K
Kepnock Residents Action Group	Kudis, R	Large Format Retail Association
Laskowska, M	Law Council of Australia — Competition & Consumer Committee	Law Council of Australia — IP Committee
Law Council of Australia — SME Committee	Law Council of Australia — SME Committee (submission 2)	Lawson, C
LCH.Clearnet	Lloyd, J	Lottery Agents Association of Tasmania
Mair, P	Margetts, D	Master Builders Australia
Master Builders Australia (submission 2)	Master Builders Australia (submission 3)	Master Grocers Australia
McCusker Centre for Action on Alcohol and Youth	Medibank Private	Merger Streamlining Group
Metcash Limited	Miller, I	Minerals Council of Australia
Minter Ellison	Momentum Energy	Monash Business Policy Forum
MTA Queensland	Municipal Association of Victoria	Narulla, H
National Alliance for Action on Alcohol	National Australia Bank	National Competition Council
National Disability Services	National Electrical and Communications Association	National Farmers' Federation
National Insurance Brokers Association of Australia	National Roads and Motorists Association	National Seniors Australia
NBN Co	Nehme, M and Laman, J	Nelson, D
News Corp	NPS MedicineWise	NSW Business Chamber
New South Wales Government	NSW Taxi Council	O'Donnell, C
Office of the Small Business Commissioner	Optometry Australia	Origin Energy Limited
Palermo, V A	Papworth, A	Pharmacy Guild of Australia

Paramedical Services Pty Ltd	Pharmaceutical Society of Australia	Phonographic Performance Company of Australia
Planning Institute of Australia	Plastics and Chemicals Industries Association	Priestley, C
Priestley, C (submission 2)	Printing Industries Association of Australia	Productivity Commission
Proud, K	QBE	Queensland Competition Authority
Queensland Dairyfarmers Organisation	Queensland Farmers' Federation	Queensland Law Society
Raitt, G	RBB Economics	Recruitment and Consulting Services Association
Restaurant & Catering Australia	Retail Guild of Australia	Rhydderch, A
Rio Tinto	Ron Finemore Transport	Rosenwald, A
Routledge, J	RSPCA Australia	Runacres, S
Seddon, N	Shipping Australia Ltd	Shop Distributive and Allied Employees Association
Shopping Centre Council of Australia	Sigma Pharmaceuticals Limited	SingTel Optus Pty Ltd
Slavery Links Australia	Small Business Development Corporation, WA	SP AusNet
Spalding, N	SPAR Australia Limited	Spier Consulting
Spier Consulting (second submission)	Standards Australia	Stanley, M B
Stern, S	Stewart, I	Summerfield, M
Suncorp Group	Sydney Airport Corporation Limited	Symbion Pharmacy Services
Tasmanian Farmers and Graziers Association	Tasmanian Government	Tasmanian Small Business Council
Telstra Corporation Limited	Terceiro Legal Consulting	The Australia Institute
The Co-Op	The Industry Group	The Infrastructure Group
Truman Hoyle	United Energy and Multinet Gas	United States Federal Trade Commission
Uniting Church in Australia	Urban Development Institute of Australia	Urban Taskforce Australia
Victorian Branch of the Australian Dental Association	Vodafone Hutchison Australia	Voiceless
WA Independent Grocers Association	Walker, M	Water Services Association of Australia
Wesfarmers Limited	Wildlife Tourism Australia	White's Grocers
Wills-Johnson, N	Wishart, D	Woodward L & Rubinstein M
Woolworths Ltd	Zoo and Aquarium Association	