



AUSTRALIAN CHAMBER OF
COMMERCE AND INDUSTRY



Response to Competition Policy Review-Final Report

May 2015

**The Australian Chamber of Commerce and Industry
is the leading voice of business in Australia**

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CONTENTS

Contents	3
Introduction	6
1. COMPETITION POLICY	8
1.1 Competition Principles and Regulation Review	8
1.2 Human Services	9
1.3 Parallel Imports	10
1.4 Competitive Neutrality	10
1.5 Government Procurement	11
1.6 Informed Choice	12
2. COMPETITION LAWS	13
2.1 Misuse of Market Power	13
2.2 Secondary Boycotts	13
2.3 Trading Restrictions in Industrial Agreements	16
3. SMALL BUSINESS	18
3.1 Small Business Access to remedies	18
4. INFRASTRUCTURE MARKETS	21
4.1 Road Transport	21
4.2 Liner Shipping	22
4.3 Cabotage – Coastal Shipping	22
5. COMPETITION INSTITUTIONS	24
5.1 Formation of National Competition Body	24
5.2 ACCC Governance	25
6. OTHER FINAL RECOMMENDATIONS	26

7.	ABOUT ACCI	27
7.2	Who We Are	27
7.3	What We Do	27
	ACCI MEMBERS	29

INTRODUCTION

The Australian Chamber of Commerce and Industry (ACCI) welcomes the release of the Competition Policy Review Final Report and the opportunity provided by the Government to comment on the Inquiry Panel's (Panel) final recommendations.

ACCI made an initial submission to the Competition Policy Review, in June 2014, in response to the Issues Paper.¹ ACCI made a further submission in response to the Competition Policy Review Draft Report in November 2014.² A significant number of the Panel's draft recommendations were consistent with our initial stated positions. The views expressed in this submission should be read in conjunction with ACCI's earlier submissions.

Competition law and policy is broad reaching and covers many aspects of the Australian economy. ACCI's submissions have focussed on areas which are most relevant to the interests of our members. ACCI consulted widely with its members in reaching a view on the matters covered in its submissions. These consultations included meetings, round-table discussions, one-on-one discussions and broad based requests for information. More generally, ACCI's submissions support a comprehensive review and reform of existing competition and regulatory framework. ACCI believes that regulatory reform and red-tape reduction are vital to reduce the costs of doing business, for all businesses in general and small to medium sized businesses in particular. Poorly formulated and implemented regulation can act as an effective barrier to entry. ACCI's prior submissions on regulatory reform have consistently advocated that all new regulation should be introduced with a comprehensive Regulation Impact Statement.

ACCI concurs with the Panel that is imperative to introduce a new round of microeconomic reform for sustainable economic growth in Australia. The key recommendations in the Final Report, which ACCI supports, relate to increasing competition and choice in human services; reviewing the competitive neutrality framework; adopting cost reflective road pricing; providing small business with access to remedies; repealing anti-competitive provisions regarding liner shipping, cabotage and parallel imports; reviewing government policies on procurement; and facilitating informed consumer choice. The key competition law reforms which ACCI supports include those pertaining to misuse of market power, secondary boycotts, and trading restrictions in industrial agreements.

ACCI supports proposals to maintain prohibitions in the *Competition and Consumer Act 2010* (CCA) in relation to secondary boycotts and the recommendation that the ACCC commit to enforcing the secondary boycott provisions with increased vigour. The practice of using secondary boycotts warrants close ongoing attention and complementary reforms. ACCI also supports amendments to the CCA to expressly prohibit enterprise agreements from containing terms restricting the engagement of

¹ [ACCI Submission – Competition Policy Review –Issues Paper, June 2014.](#)

² [ACCI Submission – Competition Policy Review - Draft Report , November 2014](#)

contractors. Such practices are anti-competitive and the ACCI's capacity to address this behaviour warrants enhancement.

ACCI does not support the recommendation to abolish the role of the Small Business Commissioner at the ACCC. ACCI believes that the office of the Small Business Commissioner enables the ACCC to maintain a strong focus on developing a competition law and policy framework relevant to the specific needs of small business. The role of the Small Business Commissioner is vital to maintain the existing momentum of the ACCC's small business activities.

ACCI supports the Panel's recommendation for the creation of a new national competition body – the Australian Council for Competition Policy (ACCP). This body should be accountable to the Federal Government and the States and Territories. It should be tasked with monitoring progress in implementing competition policy reforms and making further recommendations in relation to the need for any further reforms. ACCI supports the need for the ACCP to be invested with powers to undertake market studies, both independently but also at the request of all Governments and other stakeholders including small business and the ACCC. ACCI supports the Panel's recommendation for the ACCP to undertake an annual competition analysis. ACCI however also believes that none of these provisions should in any way diminish the ACCC's role as an advocate for competition policy reform.

1. COMPETITION POLICY

1.1 Competition Principles and Regulation Review

Recommendation 1 – Competition Principles

ACCI supports recommendation 1.

Comment: ACCI concurs with the Panel that competition law and policy should be instrumental in driving the reform agenda. Further, that the legal and regulatory framework should not restrict competition. Government policy should allow for consumer choice and diversity in the provisions of services. The Government entities which compete with the private sector should be subject to competitive neutrality principles. ACCI shares the Panel's view that collectively these measures will promote the long term interest of consumers.

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.

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 with a focus on the outcomes achieved rather than processes undertaken.

ACCI supports recommendation 8.

Comment: ACCI firmly believes that regulatory reform and red tape reduction are vital to reduce the costs of doing business for all businesses in general and small to medium sized businesses (SMEs), in particular. ACCI supports the Panel's recommendation to introduce a 'public interest test' into the regulatory/legal framework and timetables for the reform process. ACCI further supports the Panel's recommendation to set up the Australian Council for Competition Policy and to task it with undertaking these reviews (see below 5.1)

ACCI believes that while well targeted and designed regulation can deliver beneficial economic, social and environmental outcomes, poorly formulated and implemented regulation can act as an effective barrier to entry and expansion by exposing businesses to excessive compliance costs. High compliance costs stifle market competition and distort resource allocation in the economy. The economic costs from 'distortions' arise due to:

- substitution effects resulting from changes in relative prices, leading to the distortion of investment decisions; and
- overly prescriptive regulation, which prevents innovative or lower cost approaches to meeting the intended outcomes of the regulation.

These 'distortions' generally arise when regulation is overly complex, redundant, and duplicates the regulation of other jurisdictions or other regulatory bodies. To ensure that regulation delivers the greatest net benefit to the economy, it needs to be well designed, to avoid imposing any unnecessary red-tape burden on businesses.

1.2 Human 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.

ACCI supports Recommendation 2

Comment: ACCI supports the Panel's view that introducing competition policy in the provision of human services, by lowering barriers to entry and enhancing efficiency through innovation, will benefit the community. The 'presumption of choice' will have a positive impact on the delivery of human services by allowing service

providers to become more responsive to the specific needs of customers. ACCI further concurs with the Panel that the Government's stewardship of human services should not be limited to service provision but include the development of a policy and regulatory framework which will be reviewed under the proposed 'public Interest' test. ACCI believes that this recommendation is about providing the best outcomes for consumers of government services and ensures that businesses that interact with Government do not face a competitive disadvantage.

1.3 Parallel Imports

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.

ACCI supports Recommendation 13

Comment: ACCI re-affirms its support for this recommendation. In its submission to the draft report, ACCI stated that parallel import restrictions can act as de facto trade barriers and can suppress competition beyond what is necessary to protect intellectual property. In any case, given the rapidly changing nature of technology many of these restrictions can be overcome directly by consumers. ACCI further stated that to the extent that products are homogenous it supported removal of parallel import restrictions. However, for food and formulated chemical-based products (for example, household chemicals and cosmetics), international manufacturers may essentially sell different products in different parts of the world under the same label. Subject to a review of enforcement requirements, ACCI does not object to removal of parallel import restrictions if other effective means of addressing these issues are available that do not restrict competition.

1.4 Competitive Neutrality

Recommendation 15 - Competitive Neutrality Policy

Recommendation 16 – Competitive Neutrality complaints

Recommendation 17 – Competitive Neutrality reporting

ACCI supports recommendation 15, 16, and 17

Comment: As per its earlier submissions, ACCI strongly supports the recommendation to review the competitive neutrality framework. Guidelines should be prepared and regularly updated. Further, a transparent framework needs to be developed in relation to the complaints process and competitive neutrality

compliance. ACCI concurs with the Panel that an independent body should be entrusted with investigating complaints and should provide the proposed ACCP with an annual report on the number of complaints received and the investigations undertaken.

The Panel has identified aspects of the competition law framework which artificially restrict competition. For example, the Panel has identified that Governments that engage in commercial transactions should be subject to the same competitive law framework as the private sector. Applying competition policy principles to the public sector will ensure that government services are as efficient and effective as possible. This is in the long term interest of consumers.

1.5 Government Procurement

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.

ACCI supports recommendation 18

Comment: In addition to supporting Recommendation 2 (Human Services) and Recommendations 15, 16 & 17 (Competitive Neutrality), ACCI concurs with the Panel that Government procurement actions can have material impact on service delivery and competition.

ACCI concurs with Panel that choice and diversity of providers should be a key element of the framework developed for procurement, PPP and privatisation. Finally ACCI concurs with the Panel that the proposed ACCP should be entrusted with reviewing if these processes are compliant with competition principles

ACCI believes that the Governments' role is to facilitate investment in infrastructure; encourage competition and contestability and establish sound regulatory regimes to protect consumers. Privatisation is likely to provide the greatest benefits when the infrastructure sector is subject to market based competition. This issue becomes critical when a monopoly service provider is privatized. In such a scenario it is vital to develop a regulatory and pricing framework to ensure that the private sector entity does not abuse its market power. Historically, governments have argued that they need to retain ownership because of concerns that private owners of such assets would increase prices and earn monopoly profits. However, appropriate regulation

can prevent abuse of monopoly power. For example, regulators can monitor price increases periodically or they can set fixed five-year price paths. In any transfer of assets to the private sector, Governments often include a range of additional, asset-specific requirements with which the new owner must comply. These requirements may be applied through specifying certain licence requirements and management plans for a range of quality standards and community requirements. The decision to privatise should not be driven solely by the amount of money raised by privatisation, although the Government should ensure it receives a fair price. Rather, the aim should be to achieve the most efficient investment and providing the greatest net social benefit.

1.6 Informed Choice

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.

ACCI supports recommendation 21

Comment: ACCI believes that in order for markets to work efficiently it is vital for consumers to make informed choices about the goods and services available to them. This recommendation supports recommendation 2 regarding the choice in human services. ACCI believes that collectively these measures are in the long term interest of consumers.

2. COMPETITION LAWS

2.1 Misuse of Market Power

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..

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

ACCI supports Recommendation 30

Comment: Section 46 is the main provision of Australia's competition law that deals with the unilateral conduct of a single business. The new section would prohibit a business with substantial market power from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition, and would require the court identifying this conduct to balance a range of pro-competitive and anti-competitive purposes and effects. An entity with substantial market power may engage in activities which have both a pro-competitive and anti-competitive aspects. The difficulty in developing an appropriate legal provision arises from the fact the law needs to capture unilateral anti-competitive conduct and not the limit the competitive process. ACCI concurs with the Panel that the proposed reforms to section 46 will improve its effectiveness so that it prevents unilateral conduct which substantially harms competition and cannot be justified on economic grounds. ACCI concurs with the Panel that to prevent 'over-capture' there is a need for further legislative guidance on how the test would work in practice.

2.2 Secondary Boycotts

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.

ACCI supports Recommendation 36

Comment: As per its earlier submissions, ACCI supports the proposals to maintain the prohibitions in the CCA in relation to secondary boycotts. ACCI further supports the recommendation that the ACCC commit to enforcing the secondary boycott provisions with 'increased vigour' and provide transparent and consistent annual reporting with respect to its enforcement activities.

ACCI concurs with the Panel's view that timely and effective public enforcement has a deterrent effect. The Interim Report of the Royal Commission into Trade Union Governance and Corruption (Royal Commission Interim Report) also suggests a need to consider possible improvements in relation to the administration of the law by both regulators and courts.

ACCI believes that more frequent and timely reporting in relation to enforcement activity will improve the effectiveness of the current provisions and will also provide a means of measuring the progress of the ACCC in enhancing its approach to enforcement. Consistent with its earlier submissions, ACCI recommends that approximately one year after the reporting mechanisms have been in place, a further review should be conducted to determine the effectiveness of the new provisions.

ACCI can see no reason why the maximum penalty for secondary boycotts should be at a level lower than penalties for other breaches of the competition law. In order for penalties to be an effective deterrent, the penalty levels must be appropriately set. They are not currently serving as an effective deterrent.

The Royal Commission Interim Report has also suggested at page 1106 that there 'may be a number of deficiencies with the existing regulatory framework in relation to secondary boycotts', drawing attention to the CFMEU's conduct in relation to Boral. In describing the conduct of the CFMEU toward Boral, the Interim Report states:

In the present case, the CFMEU had two purposes in engaging in the ban of Boral. One was to cause substantial damage to Boral so as to intimidate it into stopping supply to Grocon. The second was, by intimidating Boral into ceasing supply to Grocon, to cause substantial damage to Grocon...

...

Plainly, the actual loss suffered by Boral from the CFMEU's conduct may be substantial. Boral estimates it has suffered loss of between \$8-\$10 million to the end of June 2014. It has clearly lost many orders of concrete...³

The Interim Report demonstrates a clear need for strengthened law to deal with the anti-competitive conduct described and states:

In particular, the conduct suggests the existence of the following possible problems:

- (a) The ineffectiveness of the current secondary boycott provisions in ss 45D and 45E of the Competition and Consumer Act 2010 (Cth) to deter illegal secondary boycotts by trade unions.*
- (b) The absence of specific provisions making it unlawful for the competitors of the target of a secondary boycott knowingly to supply a product or service in substitute for a supply by the target.*
- (c) An inability or unwillingness by the regulatory authorities to investigate and prosecute breaches of the secondary boycott provisions by trade unions speedily. There may be a number of root causes for this problem: difficulties in obtaining documentary evidence, lack of co-operation of witnesses who may fear repercussions from giving evidence, the potential overlap between the roles of a number of regulators and difficulties in ensuring compliance with court orders made in relation to secondary boycott conduct.*
- (d) 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. The Byzantine complexity of the law of contempt, and its ineffectiveness to deter secondary boycott conduct by a trade union, is amply demonstrated by the contempt proceedings commenced by Grocon and Boral in the Victorian Supreme Court.*
- (e) 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.*
- (f) 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.⁴*

The Interim Report also states at page 1114:

A legal system which does not provide swift protection against the type of conduct which Boral alleges it has suffered at the hands of the CFMEU, and which does not have a mechanism for the swift enforcement of court orders, is fundamentally defective. The defects are so great as to make it easy for those whose goal is to defy the rule of law. The defects reveal a huge problem for the Australian state and its numerous federal, State and Territory

³ Interim Report, p. 1083.

⁴ Interim Report, pp. 1107-1108.

emanations. The defying of the Victorian Supreme Court's injunctions for nearly two years, and the procedural history outlined above, will make the Australian legal system an international laughing stock. A new form of 'sovereign risk' is emerging – for investors will not invest in countries where their legal rights receive no protection in practice. At least so far as the courts are concerned, it may be appropriate for consideration to be given to procedures which ensure the swift determination of contempt applications, complemented where necessary by appropriate court rules and legislation.

While the Panel's recommendations are supported, the practice of using secondary boycotts as an industrial weapon clearly warrants close ongoing attention, particularly in the building and construction industry where such behaviours have inflicted significant damage.

Previous Royal Commissions have uncovered allegations of wilful defiance, disregard or contempt of the law by unions and there is evidence that such behaviours have not been adequately addressed by the current framework. A strong and effective legislative framework is required to address such behaviour beyond the recommendations made by the Panel, including reinstatement of a specialist regulator for the building and construction industry as has long been advocated by ACCI in submissions made in relation to other reviews and inquiries. The culture of industrial lawlessness that has been reported in multiple Royal Commissions and which regrettably appears to be continuing in the building and construction industry warrants specific regulatory attention and has significant economic and social consequences.

2.3 Trading Restrictions in Industrial Agreements

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.

ACCI supports Recommendation 37

ACCI supports recommendation 37 which is in line with ACCI's recommendation to amend the CCA to prohibit enterprise agreements from containing terms which restrict the engagement of contractors. Such legislative amendment would align with the objectives of the CCA by enhancing competitiveness, notwithstanding that the offensive provisions may appear within an agreement that otherwise deals with employee relations.

ACCI also supports the recommendation to provide the ACCC with a right to intervene in Fair Work Commission proceedings concerning compliance with sections 45E and 45EA. Practical measures will be required to enable the ACCC to become aware of agreement approval proceedings concerning compliance with sections 45E and 45EA and to ensure it is appropriately resourced to intervene.

ACCI shares the Panel's view that 'businesses should generally be free to supply good and services, including contract labour, should they choose'. ACCI's earlier submissions highlighted that restrictions on legitimate, productive and flexible forms of labour engagement cannot be sustained and urgent action is required to address these anti-competitive practices.

ACCI also maintains that amendment must be made to the *Fair Work Act 2009* (Cth) to deal with enterprise agreements seeking to restrict the engagement of contractors by:

- amending the definition of 'permitted matters' under section 172 of the FW Act so that the terms of enterprise agreements are strictly limited to matters pertaining to the employment relationship; and
- tightening the list of 'unlawful terms' contained in section 194 of the FW Act to make it clear that unlawful matters include matters which are not "permitted matters" and in particular terms which seek to restrict the engagement of contractors.

3. SMALL BUSINESS

3.1 Small Business Access to remedies

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.⁵

ACCI supports Recommendation 53

Comment: ACCI supports the Panel's recommendation that the ACCC should take a more active approach in connecting small business to alternative dispute resolution mechanisms where it considers complaints have merit but are not a priority for public enforcement. ACCI appreciates that the ACCC does not have the resources to

⁵ Productivity Commission 2014, [Access to Justice Arrangements](#), Inquiry Report No. 72, Canberra.

commence investigations in relation to most small business matters notified to it. Further, that small businesses lack the financial and logistical resources to pursue any formal legal action on their own. ACCI therefore believes that is essential to develop an alternative dispute resolution framework that provides quality information, quickly, informally and at low cost. This is essential to improving productivity for small business. This could be achieved through the appointment of a Small Business and Family Enterprise Ombudsman (SBFEO).

ACCI notes the Panel's comment that the process for the establishment of a SBFEO is likely to be completed by 1 July 2015. The SBFEO can perform a useful service by referring small businesses to an appropriate existing service for a resolution of their dispute. The SBFEO can also provide information and advice to small businesses about their options to have such disputes resolved. The SBFEO should not directly provide dispute resolution services that are currently provided by State and Territory Small Business Commissioners or the Commonwealth Ombudsman but should be given powers to perform investigations and refer disputes to the appropriate authorities. The SBFEO could collect useful data and provide formal avenues for review and policy advocacy within government. The SBFEO could be authorised to undertake research using this data and present findings and recommendations to Commonwealth, State and Territory governments for policy changes or target areas for the ACCC to focus their attention. The data and research could form the basis of an annual report by the SBFEO to be tabled in the Commonwealth Parliament. The data would also enable organisations like ACCI and its members to provide better informed representation to government agencies

ACCI further notes the Panel's comment that the process for extending unfair contract terms for small business contracts is underway. The Commonwealth Government has put out draft legislation to provide small businesses with protection against unfair contract terms.⁶ ACCI appreciates the need for legislative protections for small business in relation to unfair contract terms where there is 'unequal' bargaining power between the entities concerned. The existing legal framework largely addresses 'unfair' business dealings rather than 'unfair' contract terms. ACCI further appreciates that the costs associated with legal due diligence of low-value standard form contracts, often far exceed the benefits. This may result in small businesses forgoing critical commercial opportunities. However, while ACCI supports the introduction of unfair contract term protections for small businesses it encourages the Government to reconsider the scope of the proposed legislative provisions. ACCI believes that small business to small business contracts should not be included in the proposed regime. ACCI believes that the threshold criterion of 'unequal' bargaining power is unlikely to arise in contractual negotiations between small businesses. Such a situation is more likely to arise in the instance of small business negotiations with medium to large business entities

The Panel does not canvass any options nor make any direct recommendations to improve small business access to finance. ACCI believes that recommendations 43 and 44 in relation to the establishment and role of the Australian Council for

⁶ Exposure Draft Legislation – *Small Business and Unfair Contract Terms Bill 2015*

Competition Policy (see below: s 5.1), along with recommendations 45, 46 and 47 in relation to market studies and annual competition analysis, provide an avenue to assess credit conditions for households and businesses.

4. INFRASTRUCTURE MARKETS

4.1 Road Transport

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.

ACCI supports Recommendation 3

Comment: ACCI believes that user charging is suitable for infrastructure assets where end-users can easily be charged for their use. The services provided by these assets are essentially similar to private goods as opposed to so-called 'public goods'. User charges are commonly used for transport, water and electricity services. There are well-functioning markets in these sectors and these market-based approaches should be utilised wherever possible. Where user charging is not feasible or the cost is prohibitive, value capture methods provide an alternative to ensure the beneficiaries directly contribute to the provision of infrastructure. Value capture methods are only suited to projects that will have a direct impact on land prices. These can include urban public transport projects or local infrastructure for new housing developments, for example.

Infrastructure funding ultimately comes from two sources. These are either taxpayers or the end-users of infrastructure. Government borrowing merely shifts the burden from current to future generations of taxpayers.

A common argument is that public provision and funding of infrastructure is a way to avoid having to provide a return to the private sector through user charging. However when the costs of taxation are taken into account, it is likely that these outweigh the costs associated with direct user charging. The use of tax finance or public debt often involves a cross-subsidy.

This is not to say that taxpayers, through governments, should never invest in infrastructure. Taxpayer investment can and should occur when there is a clear and demonstrable market failure that outweighs any potential government failure and after a thorough cost benefit analysis has been undertaken. However, even in these instances, partnerships with the private sector should be undertaken to reduce the development and operating costs associated with the project.

Further, an intergenerational transfer (through government borrowing) may be economically reasonable, given the fact that infrastructure assets typically deliver a flow of benefits for several decades to come.

The key point is that funding (both for construction and operation) should come from those who are most likely to benefit from the infrastructure directly. This can be achieved in various ways, depending on the type of asset involved.

4.2 Liner Shipping

Recommendation 4 — Liner shipping

Part X of the CCA should be repealed.

ACCI supports Recommendation 4

Comment: As per its submission to the draft report, ACCI concurs with the Panel that Part X of the CCA should be repealed on the basis that it predicates anti-competitive conduct amongst international liner shipping. International shipping is central to many countries' domestic and international economic policies. It is one of a few truly international industries and many nations consider it central to the competitiveness of their export sector and therefore include it in domestic policy regulation. It is vital therefore that the liner shipping industry is subject to the provisions of the CCA.

4.3 Cabotage – Coastal Shipping

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 outweighs the costs, and the objectives of the government policy can only be achieved by restricting competition.

ACCI supports Recommendation 5

Comment: Australian coastal shipping has operated under a regime which provides Australian registered ships with preferential rights to coastal trading services over foreign vessels. The *Coastal Trading Act 2012* (CTA) provides operators with different licenses depending on their status as an Australian registered ship or a foreign registered vessel. General licenses are granted to Australian registered ships, which provide the rights to carry coastal cargo. Temporary and emergency licenses are issued to foreign registered ships to meet service needs when general license holders are unavailable. The system confers an advantage on Australian vessels by giving them unrestricted access to coastal trade. Businesses wishing to transport goods are only able to engage a foreign ship if there is no suitable general license ship available. This provides a form of protectionism to Australian ships, drives up prices and reduces competition. The complex regulatory regime imposes substantial

costs with regard to higher administration and compliance costs, less supply options, inflexibility and uncertainty. The higher costs of coastal shipping make it a less viable transport option and often forces suppliers to engage alternative forms of transport such as rail or road. Consumers are also affected by incurring higher shipping costs as rates which not usually based on market value. Some businesses note that it is often cheaper to ship internationally than it is to another Australian state.

Due to the distortionary impact of the current framework, ACCI supports the Panel, as per its submission to the draft report, that the cabotage restrictions on coastal shipping should be removed.

5. COMPETITION INSTITUTIONS

5.1 Formation of National Competition Body

Recommendation 43 – Australian Council for Competition Policy – Establishment
Recommendation 44 – Australian Council for Competition Policy – Role
Recommendation 45 – Market Studies Power
Recommendation 46 – Market Studies request
Recommendation 47 – Annual Competition Analysis

ACCI supports Recommendations 43, 44, 45, 46, and 47

Comment: ACCI supports the Panel's recommendations in relation to the establishment of the Australian Council for Competition Policy (ACCP) with its proposed powers. ACCI supports the Panel's recommendations 43 to 47 regarding the manner in which the ACCP could be created and the various powers that would be conferred on it. ACCI however considers that that none of these provisions should in any way diminish the ACCC's role as an advocate for competition policy reform.

ACCI concurs with the Panel that there is a need to develop a coherent, robust and consistent national competition policy reform agenda. An entity like the ACCP will be able to offer an independent national view on the development, implementation and effectiveness of the revised competition agenda. ACCI believes that the competition policy agenda has been inconsistent across specific sectors of the economy, leading to inefficient outcomes. More significantly, there has been a lack of ongoing monitoring and assessment of the overall market structure and dynamics of specific sectors.

ACCI believes that poor regulatory decision making has wider ramifications in terms of creating regulatory risk for businesses. Such risk can impact on investment decision-making by increasing the cost of capital and deterring potential investment. The existing institutional arrangements do not adequately support a consistent and comprehensive process for continual competition policy reform and review. ACCI believes that that there is a need to develop a nationally harmonised approach to competition policy and regulation which is supported by the Commonwealth Government and the States and Territories. ACCI concurs with the Panel that the AEMC has performed a similar role in the energy sector.

ACCI supports the proposed functions to be assigned to the ACCP, in particular the market monitoring and market studies functions. The annual competition analysis undertaken by the ACCP will allow for a detailed comparative analysis of competition policy and reform. In this capacity the ACCP will be able offer independent advice on specific areas of competition policy and regulation. ACCI believes that the market studies power conferred on the ACCP will effectively allow it to provide an independent overview of the competitive dynamics of particular markets and the need for regulatory reform. In this capacity it will be able assist and enable the ACCC

to take more effective regulatory action. ACCI notes that recommendation 46 would enable market studies to be undertaken at the request of all stakeholders, including businesses and the ACCC. This would create synergies between the regulatory functions of the ACCC and the market overview functions of the ACCP.

5.2 ACCC Governance

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.

ACCI does not support this recommendation

Comment: ACCI does not support this recommendation. The ACCC currently has two sectoral Commissioners, for small business and consumer protection. Both these individuals are also Deputy Chairs. ACCI believes that the ACCC has a key role to play in relation to competition law matters pertaining to small business. The office of the Small Business Commissioner enables the ACCC to maintain a strong focus on developing a competition law and policy framework relevant to the specific needs of small business. The role of the Small Business Commissioner is vital to maintain the existing momentum of the ACCC's small business activities. These activities include educating small businesses of their rights and obligations under the CCA. In particular, informing them about any legal immunity that may be available to them if there are any potential breaches of the CCA.

6. OTHER FINAL RECOMMENDATIONS

As stated in its submission to the Draft Report, ACCI supports these recommendations:

- Recommendation 23 - Competition Law Simplification
- Recommendation 24 – Application of the law to Government activities
- Recommendation 25 – Definition of market and competition
- Recommendation of 26 – Extra-territorial reach of the law
- Recommendation 32 - Third-line forcing test
- Recommendation 31 – Price discrimination
- Recommendation 12– Retail Trading Hours

7. ABOUT ACCI

7.2 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All eight state and territory chambers of commerce
- 29 national industry associations
- Bilateral and multilateral business organisations.

In this way, ACCI provides leadership for more than 300,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia.

7.3 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including the Fair Work Commission, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;

- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

ACCI MEMBERS

ACCI CHAMBER MEMBERS: BUSINESS SA **CANBERRA BUSINESS CHAMBER** CHAMBER OF COMMERCE NORTHERN TERRITORY **CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND** CHAMBER OF COMMERCE & INDUSTRY WESTERN AUSTRALIA **NEW SOUTH WALES BUSINESS CHAMBER** TASMANIAN CHAMBER OF COMMERCE & INDUSTRY **VICTORIAN EMPLOYERS' CHAMBER OF COMMERCE & INDUSTRY** **ACCI MEMBER**

NATIONAL INDUSTRY ASSOCIATIONS: ACCORD – HYGIENE, COSMETIC AND SPECIALTY PRODUCTS INDUSTRY **AIR CONDITIONING & MECHANICAL CONTRACTORS' ASSOCIATION** AUSTRALIAN BEVERAGES COUNCIL **AUSTRALIAN DENTAL INDUSTRY ASSOCIATION** AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES **AUSTRALIAN FOOD & GROCERY COUNCIL ASSOCIATION** AUSTRALIAN HOTELS ASSOCIATION **AUSTRALIAN INTERNATIONAL AIRLINES OPERATIONS GROUP** AUSTRALIAN MADE CAMPAIGN LIMITED **AUSTRALIAN MINES & METALS ASSOCIATION** AUSTRALIAN PAINT MANUFACTURERS' FEDERATION **AUSTRALIAN RETAILERS' ASSOCIATION** AUSTRALIAN SELF MEDICATION INDUSTRY **BUS INDUSTRY CONFEDERATION** CONSULT AUSTRALIA **HOUSING INDUSTRY ASSOCIATION** LIVE PERFORMANCE AUSTRALIA **MASTER BUILDERS AUSTRALIA** MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA (THE) **NATIONAL BAKING INDUSTRY ASSOCIATION** NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION **NATIONAL FIRE INDUSTRY ASSOCIATION** NATIONAL RETAIL ASSOCIATION **OIL INDUSTRY INDUSTRIAL ASSOCIATION** PHARMACY GUILD OF AUSTRALIA **PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION** PRINTING INDUSTRIES ASSOCIATION OF AUSTRALIA **RESTAURANT & CATERING AUSTRALIA** VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE