The voice of Australia's leading retailers

November

Submission in Response to the Competition Policy Review Draft Report

Australian National Retailers Association

The voice of Australia's leading retailers

Suite 901, 3 Spring Street

Sydney NSW 2000

P (02) 8249 4520 | **F** (02) 8249 4914

The voice of Australia's leading retailers

About ANRA

The Australian National Retailers' Association (ANRA) represents Members that lead the retail industry delivering to customers across all types of retail goods and services. They are leading employers who contribute to local communities and regional development and strongly interrelate with other Australian industries.

The current members of ANRA are:

Best & Less

Bunnings

The Co-op

Coles Group
Supermarkets | Convenience | Liquor

Costco

David Jones

Dymocks

Forty Winks

Harvey Norman
Homewares | Electrical

Just Group
Fashion | Stationery

Luxottica
Optometry | Fashion | Budget Eyewear

Petbarn

Super Retail Group
Auto | Sports | Recreation

Woolworths
Supermarkets | Liquor | General Merchandise
Home Improvement

7-Eleven

Retail is Australia's largest private sector employer, accounting for around 1.25 million jobs. The members of ANRA employ more than 500,000 people or 41 per cent of the retail workforce and 4.4 per cent of the Australian workforce, with approximately 100,000 of these employees located in regional and rural Australia. The sector supports a further 500,000 jobs in associated industries including agriculture, manufacturing, transport & logistics and construction & property maintenance.

In terms of industry value added, the retail trade industry contributed around 4.44 per cent to the national economy in 2013 to 2014. Combined turnover reached more than $270 billion across the retail industry in 2013 to 2014, which is equivalent to 17.2 per cent of Australia's nominal Gross Domestic Product (GDP).

ANRA established in 2006 following a desire by the founding member companies to contribute, at an industry level, to the development and support of public policy that would boost productivity, support employment growth, foster a competitive environment and ultimately, make the sector stronger.

The voice of Australia's leading retailers

Table of Contents

List of Tables

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACCP	Australian Council for Competition Policy (proposed body)
ANRA	Australian National Retailers' Association
CCA	Competition and Consumer Act 2010
COAG	Council of Australian Governments
EU	European Union
GDP	Gross Domestic Product
LTIC	Long-Term Interests of Consumers
PIR	Parallel Import Restrictions
RPM	Resale Price Maintenance
SLC	Substantial Lessening of Competition
the Commonwealth	Commonwealth of Australia
the Draft Report	Competition Policy Review Draft Report
the Panel	Competition Policy Review Panel

Executive Summary

ANRA welcomed the release of the Competition Policy Review Draft Report[1] (the Draft Report). The Panel has delivered a report with draft recommendations that importantly address the unfinished business of previous reviews and identified new opportunities to extend the principles, practice and benefit of competition policy across the whole economy - including service delivery in areas such as education, health and infrastructure.

In light of the Government's firm commitment to reduce the regulatory burden, cost and dampening effect of red tape on business and the community, ANRA believes the recommendations that go into the final report should focus 100 per cent on removing regulation and complexity that adds cost to business; and not on adding to the regulatory burden.

As an industry that contributed around 4.44 per cent to the national economy last year, is the private sector's largest employer and is working hard to keep prices growth below inflation, we welcome any moves by government to assist with the removal of unnecessary costs of doing business. Conversely, government decision making that adds costs to our business has a direct impact on our contribution to GDP, ability to generate new jobs and keeping prices growth below inflation.

Our response[2] to the Review's Issues Paper outlined the commitment of ANRA's members to participating in a competitive environment that protects consumers and delivers economic growth for the national economy. Our key submission themes that were positively picked up within the Draft Report included:

- Competition law is about protecting competition and not individual competitors;
- Australia has an effective competition policy regime;
- Competition policy should be economy-wide not sector specific;
- Competition could be enhanced by removing outdated regulations; and
- The performance of regulators needs to be measured and evaluated.

Table 1 summarises the recommendations from the Draft Report supported by ANRA without qualification. The recommendations are consistent with ANRA's position on fundamental competition principles; the unfinished business of microeconomic reform; and removing unnecessary regulation.

ANRA members are growing impatient on the unfinished business of trading hours deregulation, removal of parallel import restrictions, planning and zoning reform and removal of restrictions on pharmacy ownership and location. The case for reform has long been made before the

[1] *Harper et al. (2014), Competition Policy Review - Draft Report*.
[2] *ANRA Submission to the Competition Policy Review, June 2014.*

recommendations in the Draft Report, going back 20 years to the Hilmer Review and numerous reviews since[3]. Inclusion in the final report alone will not satisfy business; recommendations that Government should deliver these reforms within one to two years, and how this can be achieved across jurisdictions is important. It is ANRA's hope that business and consumers will finally see an end to the politicisation of these barriers and an opening of competition that the evidence shows will benefit consumers.

ANRA supports the Panel's position that the ACCC should stick to enforcement and consumer protection. Any take up of adopting an advocacy and policy role crosses over into the political realm and domain of the Parliament.

ANRA is also encouraged by statements within the Draft Report of the Panel's view that on the basis of the evidence presented no changes are necessary to the existing provisions for creeping acquisitions or unconscionable conduct, no foundation to introduce divestiture, or mandatory codes of conduct.

Whilst a lot of work has been done by the Panel and Secretariat, ANRA believes there are a number of draft recommendations listed in Table 2 that have merit or merit in part, however ANRA believes greater clarification and/or further consultation – in keeping with COAG's agreed Principles of Best Practice Regulation – needs to be conducted before ANRA would support any changes to guidelines, or reform of legislation.

ANRA supports the Panel's calls to progress and re-energise the policy reform agenda. We make comment on the proposals for the creation of an ACCP. ANRA believes the momentum for reform has slowed, impacting growth nationally and in the retail sector particularly. ANRA is supportive of ensuring structures are in place to deliver reform without creating duplication or unnecessary layers of government intervention.

ANRA questions the appropriateness of the ACCC conducting a guideline review with respect to 155 notices and instead favours an independent review by Treasury on this important practical issue. ANRA also raises concern with respect to the gap between the definition of 'competition' and its apparent interpretation in the practice of competition assessments. ANRA suggests that the Panel explicitly guides that both market contestability and the interaction of market participants should be given greater prominence in ACCC competition assessments.

---

[3] See NSW Government (2012) *Report of the Review of the Retail Trading Act 2008*, Queensland Competition Authority, Office of Best Practice Regulation (2013), *Measuring and Reducing the Burden of Regulation*, Economic regulation Authority (2014), *Inquiry into Microeconomic Reform in Western Australia: Final Report* and Productivity Commission (2011), *The Economic Structure and Performance of the Australian Retail Sector* and Productivity Commission (2014), *Relative Costs of Doing Business in Australia: Retail Trade*.

With so many stakeholders involved a diversity of opinion regarding the 'fit for purpose' of draft recommendations is not to be unexpected. ANRA has particular concern in regards to draft recommendations 25, 29 and 42 as listed in Table 3. ANRA believes the following recommendations are not in the best interests of fostering a healthy competitive environment and the cases for the need for reform in these areas have not been made.

An independent paper commissioned by ANRA from Pegasus Economics[4] and previously provided to Panel members and the Review Secretariat outlines convincingly in ANRA's view that there is no case for change with respect to section 46.

We agree with the Panel's approach when guiding their consideration of whether Australia's competition laws are fit for purpose[5]. We believe however with respect to the recommendations 25 and 29, that consumer wellbeing will not be enhanced over the long term; that Section 46 as it is currently interpreted by the courts demonstrates that it already protects competition rather than protecting individual competitors despite how it is couched in the Act; that Section 46 strikes the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship as evidenced by the successful cases brought by the ACCC; and recommendation 25 as drafted will remove this balance, casting a wide net over business and capturing pro-competitive behaviour, bringing on regulatory failure; and make the law less clear, less simple and less predictable for business – manifesting in years of costly and lengthy legal battles.

When considering 'fit for purpose' we can evaluate current experience which demonstrates that cases have successfully been brought by the ACCC under the existing law. We can also look to international experience, however ANRA is always careful of pointing to international experience and saying, 'because they do, we should too'. What can be often overlooked is both the complex and subtle differences in market characteristics – including structure and participants and the evolution of law to respond to those jurisdictional specifics. For example the Pegasus Report highlights the difference between the current proposal and the international experience including highlighting the higher benchmark of dominance in the EU.

With respect to the introduction of the substantial lessening of competition test as proposed in Recommendation 25, ANRA cautions against the approach that reform is simply to bring it into line with other prohibitions, this ignores that section 46 deals with unilateral acts, where as other prohibited behaviour is multilateral.

Proposals to include an effects test and also to effectively reverse the onus of proof in relation to section 46 are not new and have been considered and rejected on several occasions (Hilmer,

[4] *Pegasus Economics (2014), Response to the Competition Policy Review Panel's Recommendation on the Misuse of Market Power.*

[5] *Harper et al. (2014), Competition Policy Review Draft Report*. p.5

Dawson) because of the well accepted 'chilling effect' this would have on competition and the downstream negative impact on the consumer.

In ANRA's initial consideration of the terms of reference of the Review and response to the Issues Paper there were key areas of concern with regards to regulation that impedes competition, particularly competition from international retailers and the benefit they receive from Goods and Services Tax exemption for consumer purchases worth less than $1,000. The Panel disappointingly did not take these up, however, it is understood that the view of the Panel is that such issues are better dealt with by other concurrent or pending reviews. This is noted, however ANRA refers the Panel to its previous submission[6] should the Panel take an alternate view in the months ahead.

This Review presents to Government, the opportunity to remove a number of unnecessarily restrictive aspects of the CCA and Regulations external to the Act to ensure that the balance between consumer protections and business operations is achieved. ANRA presents this submission in response to the Draft Report and believes its response to the specific recommendations strikes the right balance.

Any simplification of the current Act should not be at the cost of clarity and predictability of the law; and should not be used to justify changes to the law that would indirectly damage consumer welfare in practice – for example, the changes proposed in Recommendation 25.

[6] *ANRA Submission to the Competition Policy Review, June 2014, Section 3.*

Table 1: Summary of draft Recommendations ANRA supports

No.	Draft Recommendation Outline	ANRA position	Page
1	Competition policy should focus on making markets work in the long-term interests of consumers.	**SUPPORT**	**9**
9	The remaining restrictions on parallel imports should be removed	**SUPPORT**	**9**
11	All Australian governments, including local government, should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed	**SUPPORT**	**10**
17	The central concepts, prohibitions and structure enshrined in the current competition law be retained	**SUPPORT**	**11**
21	Section 5 of the CCA[7] should be amended to remove the requirement that the contravening firm has a connection with Australia	**SUPPORT**	**12**
27	The provisions on 'third-line forcing' (subsections 47(6) and (7)) should be brought into line with the rest of section 47	**SUPPORT**	**12**
33	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 with, should be removed.	**SUPPORT**	**13**
34	The authorisation and notification provisions in the CCA should be simplified	**SUPPORT**	**13**
35	Exemption powers based on the block exemption framework in the UK and European Union (EU) should be introduced to supplement the authorisation and notification frameworks.	**SUPPORT**	**14**
44	The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Commonwealth and state and territory governments to estimate their effect on revenue in each jurisdiction.	**SUPPORT**	**14**
48	The Australian Competition and Consumer Commission (ACCC) should also develop a Code of Conduct for its dealings with the media	**SUPPORT**	**15**
51	The remaining restrictions on retail trading hours should be removed	**SUPPORT**	**16**
52	The Panel considers that the pharmacy ownership and location rules should be removed in the long-term interests of consumers.	**SUPPORT**	**17**

[7] *Competition and Consumer Act 2010 (CCA).*

Table 2: Summary of draft Recommendations ANRA supports in principle or supports in part

No.	Recommendation Outline	ANRA position	Page
10	All governments should include competition principles in the objectives of planning and zoning legislation	**Support in principle**	**20**
18	The competition law provisions of the CCA should be simplified, including by removing overly specified provisions	**Support in principle**	**21**
20	The current definition of 'market' in the CCA should be retained but the current definition of 'competition' should be re-worded	**Support in principle**	**21**
24	The 'price signalling' provisions of Division 1A of the CCA should be repealed. Section 45 should be extended to cover concerted practices.	**Support in part**	**22**
30	There should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal and formal review processes.	**Support in principle**	**23**
36	The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age.	**Support in principle**	**23**
39	The National Competition Council should be dissolved and the Australian Council for Competition Policy established.	**Objective supported in principle**	**24**
40	The Australian Council for Competition Policy should have a broad role encompassing research, education, identifying and monitoring reform etc.	**Objective supported in principle**	**25**
41	The proposed Australian Council for Competition Policy should have the power to undertake competition studies of markets in Australia	**Objective supported in principle**	**25**
43	The Australian Council for Competition Policy should be required to undertake an annual analysis of developments in the competition policy environment	**Objective supported in principle**	**26**
45	Competition and consumer functions should be retained within the single agency of the ACCC.	**Support in principle**	**27**
47	The Panel believes that incorporating a wider range of business, consumer and academic viewpoints would improve the governance of the ACCC.	**Support in principle**	**27**
49	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	**Support in principle**	**28**

Table 3: Summary of draft Recommendations ANRA opposes or has concerns about

No.	Recommendation Outline	ANRA position	Page
25	The Panel considers that the primary prohibition in section 46 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 over-capture, the Panel proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question: • would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and • the effect or likely effect of the conduct is to benefit the long-term interests of consumers. The onus of proving that the defence applies should fall on the corporation engaging in the conduct.	**Oppose**	**29**
29	The prohibition on resale price maintenance (RPM) should be retained in its current form as a per se prohibition.	**Oppose**	**35**
42	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.	**Concerned**	**36**

1. Draft Recommendations supported by ANRA

This section provides some brief comments on those Draft Recommendations that are consistent with ANRA's position on fundamental competition principles; the unfinished business of micro reform; and removing unnecessary regulation

ANRA supports in full, without qualification.

Draft Recommendation 1

ANRA supports draft Recommendation 1.

> *'The Panel endorses competition policy that focuses on making markets work in the long-term interests of consumers.'*

Promoting competition policy that focuses on making markets work in the long-term interests of consumers:

- Raises the welfare of Australians;
- Is considered international best practice;
- Looks beyond protectionist calls to shield particular businesses or industry from the rigors of competition; and
- Is more likely to yield an outcome that is in the public interest.

ANRA notes this draft recommendation is both consistent with the stated objective of the CCA and provides a guiding principle for the ACCC to consider when conducting competition assessments.[8] That is, the overriding concern for ACCC market studies should be whether competitive conduct is consistent with the long-term interests of consumers, not necessarily focused on market structure – see ANRA's response to draft Recommendation 20 in Section 3.

Draft Recommendation 9

ANRA supports.

> *'Remaining restrictions on parallel imports should be removed unless it can be shown that they are in the public interest; and the objectives of the restrictions can only be achieved by restricting competition.'*

The general impacts of parallel import restrictions (PIR) include:

- Artificial limits on wholesale sourcing channels;

[8] *Section 2, Competition and Consumer Act (CCA).*

- Creating an uneven playing field between domestic and international retailers not subject to PIR (that can therefore offer lower retail prices);
- Creating the settings for wholesale prices in Australia to be higher than they otherwise might; and
- A reduction in competition, which is not in the public interest.

ANRA recommends the words '*they are in the public interest; and*' are removed from the draft recommendation. If it cannot be demonstrated that the objectives of the restrictions can only be achieved by restricting competition, it follows that those objectives (to the extent that they are worthwhile) can be achieved through other means – without an adverse impact on competition.

ANRA notes the intent of this draft recommendation is consistent with the findings of several Productivity Commission inquiries – in the context of Books and the Retail sector generally – over the past five years.[9]

ANRA believes there are few hurdles to implementation from a practical perspective. Book retailers may have domestic supply contracts in place for selected titles, but members report they are generally ready to pursue alternative sourcing opportunities as soon as they become legally available. A slightly longer timeframe might be required for retailers that sell goods sourced from another market with approved graphic images.

Draft Recommendation 11

ANRA supports.

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

Regulation with anti-competitive effects should only remain in place if:

- there is a clear public benefit that outweighs the (likely private) costs and anti-competitive effect imposed on those bound by regulation; and
- it is the most appropriate (and most likely direct) means of achieving the stated objective.

Removing unnecessary or obsolete regulation will also lower compliance costs for business – resulting in lower prices for consumers.

ANRA suggests the panel guides any review of state and/or local regulation to consider:

- the anti-competitive effect of differences in regulation between jurisdictions; and
- the anti-competitive effect of treating competitors differently from each other.

[9] *Restrictions on the Parallel Importation of Books (2009), The Economic Structure and Performance of the Australian Retail Sector (2011) and Relative Costs of Doing Business in Australia: Retail Trade (2014).*

An example of one of the more obscure (and redundant) state-based regulations that should be reviewed is the '*Prices Regulations 2014*' in South Australia. The '*Prices Regulations 2014*' were introduced in their original form in 1985 to make it unlawful for retailers, including supermarkets, to return unsold bread to the manufacturer or supplier, or for a commercial relationship to require a third party to take the unsold bread. Modern supply chains are today vastly different and returning unsold bread is a term of service that modern day brand owners compete with in all other jurisdictions.

Furthermore, the practice of returning unsold bread to the bread manufacturer provides input into related industries – such as the manufacture of breadcrumbs, croutons and animal feed – and avoids waste; or to third parties, like charity OzHarvest that distributes surplus food to people in need. In contrast, the '*Prices Regulations 2014*' force retailers to dump stock and perversely generates food waste for landfill, rather than preventing it.

ANRA recognises that some levels of government – particularly local government – might face capacity constraints and limited resources to undertake detailed regulatory reviews. The Panel should consider recommendations in its final report that encourage the Commonwealth of Australia (the Commonwealth) to incentivise state and local governments to hasten the pace of reform.

ANRA provides some further comments on promoting reform through institutional and financial incentive structures; in response to draft Recommendations 39 and 44, in particular.

Draft Recommendation 17

ANRA supports.

> *'The Panel recommends that the central concepts, prohibitions and structure enshrined in the current competition law be retained.'*

The central concepts and structure of the CCA have evolved in line with Australia's needs. The CCA currently facilitates competitive conduct and prohibits several specific types of anti-competitive behaviour. The CCA's general prohibitions (notably under section 46) also provide further safeguards against anti-competitive behaviour. The ACCC has successfully enforced the prohibitions.

Draft Recommendation 21

ANRA supports.

> *'Section 5 of the CCA should be amended to remove the requirement that the contravening firm has a connection with Australia and this should also occur with respect to actions under the Australian Consumer Law.'*

The object of the CCA is better served by extending coverage to conduct that impacts on competition in Australian markets and the rights of Australian consumers.[10] This action:

- Lowers the risk of damaging conduct by firms selling into but without a connection to Australia; and
- Protects Australian consumers from prohibited conduct by international firms without a connection to Australia.

Draft Recommendation 27

ANRA supports.

> *'The provisions on 'third-line forcing' (subsections 47(6) and (7)) should be brought into line with the rest of section 47.'*

The current '*per se'* prohibition on 'third line forcing' under section 47 of the CCA:

- Creates unnecessary notification expenses;[11]
- Impedes competitive behaviour that often delivers benefits to consumers; and
- Is out of step with economic principles.

ANRA also notes that both the Hilmer Review (1993) and Dawson Review (2003) supported removing the '*per se'* prohibition on third line forcing.

[10] *Section 2, CCA: '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.'*

[11] *Only 10 of 4,298 exclusive dealing notifications made between 1st January 2000 and 10th June 2014 have been revoked by the ACCC. ACCC Notifications Register as at 11 June 2014.*

Draft Recommendation 33

ANRA supports.

> *'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 with, should be removed.'*

ANRA submits that any conflict between the CCA and the Fair Work Act should be resolved by amending sections 45E and 45EA so that they expressly include awards and enterprise agreements. ANRA understands the purpose of these sections is to prevent an employer or head contractor from entering into an arrangement with an employee association or their representative that hinders or stops the supply or acquisition of goods or services from a second party. The proposed change would extend these sections to awards and enterprise bargaining agreements – which are typically negotiated by an employee association but are not agreements *with* an employee association.

ANRA sees no reason for industrial instruments that are negotiated by employee associations to be excluded from the CCA. The coverage of sections 45E and 45EA should not be excluded from awards and enterprise bargaining agreements negotiated under the Fair Work Act. Having restrictive clauses of this nature enshrined within an enterprise bargaining agreement is clearly anticompetitive; because it creates an artificial constraint on firms' ability to consider engaging alternative labour sources and potentially other suppliers of goods or services.

Draft Recommendation 34

ANRA supports.

> *'The authorisation and notification provisions in the CCA should be simplified, with the ACCC empowered to grant exemptions.'*

The overly complex (highly specified) authorisation and notification provisions:

- create substantial legal and administration costs for both business and the ACCC alike; and
- can be detrimental to consumer welfare because this places upward pressure on business costs, which could flow through to consumer prices.

Empowering the ACCC to grant exemptions would further reduce the administrative cost of applying and enforcing the CCA.

Draft Recommendation 35

ANRA supports.

> *'Exemption powers based on the block exemption framework in the UK and EU should be introduced to supplement the authorisation and notification frameworks.'*

The proposed block exemption powers for the ACCC would:

- lower the administrative costs of businesses operating under the CCA;
- place downward pressure on consumer prices (through lower costs);
- provide greater certainty to business seeking exemptions, in a timely fashion; and
- lower the CCA enforcement costs of the ACCC.

Indeed, the strong desire to lower the administrative costs of operating under the CCA motivated ANRA to recommend that:[12]

> *'The Panel should consider a self-assessed public benefit or efficiency defence which would allow businesses to make their own decisions about the effect of their conduct in the market. This option would, of course, be subject to the risk of ACCC intervention.'*

Draft Recommendation 44

ANRA supports.

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

Commonwealth competition payments to the states and territories:

- played a key role in the success of the National Competition Policy[13] and Seamless National Economy National Agreement; [14]
- compensate individual jurisdictions for prohibitive implementation costs; and
- redistribute the expected benefits that might accrue outside of the reforming jurisdiction(s);

---

[12] *ANRA (2014), Submission to the Competition Policy Review. p.48.*

[13] *Productivity Commission (2005), Review of National Competition Policy Reforms and cited in NSW Government (2014), Competition Policy Review – NSW Government Submission, p.14.*

[14] *NSW Government (2014), Competition Policy Review – NSW Government Submission, p.15.*

ANRA supports the Panel's view that competition payments should be based on the actual implementation of reform and not on simply undertaking reviews. There is recent evidence of state-based inquiries into microeconomic reform identifying opportunities for reform that would benefit business and consumers, without commensurate implementation. Indeed, the Productivity Commission recently found with respect to the deregulation of retail trading hours:[15]

> *There is evidence of the benefits of reform from state regulatory review agencies. The main impediment to deregulation appears to be a lack of political commitment, a significant driver of regulatory policy reform.*

Turning to the design of competition payments, the Productivity Commission has specific experience in undertaking the nature of study described in draft Recommendation 44. Should the Commonwealth proceed with a further round(s) of competition payments, ANRA sees no reason for an alternative agency to be appointed to estimate the impact of reform on revenue flows.[16]

Draft Recommendation 48

ANRA supports.

> *'The ACCC should also develop a Code of Conduct for its dealings with the media.'*

The ACCC has an established record of making public statements about its investigation intentions and on relevant matters before the courts.[17] This suggests the ACCC is using the media to build a case to justify actions.

There is also evidence that sections of the media use the ACCC's actions to generate 'guilty verdicts' within the public psyche ahead of any formal action by the ACCC or court determinations. These are unfair outcomes (for the accused party) that would be tempered if the ACCC demonstrated more discipline it its use of public statements.

Making public statements to the media (or in any public forum for that matter) about the conduct of a corporation or individual in the absence of either an admission of guilt or court determination:

- significantly undermines the perception of ACCC impartiality;
- is grossly unfair and highly prejudicial;
- is a particularly disturbing form of 'official lynch justice'[18]; and

---

[15] *Productivity Commission (2014), Relative Costs of Doing Business in Australia: Retail, Finding 5.4.*

[16] *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 and Productivity Commission (2005), Review of National Competition Policy Reforms.*

[17] *For example, see Bezzi (2013), Competition Watchdog's investigation into major supermarkets, Court (2013), Enforcement priorities at the ACCC and Sims (2014), Food and grocery and Australia's competition law.*

- unnecessarily risks significant and costly consequences for falsely accused parties, including;
    - poorer customer perceptions of the brand; and
    - possible withdrawal of support from suppliers and/or investors.

ANRA notes the Dawson Review (2003) also recommended the ACCC develop a media Code of Conduct in consultation with interested parties to govern its use of the media, and in particular that it should decline to comment on investigations.[19]

Draft Recommendation 51

ANRA supports.

> *'The Panel recommends that remaining restrictions on retail trading hours 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.'*

The regulation of retail trading hours:

- is detrimental to consumer choice and convenience;
- is increasingly out of line with modern expectations;
- distorts competition in retail markets;
- restricts employment[20]; and
- prevents businesses from making independent operating decisions.

ANRA notes this draft recommendation is consistent with the recent findings of several state and federal inquiries into the retail sector and also follows recommendations in the Hilmer Review – representing long overdue reform.[21]

Retailers would welcome immediate implementation of these reforms, making the decision of when to trade a business one and not regulated by government; the immediate implementation of these reforms will not force businesses to open 24 hours, 7 days a week.

---

[18] *Whitman, J. (1998), What Is Wrong with Inflicting Shame Sanctions? Yale Law Journal, 107, 1055, p.1059*

[19] *Dawson et al. (2003), Review of the Competition Provisions of the Trade Practices Act. p. 189-190*

[20] *See Ernst & Young (2014) Liberalisation of Retail Trading Hours, p.20*

[21] *See NSW Government (2012), Queensland Competition Authority, Office of Best Practice Regulation (2013), Economic regulation Authority (2014) and Productivity Commission (2011 and 2014).*

Draft Recommendation 52

ANRA supports.

> *'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 and quality of advice on pharmaceuticals that do not unduly restrict competition.'*

Restrictions on pharmacy ownership and locations:

- limits consumer choice on where to obtain pharmacy services;
- limits the ability of suppliers to meet consumers' demands; and
- supports a false premise that ownership and location is about public safety and prevents a competitive market.

2. Further Draft Report content that ANRA supports

Looking beyond the specific draft recommendations considered in the previous section, there are other important statements within the Draft Report that ANRA supports.

Creeping Acquisitions

ANRA supports this statement.

> *'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 the case for change has been made.'*[22]

The CCA's reference to a '*substantial lessening in competition in any market*' under section 50 already permits the ACCC to take a very narrow view of individual transactions.[23]

In ANRA's view, most of the proponents for extending creeping acquisitions provisions represent commercial interests that would benefit from limiting competition – this is not in the long term interests of consumers.

Divestiture remedy to address market power concerns

ANRA supports this statement.

> *'... divestiture is likely to have broader impacts on the general efficiency of the firm. Such changes could also have negative flow-on effects to consumer welfare.'*[24]

Divestiture is an inappropriate penalty because:

- there is no clear link between the assets to be divested and contravening conduct;
- there could be widespread and unpredictable impacts on the viability of the company, shareholder value, employees' job security and customer welfare; and
- the ACCC and the courts also have no experience in splitting up a company.

The Panel highlights that both the Hilmer Review (1993) and Dawson Review (2003) concluded that divestiture is an inappropriate penalty.[25]

---

[22] *Harper et al. (2014), Competition Policy Review Draft Report. p.48*

[23] *ACCC (2013) Public Competition Assessment, 25 October 2013: Woolworths Limited - proposed acquisition of supermarket site at Glenmore Ridge Village Centre.*

[24] *Harper et al. (2014), Competition Policy Review Draft Report. p.211*

[25] *Harper et al. (2014), Competition Policy Review Draft Report. p.211*

16.3 Unfair and Unconscionable Conduct in Business Transactions

ANRA supports this statement.

> *The Panel's view: '... there is not a strong case that the current unconscionable conduct provisions are not working as intended to meet their policy goals'.*[26]

Extending the current unconscionable conduct provisions would:

- distort competition by providing protection to special interest groups;
- generate additional uncertainty, cost and delays for counterparties not covered; and
- is potentially detrimental to the long-term interests of consumers.

ANRA notes both the Dawson Review (2003) and Productivity Commission (2008) warned against the risks of extending generic consumer protections to small businesses. These risks appear to have been ignored by supporters of the proposal to extend unfair contract terms law to small business contracts.[27]

16.4 Codes of Conduct

ANRA supports this statement.

> *The Panel's view: 'Codes of conduct play an important role under the CCA by providing for a flexible regulatory framework to set norms of behaviour.'*[28]

ANRA members are signatories to several Codes of Conduct – including the Scanning Code, Franchising Code and the Food and Grocery Industry Code of Conduct. This is because Codes of Conduct:

- provide a low-cost dispute resolution mechanism;
- encourage broader understanding and trust throughout the supply-chain;
- guide signatories to avoid potential conduct of concern across supply chains; and
- can work to strengthen the CCA when supported by civil penalties and infringement notices.

ANRA members believe voluntary and voluntary prescribed Codes of Conduct give retailers the opportunity to assess whether a Code is appropriate for their business structure and practices. Mandatory Codes are less attractive because they effectively force compliance – in contrast to being designed with enough appeal to satisfy the concerns of potential signatories.

---

[26] *Harper et al. (2014), Competition Policy Review Draft Report. p.219*

[27] *Commonwealth Treasury (2014), Extending Unfair Contract Term Protections to Small Businesses.*

[28] *Harper et al. (2014), Competition Policy Review Draft Report. p. 220*

3. Draft recommendations supported in principle or in part by ANRA

This section provides some brief comments on those draft Recommendations that ANRA supports in principle or in part. ANRA believes greater clarification and/or further consultation – consistent with COAG's agreed Principles of Best Practice Regulation – should be conducted before ANRA would support in full any changes to guidelines, or reform of legislation.[29]

Draft Recommendation 10

ANRA supports in principle.

> *'All governments should include competition principles in the objectives of planning and zoning legislation.'*

Incorporating competition principles into planning and zoning assessments:

- promotes the ability of businesses to locate where consumers' want them to locate;
- promotes greater competition within local economies; and
- leaves fewer opportunities for competitors to launch strategic appeals that could have the effect of limiting competition.

ANRA notes this draft Recommendation 10 is also consistent with the findings of several Productivity Commission inquiries.[30]

However, ANRA would welcome further guidance on the proposed 'internal review processes' that can be triggered by new entrants to a local market. These are not discussed in any detail in the Draft Report. ANRA is concerned the phrase 'internal review processes' could simply mean that a planning decision could be compulsorily reviewed after a new entrant announces they might enter an area. This would leave planning systems open to strategic manipulation.

ANRA also has concerns about the application of the principle *'ensuring arrangements do not explicitly or implicitly favour incumbent operators'*.[31] This might have the unintended consequence of planning practitioners overcompensating and taking a bias against existing operators. ANRA recommends the wording takes a neutral position – such as *'ensuring arrangements do not explicitly or implicitly favour either new or incumbent operators'*.

[29] COAG (2007), *Best Practice regulation: A Guide for Ministerial Councils and National Standard Setting Bodies. p.4*

[30] *Productivity Commission (2011, 2012 and 2014).*

[31] *Harper et al. (2014), Competition Policy Review Draft Report. p.32*

Draft Recommendation 18

ANRA supports in principle.

> *'The competition law provisions of the CCA should be simplified.'*

Simplification of competition law provisions of the CCA could potentially result in lower enforcement and compliance costs for regulators and business alike.

The panel has highlighted subsection 45(1) and sections 45B, 45C, 46A and 46B for possible removal and this demonstrates there is scope to clean up the CCA. With respect to these specific sections, ANRA shares the Panel's view that they are redundant.

ANRA would welcome the opportunity to provide submissions during public consultations for any detailed proposals to streamline or simplify the CCA beyond the already afore mentioned.

Removal of redundant provisions is easy, however simplification of the provisions should not be at the cost of clarity and predictability of the law; and should not be used to justify changes to the law that would damage consumer welfare in practice – for example, the changes proposed in Recommendation 25.

Draft Recommendation 20

ANRA supports in principle.

> *'The current definition of 'market' in the CCA should be retained but the current definition of 'competition' should be re-worded.'*

The CCA appropriately defines a 'market' as one that operates in Australia and this can include a global market that Australia participates in.

The proposal for 'competition' to capture the actual and/or potential impacts of offshore participants is supported as it would permit the CCA to consider all sources of competition that affect markets in Australia.

However, ANRA has concerns with regards to the interpretation of 'competition' in the practice of competition assessments – particularly through the prism of competitive interaction. It would appear the ACCC still focuses quite heavily on market concentration when considering these matters, despite wide held understanding that *'concentration alone does not provide much guidance to the competitiveness of a market'*.[32]

ANRA suggests the Panel explicitly guides that both market contestability and the interaction of market participants should be given greater prominence in ACCC competition assessments.

[32] *Productivity Commission (2011), The Economic Structure and Performance of the Australian Retail Sector. p.38*

Draft Recommendation 24

ANRA supports in part.

> *'The 'price signalling' provisions of Division 1A of the CCA should be repealed. Section 45 should be extended to cover concerted practices which have the purpose, or would have or be likely to have the effect, of substantially lessening competition.'*

The current 'price signalling' provisions of Division 1A of the CCA:

- have (banking) sector-specific application, which contradicts the panel's support for economy-wide application of the law;[33] and
- prevent public price disclosure that:
  - informs consumer choice; and
  - promotes competitive response.

ANRA supports economy wide application of competition law and supports the repeal of the 'price signalling provision'.

ANRA does not support the recommendation as drafted as it relates to 'concerted practices'.

ANRA notes there are two definitions used to define a 'concerted practice' in the Draft Report – 'a regular practice'[34] and 'a regular and deliberate activity'[35].

ANRA also notes that whilst Recommendation 24 is consistent with established practice under European legal frameworks; the definition in the EU is more defined and includes the degree of communication between competitors. The German Bundeskartellamt (2011) inquiry into fuel retailing considered such action:[36]

> *'Mutual price monitoring without communication is not objectionable under competition law. '*

As drafted, in ANRA's view, there exists uncertainty for application, the described approach is broad and may capture information sharing that is for the purposes of benchmarking or determining best practice – both of which are legitimate business practices that could result in substantial consumer benefit.

ANRA believes that public stakeholder consultation, with regards to the definition of concerted practices and its implementation, including guidelines – should be undertaken before any change to the Act is made.

---

[33] *Harper et al. (2014), Competition Policy Review Draft Report. p.38*
[34] *Harper et al. (2014), Competition Policy Review Draft Report. p.42*
[35] *Harper et al. (2014), Competition Policy Review Draft Report. p.229*
[36] *Bundeskartellamt. (2011). Fuel Sector Inquiry: Final Report in accordance with § 32e GWB – Summary.*

Draft Recommendation 30

ANRA supports in principle.

> *'There should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal and formal merger review processes.'*

Prolonged merger review (both informal and formal) processes:

- create investment uncertainty for business;
- can become distracted by overly-complex information requests; and
- increase assessment and approval costs for both applicants and the ACCC.

ANRA and its members would welcome the opportunity to work further with the ACCC to improve the timeliness and transparency of merger review decisions – negotiations might be mediated by an appropriate independent stakeholder like Commonwealth Treasury. The five principles outlined in draft Recommendation 30 are a good starting point for consultation.

ANRA understands the merger clearance system shall remain self-regulatory in nature; and therefore the question over which mergers are notified and which are not remains with the merging parties and not at the direction of the ACCC.

Draft Recommendation 36

ANRA supports in principle.

> *The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age.*

Members report the ACCC's current approach to 155 notices:

- might only reflect simple suspicion, rather than having reasonable grounds for investigation;
- is unnecessarily broad and vague;
- is based on unrealistic timeframes (that require subsequent negotiation);
- is inappropriately used for investigating matters concerning a third party;
- can be extremely costly to comply with (which is an anti-competitive outcome in itself); and
- sometimes delivers no clear outcome (which reinforces the perception the notice was served as a fishing exercise).

Whilst supportive of a review, ANRA believes this should be conducted independently and not reflect the ACCC simply reviewing its own practices.

The review should also give regard to:

- the scope of the notice - a clearer explanation of what information is required would put business in a better position to assist the ACCC in its investigations. The 155 notice should be framed in the narrowest form possible, consistent with the scope of the matter being investigated. For example, the ACCC might state the specific geographic location, time period of concern and narrow description of the product or conduct in question; and
- constraints on how and when the ACCC might issue 155 notices for investigations focused on a third party.

ANRA supports the Panel's view that:

> *'the requirement of a person to produce documents in response to a section 155 notice should be qualified by an obligation to undertake a reasonable search'.*[37]

ANRA would welcome the opportunity to provide comments to an independent review (preferably by the Commonwealth Treasury).

Draft Recommendation 39

ANRA supports the objective.

> *'The National Competition Council should be dissolved and the Australian Council for Competition Policy established.'*

Australia's competition institutions can be an important driver of reform, but the current framework of institutions and incentives are yielding a pace of reform that is sluggish at best. This slow pace of reform is reflected upon in the recent independent assessment of reform under Council of Australian Governments (COAG):[38]

> *'(T)he COAG process has delivered initiatives across a range of very important areas of policy at a noticeably faster pace than had been achieved in most earlier periods. However, this pace has dropped off in recent years.'*

ANRA is broadly supportive of further attempts to deliver an appropriate framework of institutions and incentives that would reinvigorate pro-competitive reform – particularly at the state level. We note the Panel's comments on National Competition Council scope and belief that the ACCP provides an institutional catalyst that reinvigorates a nationally co-ordinated approach to competition policy and regulatory reform.

However, ANRA also notes there is a risk the proposed ACCP might simply establish another layer of bureaucracy that duplicates much of the policy work already being undertaken elsewhere, including the Commonwealth and state and territory Treasuries, the Productivity Commission and

[37] *Harper et al. (2014), Competition Policy Review Draft Report. p.53*

[38] *Deloitte Access Economics (2013), Assessment of progress under the COAG Reform Agenda. p.30*

state based Statutory commissions and/or authorities. This increases the demands on government budgets, without necessarily delivering the reform gains.

Draft Recommendation 40 & 41

> *Draft Recommendation 40: 'the Australian Council for Competition Policy should have a broad role encompassing research, education, identifying and monitoring reform etc.'*
>
> *Draft Recommendation 41: 'The proposed Australian Council for Competition Policy should have the power to undertake competition studies of markets in Australia.'*

ANRA supports the objective.

ANRA believes the functions described in draft Recommendations 40 and 41 are already largely performed by the Productivity Commission. The Panel recognises:[39]

> *The [Productivity Commission] 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.*

The Panel has taken the view the Productivity Commission is not necessarily suited to undertaking this role on the basis that the work is driven by the Commonwealth and that its legislation and governance would need significant change if it were to take on a role in the competition policy space.[40]

While the Panel is correct to observe the Productivity Commission's work program is driven by the Commonwealth, this has not been an impediment for the Productivity Commission to work across jurisdictions. The Productivity Commission provides the Secretariat for the Review of Government Services that involves the Commonwealth, state and territory Governments. In the past the Productivity Commission and its predecessors have undertaken inquiries at the request of the Council of Australian Governments as well as individual jurisdictions.

The Productivity Commission and its predecessor organisations have examined various competition policy related issues in the past, including a review of the National Access Regime completed in October 2013, and has consistently made findings and recommendations relating to competition in its reports.

In relation to conducting market studies, ANRA notes that as part of its legislative mandate, the Productivity Commission, amongst other requirements, must have regard to the need to:

---

[39] *Harper et al. (2014), Competition Policy Review Draft Report. p.56*

[40] *Harper et al. (2014), Competition Policy Review Draft Report. p.56*

- improve the overall economic performance of the economy through higher productivity in the public and private sectors in order to achieve higher living standards for all members of the Australian community; and
- encourage the development and growth of Australian industries that are efficient in their use of resources, enterprising, innovative and internationally competitive.[41]

There is a risk the market studies function of the proposed ACCP would duplicate the work already undertaken by the Productivity Commission, despite the Panel's guidance to avoid such an outcome.[42] Indeed, the Panel's Draft Report contains over 200 references to the Productivity Commission, strongly suggesting the ACCP could duplicate rather than complement some of the work performed by the Productivity Commission.

Draft Recommendation 43

ANRA supports the objective.

> *The Australian Council for Competition Policy should be required to undertake an annual analysis of developments in the competition policy environment.*

The stagnant pace of reform suggests there is merit to periodic review of developments in the competition policy environment. This will likely assist with maintaining reform momentum. ANRA believes this could be undertaken by the Productivity Commission within its current legislative mandate.

ANRA believes the ACCP might be conflicted as a competition policy advocate. Such an advocacy role could be politically contentious and thus makes it an inappropriate function and activity for a publicly funded entity.

Under the model proposed by the Panel, the ACCP will be placed in a particularly awkward situation where it will become accountable to all jurisdictions on the one hand, while on the other hand being responsible for assessing whether reforms have been undertaken to a sufficient standard to warrant compensation payments being made to state and territory jurisdictions. This will put the ACCP in a particularly invidious position of being both accountable as well as passing judgement on states and territories.

[41] Sections 8(1)(a) and (c) of the Productivity Commission Act 1998.

[42] *Harper et al. (2014), Competition Policy Review Draft Report.* p.*284*

Draft Recommendation 45

ANRA supports in principle.

> *'The competition and consumer functions should be retained within the single agency of the ACCC.'*

Retaining competition law enforcement and consumer protection functions within a single agency provides certain benefits, including:

- promoting competition in the long run protects the interests of consumers, so the single agency is potentially rewarded with a reduced workload; and
- economies of scale with respect to administrative costs, and significantly talent pooling and skills development.

Furthermore, the current structure of the ACCC is consistent with international experience in developed western economies. The Panel is likely aware the competition and consumer protection functions of the United Kingdom's Competition Commission and Office of Fair Trading were recently merged into the single Competition and Markets Authority.[43] The rationale for doing so included achieving economies of scale and avoiding the duplication of regulatory effort.[44]

Avoiding the duplication of regulatory effort is particularly relevant within the context of Australia's federal structure. The panel might also consider making recommendations to avoid the duplication of regulatory effort between the ACCC's consumer protection function and state and territory agencies like the Office of Fair Trading. This would have the added benefit of reducing the regulatory 'contact points' for businesses and consumers alike.

The Panel has highlighted that there remains the potential for ACCC consumer protection activity to cloud the ACCC's competition law enforcement activities.[45] The ACCC at times has appeared to justify enforcement action through consumer advocacy prior to any consideration by a court which can unfairly and wrongly prejudice matters. ANRA believes an appropriate Code of Conduct for the ACCC and media (Draft Recommendation 48) should address these issues.

Draft Recommendation 47

ANRA supports in principle.

> *'The Panel believes that incorporating a wider range of business, consumer and academic viewpoints would improve the governance of the ACCC.'*

Establishing a greater degree of independent oversight of the ACCC:

---

[43] *Formally commenced on 1st April 2014.*

[44] *PricewaterhouseCoopers (2014), Why merge the OFT and Competition Commission? (www.pwc.co.uk)*

[45] *Harper et al. (2014) Competition Policy Review Draft Report. p.61*

- will give the ACCC a more balanced (including commercial or 'real world') perspective of both its own conduct and the conduct of the stakeholders it regulates;
- provides a 'circuit breaker' of sorts against political influence over ACCC decision making; and
- increases accountability for the regulator's conduct (including its use of the media). [46]

Experience would suggest that introducing non-executive members onto the board of a regulator has been challenging and not always effective in practice. The Panel's final recommendation might draw on the experience of the Australian Prudential Regulation Authority, whose non-executive board was replaced with an executive group following a recommendation of the HIH Royal Commission.[47]

ANRA believes the proposed alternative 'Advisory Board' would largely become a 'toothless tiger' and an irrelevance, easily bypassed by the ACCC in its day-to-day operations.

Draft Recommendation 49

ANRA supports in principle.

> *'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.'*

Small businesses are important participants in the Australian economy and often act as suppliers to larger businesses. Building the awareness of, and connecting small business to remedies, including alternative dispute resolution:

- builds trust between small business and public authorities;
- promotes awareness of the law and other supportive mechanisms, such as an applicable industry code; and
- could significantly lower the legal costs for small businesses with a legitimate complaint.

ANRA believes the existing network of small business commissioners, ombudsman, courts, tribunals and industry codes provide a great deal of scope for small business access to justice. ANRA is not convinced an additional small business dispute resolution scheme, solely for CCA matters, is warranted in light of the extensive support already in place and the complications that would arise if the complaint is also relevant to other legislation.

[46] *Uhrig, J. (2003), Review of the Corporate Governance of Statutory Authorities and Office Holders.*
[47] *Owen, N. (2003), The Failure of HIH Insurance: Volume I - A Corporate Collapse and its Lessons.*

4. Draft Recommendations that ANRA opposes or has concerns about

This section provides comments on the draft recommendations that ANRA opposes or has serious concerns about. ANRA believes the following recommendations are not in the best interests of fostering a healthy competitive environment and the cases for the need for reform in these areas have not been made.

Draft Recommendation 25

ANRA opposes.

> *'The primary prohibition in section 46 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 over-capture, the Panel proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question:*
>
> *would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and*
>
> *the effect or likely effect of the conduct is to benefit the long-term interests of consumers.*
>
> *The onus of proving that the defence applies should fall on the corporation engaging in the conduct.'*

Proposals to include an effect's test and to reverse the onus of proof in relation to section 46 are not new and have been considered and rejected on several occasions.[48] A warning from the Dawson Review (2003) is particularly telling:[49]

[48] *Pegasus Economics (2014b), Response to the Competition Policy Review Panel's Recommendation on the Misuse of Market Power. p.18*

[49] *Dawson et al. (2003), Review of the Competition Provisions of the Trade Practices Act. p.86*

> *'As with the introduction of an effects test, the reversal of the burden of proof would discourage corporations from engaging in competitive conduct for fear of being unable to discharge the reversed onus. It is likely that greater caution would be taken to avoid litigation under section 46, which would discourage rather than encourage competitive behaviour.'*

It is this 'chilling effect' of both an effects test and the reversal of the burden of proof that would:

- dampen the competitive environment;
- have the effect of keeping unnecessary costs and inefficiencies in a business; and
- reduce competition; and deliver reduced benefits to consumers.

We agree with the Panel's approach when guiding their consideration of whether Australia's competition laws are fit for purpose[50]. We believe however with respect to recommendations 25 that:

- consumer wellbeing will not be enhanced over the long term;
- Section 46 as it is currently interpreted by the courts demonstrates that it already protects competition rather than protecting competitors despite how it is couched in the Act;
- Section 46 strikes the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship as evidenced by the successful cases brought by the ACCC, and recommendation 25 as drafted will remove this balance casting a wide net over business and capturing pro-competitive behaviour, bringing on regulatory failure;
- As drafted will make the law less clear, less simple and less predictable for business and end in years of costly and lengthy legal battles.

As with previous reviews, ANRA is not convinced the case for change has been made.

An independent paper commissioned by ANRA from Pegasus Economics[51]and previously provided to Panel members and the Review Secretariat outlines convincingly that there is no case.

We share a common view with the Panel, ACCC and others that competition law should be directed towards protecting the process rather than individual competitors. It would appear that those supporting the changes believe the current section 46 protects individual competitors, and that is case enough for change. However, section 46 has not been interpreted by the courts in this manner. The High Court decisions in both Queensland Wire and Boral are good examples.

---

[50] *Competition Policy Review Draft Report*, September 2014, p.5

[51] *Pegasus Economics (2014), Response to the Competition Policy Review Panel's Recommendation on the Misuse of Market Power.*

When considering 'fit for purpose' we can look to international experience, however ANRA is always careful of pointing to international experience and saying, 'because they do, we should too'. What can be often overlooked is both the complex and subtle differences in market characteristics – including structure and participants and the evolution of law to respond to those jurisdictional specifics. For example the Pegasus Report highlights the difference between the current proposal and the international experience including highlighting the higher benchmark of dominance in the EU.

With respect to the introduction of the substantial lessening of competition test as proposed in Recommendation 25, ANRA cautions against the approach that reform is simply to bring it into line with other prohibitions, this ignores that section 46 deals with unilateral acts, where as other prohibited behaviour is multilateral.

Just as the case for change has not been made, nor has it been demonstrated the proposed changes would be better suited for capturing genuinely anti-competitive conduct than the existing provisions. Even if they did, this must be weighed up against the risk of regulatory failure; that is, of capturing pro-competitive conduct, deterring innovation and creating unnecessarily higher compliance costs for business – all of which are not in the long-term interest of consumers.[52]

Governments and regulators and those that are advising both, should always be careful of pointing to international experience and saying 'because they do, we should too'. It is a simplistic approach for what are quite complex and subtle differences in market characteristics – including structure and participants and the evolution of law to respond to those jurisdictional specifics.

For example, whilst the European Union applies an effects test in relation to its abuse of dominance provision, the threshold of dominance is considerably higher than in Australia[53].

The Test

The requirements to prove both an anticompetitive purpose and a use or 'taking advantage' of market power in the current test have been successfully used by the courts to help distinguish conduct that manifests competition from conduct that damages competition.

The Draft Report's recommendation aims to make the same distinction as above but by instead using a 'substantial lessening of competition' (SLC) test. Despite SLC provisions in other sections of the CCA, ANRA believes it is not clear what a SLC means within the context of section 46 because of the distinction between multilateral[54] and unilateral conduct.

It is not true that with respect to this draft recommendation business can be comforted by their compliance of SLC in other sections. The ACCC has frequently asserted there would be no SLC

---

[52] *Pegasus Economics (2014), Response to the Competition Policy Review Panel's Recommendation on the Misuse of Market Power. p.iii*

[53] *Pegasus Economics (2014b), Response to the Competition Policy Review Panel's Recommendation on the Misuse of Market Power. p.11*

[54] *sections 45, 47 and 50 of the CCA.*

under the new section 46 where product innovation or sustained price reductions arising from efficiencies resulted in the exit of one or more competitors;[55] but if the ACCC takes guidance from the application of SLC in sections 45, 47 or 50 it is likely a large amount of pro-competitive conduct will be caught.

For example, in the merger context, the ACCC has often found that a reduction in the number of competitors in a market would result in a SLC and have subsequently rejected applications. Therefore, conduct that both increases efficiency and hence total welfare may also lessen competition by seeing a company leave the market and section 46 may apply.[56] As a result, the basis on which the ACCC or a court would judge unilateral conduct that resulted in the exit or prevented the entry of a competitor remains difficult to predict – despite the presence of the SLC test in other parts of the CCA.

The authors of the Pegasus report could not find any evidence within Australian jurisprudence to suggest the establishment of efficiency negates a finding of an SLC effect:

> *'The only mechanisms currently available to argue efficiencies reside within the taking advantage and purpose elements in the existing section 46 provision'.*[57]

One thing that is clear from the proposal is that if the ACCC's narrowest market definitions are adopted – sometimes as confined as a single suburb[58] – then any business incumbent in a local market may be considered to have market power and therefore bears a high risk of prosecution.

The Defence

ANRA understands that the Draft Report proposes to address the challenge of distinguishing pro-competitive behaviour from anti-competitive behaviour by introducing a defence.

Given the objective of the CCA is to promote consumer welfare, it is ANRA's view that the two limbs of the single defence could have perverse consequences. Conduct that could somehow be proved to be in the long-term interests of consumers could still be prohibited if the first limb of the defence is not established.

In ANRA's view, the rational business decision defence is a reasonable summary of the courts' interpretation of the requirement that a business use or 'take advantage' of its market power. But it also introduces new language that does not closely match any previous formulation by the courts or the legislature. ANRA understands the CCA was amended in 2008 to add a number of alternative formulations that a court may take into account in applying the 'take advantage' element, and this has not yet been applied. It is therefore not clear that another new formulation is useful when the previous ones have not yet been tested.

---

[55] *Sims (2014), Bringing more economic perspectives to competition policy and law.*

[56] *Trindade et al. (2014), Building better mousetraps: Harper's re-write of section 46. P. 4*

[57] *Pegasus 2014, Response to the Competition Policy Review Panel's Recommendation on the Misuse of Market Power. p.10.*

[58] *ACCC (2013) ACCC to oppose Woolworths' proposed acquisition of Glenmore Ridge site*.

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.

Whilst the term 'long-term interests of consumers' (LTIC) is a shared goal, it is not sufficiently precise or predictable to use as a legal element of either a defence or a prohibition. If LTIC is predicated on an aggregate welfare or efficiency standard then it ultimately means exactly the same thing as the rational business decision defence. If a court decides to apply a literal interpretation of LTIC, or if LTIC means something other than an aggregate welfare standard, then it may require a company to exhibit fairly full or near perfect foresight. There is also doubt about whether the timeframes for assessing LTIC also match that for SLC.

Possible Outcomes

The proposed section 46 and the proposed defence would greatly increase uncertainty and compliance costs for businesses judging proposed conduct against this new legal standard.

Table lists two scenarios, Scenario 1 and 2, demonstrate the possible chilling effect on competition.

Table 4: Scenarios of Unintended Consequences in relation to draft Recommendation 25

Scenario 1: Disincentive to pass on cost savings to customers Company A is a major retailer across Australia, carrying in excess of 30,000 product lines. It makes thousands of decisions each year about product ranging and pricing. These decisions are driven by customer demand and are typically focused on delivering better value, quality and service to the customer. If Company A considers lowering the price of paper towel (a low cost but bulky item) because it has made significant improvements to its supply-chain logistics; the proposed new section 46 would also require Company A to be in a position to predict whether other retailers showed similar initiative and are able to compete on similar terms. If not, other retailers might not be able to make similar offers and might stop ranging paper towel. That might well be seen to result in a SLC in the market for paper towel, despite the actions of Company A clearly being in the interests of consumers. Company A is therefore reluctant to pass on the cost savings to consumers. The proposed changes to section 46 will complicate and create uncertainty about whether Company A's pricing or ranging decisions would or could result in a SLC in a market. To require Company A to make predictions of the likely market effects of routine decisions would make business decision-making unwieldy, introduce untold complexity to its daily operations and put at risk outcomes that could improve consumer welfare.
Scenario 2: Inefficient firm enjoys protection from competition Company B sells widgets and procures most of its widgets inventory from a major supplier called Widdings. Widdings is one of only two suppliers in Australia. Company B has suffered inadequate service from Widdings for some years; including consistent failure to meet delivery schedules, an unwillingness to innovate in packaging and generally being difficult to deal with. This costs Company B time and money and is ultimately reflected in retail prices that could otherwise be lower. Company B is considering whether it should swap to the other major supplier of widgets and to cease dealing with Widdings. Widdings relies heavily on Company B as its major customer. Company B currently buys 90% of its production. If Company B ceases to deal with Widdings, Widdings is likely to fail. This leaves only one major producer of widgets in Australia. The one remaining producer will not produce enough volume for the market so prices are likely to increase. The decision of Company B may result in a SLC in the wholesale widgets market. Company B would therefore be exposed to the risk of contravening the new section 46. Company B may or may not ultimately be able to establish the two elements of the new defence – both are speculative and would require detailed legal and economic advice. This means making and implementing the decision would be costly and take several extra months. Company B may therefore be dissuaded from making this decision, retaining Widdings as a supplier causing ongoing inefficiencies in the relevant markets. Company B's shareholders also suffer detriment as a result of this decision.

We have outlined above the difficulty in relying on the ACCC's word that 'competition on its merits' would be protected given the way it interprets the same outcomes. That is, a change in market structure as anti-competitive under other sections of the CCA.

As an example of outcomes companies could do any of the following when faced with a rational business decision that would save costs and could benefit consumers but also exclude competitors:

- make the rational business decision, but not pass the benefits onto consumers in the form of lower prices which would reduce benefits of competition;
- Not make the rational business decision, instead taking a risk averse approach which could keep inefficient costs in a business and could have the effect of driving up consumer prices;
- take the gamble and then be prepared to mount a substantial, lengthy and costly legal defence involving economic evidence about the long-term interests of consumers and the rational behaviour of a business without market power in the same circumstances, whilst dealing with the negative consequences to brand and thereby eroding shareholder value.

All would have either an immediate or long-term 'chilling effect' on competition. None are desirable given the interests of the consumer and all are avoidable with a rethink of the draft recommendation.

Draft Recommendation 29

ANRA opposes.

> *'The prohibition on resale price maintenance (RPM) should be retained in its current form as a per se prohibition, but the notification process should be extended to include resale price maintenance.'*

The Draft Report states that '*concerns remain about the likely anti-competitive effects of RPM*'[59], however to the contrary there is an overwhelming weight of literature demonstrating that RPM:

- can deliver pro-competitive outcomes;
- can incentivise retailers to invest in post-market services for consumers; and
- does not always facilitate collusion within supply chains or excludes willing participants in a market.

ANRA appreciates the Panel has proposed the introduction of a less costly means to engage in legalised resale price maintenance (RPM) by permitting notification (in contrast to the more costly authorisation process that is the only legal means currently available). However, ANRA

[59] *Harper et al. (2014), Competition Policy Review Draft Report. p.234*

does not share the Panel's conclusions on why the existing per se prohibition against RPM should be retained in favour of a competition based test.[60]

The Panel should revisit the literature and the per se prohibition on RPM should not be retained.

Draft Recommendation 42

ANRA has concerns.

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

Whilst ANRA believes it understands the Panel's intent is to engage the States and Commonwealth on these issues in a central body. ANRA is concerned about overlap, duplication, and a possible increased burden on business to participate.

- The ability to do as suggested already sits within the powers of the Productivity Commission.
- The threshold for issuing a reference for a competition study should be determined by the number of jurisdictions the study covers.
- The threshold for studies across multiple or all Australian jurisdictions should be higher than a single state to mitigate the risk of politically motivated competition studies. Furthermore, the reference must also come from the jurisdiction(s) being studied. The majority of jurisdictions likely to be involved might be an appropriate threshold for national studies, while a single state could issue a reference to examine within its own jurisdiction.

[60] *Harper et al. (2014), Competition Policy Review Draft Report. p.46*