Competition Policy Review Secretariat

The Treasury

Langton Crescent

PARKES ACT 2600

17th of November 2014

Response to Competition Policy Review - Draft Report – September 2014

Dear Sir/Madam,

The Australian Newsagents' Federation has prepared the following response to the Competition Policy Review Draft Report – September 2014

Yours faithfully,

Ben Kearney

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Australian Newsagents' Federation (ANF)

Response to Competition Policy Review - Draft Report

The Australian Newsagents' Federation (ANF) is the peak industry body representing newsagents in Australia. The industry is made up of some 4000+ small businesses whose owners and employees make a significant contribution to Australia's economy, and who form one of the largest and most trusted independent retail channels in the country.

The ANF makes this submission in response to the Draft Panel Report – September 2014 released by the Competition Policy Review (Harper Review).

The ANF is broadly supportive of making competition law simpler, more accessible, fairer and more consistent across Australia and we appreciate the panel's efforts so far in considering these issues.

The ANF recognizes the overwhelming complexity of the task being undertaken by the Panel. Nonetheless, we feel that the approach taken so far is reflective of a fairly narrow pure economic approach to protecting competition.

The objects clauses of most competition law take a broader approach than the purely economic. It is our view that competition law should factor in other considerations. We feel that issues such as 'fair conduct' and 'fair trading' need to receive more consideration and weighting in your recommendations.

Small business issues also need to rate higher in the mix, as a healthy and competitive small business sector is essential to maintain competitive tension in the economy with major retailers in particular.

The ANF has made several comments on specific draft recommendations in the following pages. Thank you for considering our comments and concerns.

ANF responses to the recommendations in the Draft Report

Draft Recommendation 1 — Competition principles

The Panel endorses competition policy that focuses on making markets work in the long-term interests of consumers. The following principles should guide Commonwealth, state and territory and local governments in implementing competition policy:

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

Applying these principles should be subject to a 'public interest' test, so that:

- *the principle should apply unless the costs outweigh the benefits; and*
- *any legislation or government policy restricting competition must demonstrate that:*

– *it is in the public interest; and*

– *the objectives of the legislation or government policy can only be achieved by restricting competition.*

COMMENT

The ANF agrees with the general thrust of this recommendation. However, in "making markets work" suitable recognition should be given to fostering a climate that enables entry and exit in markets and fair trading in markets for all players in the market. That should not be seen as unacceptable intervention in markets.

Draft Recommendation 9 — Parallel imports

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.*

COMMENT

The ANF is of the view that the Panel should note one of the primary reasons why governments have preserved parallel import prohibitions, is due to the concerns that the removal of such laws may have a particularly devastating effect on small business sectors. Any lifting of the restrictions should make it clear what is the expected small business impact. Transparency in relation to the impact of removal of restrictions is extremely important. This was overlooked in the past NCP process.

Draft Recommendation 10 — Planning and zoning

All governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision-making.

The principles should include:

- *a focus on the long-term interests of consumers generally (beyond purely local concerns);*
- *ensuring arrangements do not explicitly or implicitly favour incumbent operators;*

- *internal review processes that can be triggered by new entrants to a local market; and*
- *reducing the cost, complexity and time taken to challenge existing regulations.*

COMMENT

The main beneficiaries of such restrictions are small businesses including Newsagents. The Panel should note that one of the primary reasons that governments have preserved restrictions on planning and zoning laws is because of their concern that the removal of such laws may have a particularly devastating effect on various small business sectors. Big players will simply expand as they will outbid others for sites bringing into question the issue of 'fair trade'. Less restrictive planning and zoning regimes may ultimately allow a few more large competitors access to the marketplace but it will be at the expense of many small businesses.

Draft Recommendation 11 — Regulation review

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

Regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that:

- *they are in the public interest; and*
- *the objectives of the legislation or government policy can only be achieved by restricting competition.*

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

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

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

The review process should be overseen by the proposed Australian Council for Competition Policy (see Draft Recommendation 39) with a focus on the outcomes achieved, rather than the process undertaken. The Australian Council for Competition Policy should conduct an annual review of regulatory restrictions and make its report available for public scrutiny.

COMMENT

The ANF is of the view that any such regulation review should also contemplate, as part of its consideration of the public benefit, the impact that any changes are likely to have on small businesses like Newsagents. It is likely that many of these regulations are driven by the policy objective of providing support and opportunities for local small and medium sized businesses.

Draft Recommendation 13 — Competitive neutrality policy

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

The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy (see Draft Recommendation 39).

COMMENT

The ANF is a longstanding supporter of the principle of competitive neutrality. We strongly agree with this recommendation.

Draft Recommendation 14 — Competitive neutrality complaints

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

- *assigning responsibility for investigation of complaints to a body independent of government;*
- *a requirement for the government to respond publicly to the findings of complaint investigations; and*
- *annual reporting by the independent complaints bodies to the proposed Australian Council for Competition Policy (see Draft Recommendation 39) on the number of complaints received and investigations undertaken.*

COMMENT

The ANF strongly agrees with this recommendation. Government bodies responsible for investigating these complaints have generally not investigated such matters in a rigorous and transparent matter. A more transparent process is important to remove any suspicion that the government agency investigating the competitive neutrality complaint may have a conflict of interest.

A further concern is that the government agencies charged with investigating such competitive neutrality complaints often do not have appropriately trained investigatory staff. It is important therefore for the proposed Australian Council for Competition Policy to be appropriately staffed with trained investigators.

Draft Recommendation 15 — Competitive neutrality reporting

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

COMMENT

The ANF agrees with this recommendation. Greater transparency in competitive neutrality reporting is essential given past failures in this area.

Draft Recommendation 17 — Competition law concepts

The Panel recommends that the central concepts, prohibitions and structure enshrined in the current competition law be retained because they are the appropriate basis for the current and projected needs of the Australian economy.

COMMENT

The ANF supports this recommendation; it reiterates concerns we have about the apparent confusion around the actual objects of the CCA. The objects of the CCA are not just the promotion of competition to the exclusion of all else. See later comments in relation to section 46.

Draft Recommendation 19 — Application of the law to government activities

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

COMMENT

The ANF agrees and this should be a priority matter that all Governments can agree upon as a matter of urgency. In fact the Commonwealth Government can lead on this issue.

Draft Recommendation 20 — Definition of market

The current definition of 'market' in the CCA should be retained but the current definition of 'competition' should be re-worded to ensure that competition in Australian markets includes competition from goods imported or capable of being imported into Australia and from services supplied or capable of being supplied by persons located outside of Australia to persons located within Australia.

COMMENT

The ANF is disappointed that deeper consideration has not been given to the issue of definition of market, and that this should be a question of fact and not definition.

As we commented in our initial submission, with the growth of online sales, competition is now occurring between franchisors/suppliers, and their "agents" (retailers) even though no title of goods may have changed hands. We believe strongly that the CCA needs to better reflect this new reality that has come about partly through technological change.

'Agency' is a legal point of some importance to the Newsagent Industry. The ACCC and the Courts in some cases have taken the view that businesses in an agency relationship to a supplier are not in competition with that supplier and hence some of the CCA prohibitions do not apply. This is not the way "agents" would see the market dynamics and this issue needs to be clarified and requires further consideration by the Panel.

Draft Recommendation 22 — Cartel conduct prohibition

The prohibitions against cartel conduct should be simplified and the following specific changes made:

- *the provisions should apply to cartel conduct affecting goods or services supplied or acquired in Australian markets;*
- *the provisions ought be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility;*
- *a broad exemption should be included for joint ventures and similar forms of business collaboration (whether relating to the supply or the acquisition of goods or services), recognising that such conduct will be prohibited by section 45 of the CCA if it has the purpose, effect or likely effect of substantially lessening competition;*
- *an exemption should be included for trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including IP licensing), recognising that such conduct will be prohibited by section 47 of the CCA (revised in accordance with Draft Recommendation 28) if it has the purpose, or has or is likely to have the effect or likely effect of substantially lessening competition.*

COMMENT

The ANF agrees with this recommendation. However, we are also intensely of the view that further serious consideration must be given to the fact that in many cases suppliers and resellers are in direct competition with each other, particularly now that suppliers are often actively competing with their own "agents" (resellers) in the online sphere, as occurs in our industry.

It needs to be made clear that the law catches this structure and that this not be exempt from the law. The ACCC has previously advised associations like the ANF that agents are not in competition with principals despite it being clear to consumers that they are. This is an area where the law has fallen behind what is now occurring in the marketplace. This issue is on appeal by the ACCC, decision reserved. Depending on the outcome of that appeal there should be consideration of a specific provision that agents and principals are in competition with each other unless the facts are otherwise.

Draft Recommendation 25 — Misuse of market power

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.

However, the Panel is concerned to minimise unintended impacts from any change to the provision that would not be in the long-term interests of consumers, including the possibility of inadvertently capturing pro-competitive conduct.

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.

The Panel seeks submissions on the scope of this defence, whether it would be too broad, and whether there are other ways to ensure anti-competitive conduct is caught by the provision but not exempted by way of a defence.

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

COMMENT

The ANF is concerned that the Panel has made a recommendation that will not improve the law; in fact, it makes it harder to enforce, and will take out the language about competitors and repeal the predatory pricing provision.

When introducing the current law into the Senate in 1973 the late Lionel Murphy stated,

> *Monopolisation is denned in clause 46, which is now in the form of the amendments that I circulated before the double dissolution of Parliament. The clause covers various forms of conduct by a monopolist against his competitors or would-be competitors. A monopolist for this purpose is a person who substantially controls a market. The application of this provision will be a matter for the Court. An arithmetical test such as one third of the market- as in the existing legislation- is unsatisfactory. The certainty which it appears to give is illusory.*
>
> *Clause 46 as now drafted makes it clear that it does not prevent normal competition by enterprises that are big by, for example, their taking advantage of economies of scale or making full use of such skills as they have; the provision will prohibit an enterprise which is in a position to control a market from taking advantage of its market power to eliminate or injure its competitors.*

The provision will not apply merely because a person who is in a position to control a market engages in conduct within one of the classes set out in the clause. It will be necessary for the application of the clause that, in engaging in such conduct, the person concerned is taking advantage of the power that he has by virtue of being in a position to control the market. For example, a person in a position to control a market might use his power as a dominant purchaser of goods to cause a supplier of those goods to refuse to supply them to a competitor of the first mentioned person- thereby excluding him from competing effectively. In such circumstances the dominant person has improperly taken advantage of his power.

The clear intention at the time was to impact on competitors and on competition. We are not aware of the Parliament changing that intention.

Over the years the ACCC and the Courts had interpreted the section to impact on competition only and not competitors, although it will often be hard to distinguish between the two.

It is fine for the ACCC in choosing its priorities to limit its role to matters that impact upon competition broadly but not for the Courts.

Politically the section has always been promised to assist small business and that was compounded when the price discrimination provisions were repealed in 1986, it was said at the time that section 46 would do a better job of combatting such conduct to the benefit of small business.

We submit that both regimes are required; one that focuses on competition and one that covers competitors.

We see a value in the Panels suggested provision to be used primarily by the ACCC to attack major and broad anti-competitive conduct and to include substantial remedies including divestiture.

However, in relation to the Panel proposal, we would not have the suggested defence. If there is to be a defence it should be 'legitimate business conduct', although that is very uncertain and may need some fleshing out.

We would then suggest the following collateral provision that relates to competitors, namely,

The provision

> ***(1)*** *A corporation that has a substantial degree of power in a market shall not engage in conduct, in that or any other market, for the purpose or effect or likely effect of:*
>
> *(a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;*
>
> *(b) preventing the entry of a person into that or any other market; or*
>
> *(c) deterring or preventing a person from engaging in competitive conduct in that or any other market.*
>
> ***(1A)*** *For the purposes of subsections (1):*
>
> *(a) the reference in paragraphs (1) (a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors or to a particular competitor,*
>
> *(b) the reference in paragraphs (1) (b) and (c) to a person includes a reference to persons generally, or to a particular class or to a particular competitor.*
>
> *In the Act or the Explanatory Memorandum there should be a non-exclusive list of conduct that may damage competitors namely.*

Add a list (non-exclusive) of conduct to be deemed to be likely to amount to a breach along the lines of, but not a copy of the Canadian law, namely the following,

- *(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the*

supplier, for the purpose or effect of impeding or preventing the customer's entry into, or expansion in, a market;

- *(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose or effect of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;*
- *(c) freight equalization on the plant of a competitor for the purpose or effect of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;*
- *(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;*
- *(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;*
- *(f) buying up of products to prevent the erosion of existing price levels;*
- *(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;*
- *(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the purpose or effect of preventing a competitor's entry into, or expansion in, a market; and*
- *(i) selling articles at a price lower than the acquisition cost for the purpose or effect of disciplining or eliminating a competitor.*
- *(j) introducing additional capacity into a market that has no economic rationale with the purpose or effect to eliminate or prevent competition.*

- (k) *discriminate between customers which has no economic rationale*
- *(l) using buying power to induce discrimination and knowingly threaten the viability of the supplier unless it can be shown that the viability is threatened for other reasons.*

It will be a defence to the above prohibition if the corporation can show that the conduct is pro-competitive or amounts to legitimate business conduct.

In relation to sanctions there would not be penalties or divestiture but injunctions and damages.

Authorisation is to be available for both provisions where conduct in breach can be exempted if there is countervailing public benefit.

Consideration should be given to changing the name of the provision to ***monopolisation*** once taking advantage is taken out as suggested by the Panel.

We are concerned at the Panels cursory treatment of the question of whether a divestiture should be introduced for proven breaches of section 46.

First, there is no discussion in the Draft Report of the various situations where the remedy has been used in the US and whether the remedy was used successfully in these cases to achieve positive competitive outcomes.

Second, it appears that the Panel assumed that the use of a divestiture remedy "is likely to have broader impacts on the efficiency of the firm." There is simply no basis for stating that a divestiture remedy is "likely" to have this effect.

The fact is that divestiture will seldom be utilised but in our view should be in the suite of remedies.

Draft Recommendation 26 — Price discrimination

A specific prohibition on price discrimination should not be reintroduced into the CCA. Where price discrimination has an anti-competitive impact on markets, it can be dealt with by the existing provisions of the law (including through the recommended revisions to section 46, see Draft Recommendation 25).

Attempts to prohibit international price discrimination should not be introduced into the CCA on account of significant implementation and enforcement complexities and the risk of negative unintended consequences. Instead, the Panel supports moves to address international price discrimination through market solutions that empower consumers. These include the removal of restrictions on parallel imports (see Draft Recommendation 9) and ensuring that consumers are able to take legal steps to circumvent attempts to prevent their access to cheaper legitimate goods.

COMMENT

The ANF does not support the reintroduction of a specific price discrimination provision but we are concerned that the panel has not looked deeper into this important issue. A major problem, which many small businesses like Newsagents face is that we are unable to buy products from our suppliers at a wholesale price which is lower than the retail prices being offered for the same products by our major retail competitors. It is important for the Harper Review to fully investigate and gain an understanding of this problem before dismissing any potential solutions.

Serious consideration should be given to section 46 and concerns about discrimination as was promised when section 49 was repealed in 1986.

Draft Recommendation 27 — Third-line forcing test

The provisions on 'third-line forcing' (subsections 47(6) and (7)) should be brought into line with the rest of section 47. Third-line forcing should only be prohibited where it has the purpose, or has or is likely to have the effect, of substantially lessening competition.

COMMENT

The ANF does not support this recommendation. The Panel has evaluated third line forcing through the lens of competition law. However, there is an equally valid way of considering the prohibition on third line forcing – namely that it promotes freedom of contract.

The prohibition in subsections 47(6) and (7) are aimed at preventing interference with freedom of contract. In other words, these provisions preserve the freedom of a party not to have to agree to purchase goods or services, which they do not want or need from a party whom they do not want to contract with. The prohibition also frees up business dealings.

The Panel has not considered the likely effect that this recommendation will have in the marketplace. The ANF believes that if this recommendation is implemented there will be a dramatic upsurge of tied sales. Furthermore, it is likely that the main group which will end up being subject to such tied arrangements will be small businesses like Newsagents. Big can resist such 'forcing"

Draft Recommendation 29 — Resale price maintenance

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

COMMENT

The ANF does not agree with this recommendation for the same reasons as we do not agree with the recommendation concerning third line forcing. Again the Panel has evaluated resale price maintenance (RPM) through the lens of competition law. However, there is an equally valid way of considering the prohibition on RPM – namely that it promotes freedom of contract.

The prohibition on RPM is aimed at preventing interference with freedom of contract. In other words, these provisions preserve the freedom of a party to sell a product,

which they have purchased and title in, at any price that they wish, rather than being forced to sell the product at a price determined by another party.

The Panel has not considered the likely effect of this in the marketplace. We believe that if this recommendation is implemented there will be a dramatic upsurge of the incidence of RPM. Again, it is likely that the main group which will end up being subject to RPM will be small businesses like Newsagents and consumers as RPM will always set higher prices than a free market.

Draft Recommendation 34 — Authorisation and notification

The authorisation and notification provisions in the CCA should be simplified:

- *to ensure that only a single authorisation application is required for a single business transaction or arrangement; and*
- *to empower the ACCC to grant an exemption (including for per se prohibitions) if it is satisfied that either the proposed conduct is unlikely to substantially lessen competition or that the proposed conduct is likely to result in a net public benefit.*

COMMENT

The ANF is supportive of simplifying authorisation and notification provisions. However, this does change the authorisation test and it is not clear how that will operate. More consideration should be given to the consequences.

Draft Recommendation 35 — Block exemption power

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

COMMENT

The ANF is generally supportive of this recommendation but would wish to see further detail of how this particular recommendation would operate in practice. In particular, will there be time limits and can the block exemption be challenged?

Draft Recommendation 36 — Facilitating private actions

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

COMMENT

The ANF strongly agrees with this recommendation. The Act from the start had a strong self-enforcing goal but that turned out to be illusory.

Much more has to be done to facilitate private actions. In this regard, we are disappointed that the Panel did not consider other more meaningful ways of seeking to facilitate private actions, such as allowing treble damages awards and making changes to the usual costs rules.

The issue of compensation to victims of breaches of the TPA is a major one and not really being addressed by anyone in the past.

It was always the policy of the TPA (section 83) that where the ACCC or any litigant was successful in proving a breach of the TPA others can use that action to base damages action upon. This policy has never materialised in practice.

The suggestions seek to overcome practical problems that have arisen when victims of anti-competitive conduct have tried to get compensation following successful ACCC cases. This is not where the ACCC seeks compensation for victims (representative actions) but where victims seek to take their own action.

We feel that consideration should also be given to a provision that damages can include punitive damages, such as treble damages if the Court deemed that appropriate.

Section 83 - coats tails actions

(1) In a proceeding against a person under section 82 or in an application under sub section 87 (1 A) for an order against a person a finding by a court made in any

proceedings under this Act, in which a person has been found to have contravened, or to have been involved in a contravention of, a provision of this Act is prima facie evidence of the fact that a contravention has occurred.

(2) For the purposes of subsection (1), a finding of contravention may:

(a) be proved by production of a document under the seal of the court from which the finding appears; and

(b) also be proved by the evidence contained in documents available at the hearing of the proceeding for the contravention or offence, including:

(i) written statements or admissions admissible as evidence on the hearing of the application;

(ii) depositions taken at the application proceeding; or

(iii) any written statements or admissions used as evidence in the proceeding.

(3) In any proceeding under section 82 or an application under section 87 (1A), a court will accept any of matters listed in sub paragraph (2) above as conclusive of a finding of contravention, unless there is evidence to the contrary.

(4) In considering the issue of damages the Court may impose any damages that the Court considers appropriate, including punitive damages.

Consent injunctions.

Section 80 (1A)-

(i) In a consent application under sub paragraph (1AA) the Court shall take reasonable steps to determine whether such an order , without the Court being satisfied that a person has engaged , or is proposing to engage, in conduct in contravention of the Act , will detrimentally affect any other persons.

(ii) If the Court is of the view that any other persons will be detrimentally affected the Court shall not make a consent order, without being satisfied that a person has engaged, or is proposing to engage, in conduct in contravention of the Act.

Draft Recommendation 39 — Establishment of the Australian Council for Competition Policy

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

The Australian Council for Competition Policy should be established under legislation by one State and then by application in all other States and the Commonwealth. It should be funded jointly by the Commonwealth, States and Territories.

Treasurers, through the Standing Committee of Federal Financial Relations, should oversee preparation of an intergovernmental agreement and subsequent legislation, for COAG agreement, to establish the Australian Council for Competition Policy.

The Treasurer of any jurisdiction should be empowered to nominate Members of the Australian Council for Competition Policy.

COMMENT

The ANF agrees that an organization such as the ACCP is required as an advocate for competition policy. It is not appropriate for a law enforcement agency such as the ACCC to be called on, or expected, to provide policy advice to government.

Draft Recommendation 40 — Role of the Australian Council for Competition Policy

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

- *advocate and educator in competition policy;*
- *independently monitoring progress in implementing agreed reforms and publicly reporting on progress annually;*
- *identifying potential areas of competition reform across all levels of government;*
- *making recommendations to governments on specific market design and regulatory issues, including proposed privatisations; and*
- *undertaking research into competition policy developments in Australia and overseas.*

COMMENT

The ANF agrees that the proposed role of the ACCP is appropriate.

Draft Recommendation 41 — Market studies power

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

The Panel seeks comments on the issue of mandatory information-gathering powers and in particular whether the PC model of having information-gathering powers but generally choosing not to use them should be replicated in the Australian Council for Competition Policy.

COMMENT

The ANF agrees that the ACCP should have these powers and we do not support the ACCC doing such studies.

Draft Recommendation 42 — Market studies requests

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.

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

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

COMMENT

The ANF agrees with this recommendation.

Draft Recommendation 43 — Annual competition analysis

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

COMMENT

The ANF agrees, subject to the ACCP being required to seek input from the ACCC about areas which it considers to be of particular importance.

Draft Recommendation 44 — Competition payments

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.

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

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

COMMENT

The ANF agrees with this recommendation.

Draft Recommendation 45 — ACCC functions

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

COMMENT

The ANF strongly agrees with this recommendation. No case has been made for separating the ACCC's competition and consumer functions into two separate

agencies. Indeed, over recent years there has been a great deal evidence of the synergies which exist between the competition law and consumer law functions.

Past attempts to split some of these roles have failed and powers taken off the ACCC have been returned and at time enhanced, for instance product safety.

Draft Recommendation 47 — ACCC governance

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

The Panel seeks views on the best means of achieving this outcome, including but not limited to, the following options:

- ***replacing the current Commission with a Board comprising executive members, and non-executive members with business, consumer and academic expertise (with either an executive or non-executive Chair of the Board); or***
- ***adding an Advisory Board, chaired by the Chair of the Commission, which would provide advice, including on matters of strategy, to the ACCC but would have no decision-making powers.***

The credibility of the ACCC could also be strengthened with additional accountability to the Parliament through regular appearance before a broadly-based Parliamentary Committee.

COMMENT

The ANF does not agree with the proposal to replace the current ACCC Commission with a Board comprising executive members. No case has been made for such a change. Indeed, such a change would seriously weaken the effectiveness and independence of the ACCC. We are also concerned that Board appointments would become politicised, which would in turn undermine the independence of the ACCC.

We also have great concerns about an Advisory Committee; it will impact on the independence of the ACCC. The ACCC will always be looking over its shoulder.

We do however; support a Standing Joint House Parliamentary Committee that reviews the ACCC twice yearly.

Draft Recommendation 49 — 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.

The Panel invites views on whether there should be a specific dispute resolution scheme for small business for matters covered by the CCA.

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.

COMMENT

The ANF feels strongly that the Panel should have been able to put forward more substantive recommendations in relation to this issue.

Informal mechanisms of justice, such as ADR are very important to our members. In some states it is much harder to access these than in others though. We would be supportive of a specific dispute resolution scheme for small business for matters covered by the CCA. We do feel however that the focus of the discussion must also be on how to provide small businesses with better access to justice. Small businesses are as willing as larger businesses in pursuing their legal rights through courts and tribunals. Unfortunately, the costs of pursuing those rights are often cost prohibitive.

A first step is to try to identify ways in which small businesses can assert their legal rights in courts and tribunals in the most cost effective ways.

One novel solution may be to explore the possibility of state and territory Tribunals being given the jurisdiction to adjudicate in relation to simple competition law matters. Currently, many small businesses pursue ACL issues, including unconscionable conduct allegations, through state tribunals such as the NCAT, QCAT and VCAT, with some measure of success.

There is no reason in principle why a small business would not be able to pursue a complaint involving less complex competition law issues through a state tribunal. For example, it seems that a small business which was the subject of a third line forcing arrangement or a resale price maintenance arrangement should be able to pursue that issue through a tribunal by seeking an order that the relevant agreement was void and unenforceable. Small businesses could also have the right to seek compensation from the Tribunal in relation to such conduct.

We feel that it would be feasible for tribunals to be called upon to adjudicate on small business complaints involving other types of exclusive dealing arrangements. In these matters, the small business would be required to demonstrate on the balance of probabilities that the particular conduct was likely to substantially lessen competition. The main concern is that most tribunals may not have sufficient expertise with CCA provisions or concepts. However, these issues could be overcome by providing additional training.

As stated above, other options for improving small business access to justice would include encouraging the ACCC to pursue both pecuniary penalties and compensation as part of its CCA cases. Section 79B would then come into play with the Court being required to give preference to compensation for victims of the anticompetitive conduct.

Other options which could be explored include the introduction of US-style incentives for private actions, such as a right to treble damages awards and changes to the usual cost orders in for competition law private actions – ie costs to be born by each party rather than costs following the event.

Another initiative which could be explored is the creation of a pro-bono law firm panel for the provision of competition and consumer law advice to small businesses. The idea would be for particular firms with expertise in competition and consumer law matters to be appointed to a pro-bono panel for the purpose of providing small businesses with initial free advice in relation to competition and consumer law issues. Through this process, many small businesses would be able to understand the

reasons why their particular complaint may not raise an actionable breach of competition or consumer laws.

If on the other hand the small business complaint had merit, the pro-bono law firm could either:

(1) provide free legal advice to the small business about how to draft a complaint letter to the ACCC; or
(2) be engaged by the small business to provide to draft an initial complaint letter to the ACCC raising the allegations.

This pro-bono panel could also be extended to providing free legal advice to small businesses which had become the subject of an ACCC investigation or ACCC litigation. The pro-bono firm would be expected to provide the small business with advice on such issues as the ACCC investigation, particularly in relation to their legal obligations in responding to statutory notices and the legal implications of entering into a section 87B undertaking. Other areas of advice could include substantiation notices, infringement notices and public warning notices.

The pro-bono law firms could be called upon to give free advice to small businesses which become involved in ACCC investigations or litigation either as a witness or as a recipient of an ACCC statutory notice or subpoena.

In relation to access to justice through mediation the various Small Business Commissioners have been providing a valuable mediation function to Newsagents. We believe that these initiatives should be supported and if possible extended.

We do not support the ACCC having a mediation role in small business disputes. Such a role would invariably create conflicts of interests which would blur the ACCC's role as an enforcement agency.

Some other options that might be considered are.

Disputes between businesses that are not suitable for litigation.

1. **Trade associations** could filter complaints and seek to resolve matters. (some funding could be allocated to approved trade associations to complete this).
2. **Small business Commissioner**- seeks to mediate /arbitrate dispute.

ACCC/ASIC - referrals from trade association / small business commissioner where enforcement action might be warranted. Neither ACCC nor ASIC currently seek to resolve complaints as such and probably should not unless there is a major rejigging of their role.

Private litigation/ADR - always available to business. Trade associations should be given standing in relevant Courts and Tribunals to represent business plaintiffs.

Disputes that warrant private litigation

The major impediment to such action is costs orders. It is suggested that consideration to prevent such orders in CCA actions unless they are vexatious. There are precedents for such a regime.

At the start of the TPA its self-enforcing nature was seen as a major innovation but that did not eventuate in the competition provisions.

Draft Recommendation 49 — Collective bargaining

The CCA should be amended to introduce greater flexibility into the notification process for collective bargaining by small business. One change would be to enable the group of businesses covered by a notification to be altered without the need for a fresh notification to be filed (although there ought to be a process by which the businesses covered by the notification from time to time are recorded on the ACCC's notification register).

The ACCC should take actions to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses.

COMMENT

The ANF strongly agrees with this recommendation but suggests the following to overcome practical difficulties.

Furthermore serious consideration should also be given to protecting members of a collective boycott group approved by the ACCC from breach of contract action. There is precedent for this in the IR sphere

Notice to Commission

Take away the contract language in the current law and use the language of agreement, understanding and arrangements. This avoids some of the inflexibilities in relation to changing the composition of groups.

Threshold

In addition to the prescribed monetary thresholds any person who is covered by the mandatory Franchising Code can be a member of a collective bargaining group with no reference to any monetary threshold.

Consent, to being part of a collective bargaining group

In any Notice lodged with the ACCC it will be assumed, unless the contrary can be shown, that the listed parties have consented to the Notice.

Public benefit

It should be stated in the Act that collective bargaining is, unless the contrary can be shown, a public benefit.

Variations to a group

A notice may be varied at any time by the applicant and the ACCC has 14 days to object.

A notice of variation shall not be a new Notice and will be assessed by the Commission as a variation only.

Time for new application

An applicant may not lodge a same or similar notice within a period of 12 months of a Notice being rejected by the Commission or the Tribunal.

Collective boycotts

Where a collective boycott has been exempted under these provisions the target of such a boycott will seek leave of the Court where it wishes to take legal action for breach of contract flowing from implementing the boycott.

The Court will assess whether in all the circumstances it is appropriate that a breach of contract action is in the public interest. In doing so the Court must have regard to the ACCC decision.

Draft Recommendation 50 — Retail trading hours

The Panel notes the generally beneficial effect for consumers of deregulation of retail trading hours to date and the growth of online competition in some retail markets. 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.

COMMENT

The ANF is strongly of the view that retail trading hours have already been freed up considerably and that any new changes are likely to have a particularly negative effect on existing retailers, the vast majority of which are small and medium sized businesses like Newsagents. Therefore, we think that it is important for the Panel to consider the impact of this proposed change on both consumers and small businesses.

Draft Recommendation 51 — Pharmacy

The Panel does not consider that current restrictions on ownership and location of pharmacies are necessary to ensure the quality of advice and care provided to patients. Such restrictions limit the ability of consumers to choose where to obtain

pharmacy products and services, and the ability of providers to meet consumers' preferences.

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

Negotiations on the next Community Pharmacy Agreement offer an opportunity for the Australian Government to remove the location rules, with appropriate transitional arrangements.

COMMENT

The ANF does not support the perceived economic benefits associated with the deregulation of the pharmacy sector. Newsagents have already been de-regulated and there is little evidence we are aware of that consumers benefitted substantially. Such changes are likely to have a particularly negative effect on existing pharmacies, the vast majority of which are small businesses.

Therefore, it is important for the Panel to consider the impact of this proposed change on both consumers and the relevant small businesses.

Thank you for considering our comments.