



Australian
Competition &
Consumer
Commission

**Australian Competition & Consumer Commission
Submission to the *Competition Policy Review* –
Response to the Draft Report**

26 November 2014

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Executive Summary

The Draft Report of the Competition Policy Review is a significant contribution to Australia's policy debate. It highlights the sheer breadth of interaction between governments and private entities across the whole Australian economy, and sets out principles and recommendations which, if adopted, could significantly enhance economic productivity over the decades ahead.

In its response, the ACCC's submission follows the broad structure of the Draft Report, in three main sections:

- competition policy;
- competition laws; and
- competition institutions.

In short, the ACCC is largely supportive of the Review Panel's recommendations in relation to competition policy and competition law. The ACCC does, however, have significant differences with the Review Panel with respect to its recommendations relating to competition institutions.

Competition policy

The ACCC supports most of the Review Panel's recommendations in relation to competition policy. In particular, the ACCC supports the findings in relation to intellectual property, parallel imports, planning and zoning, electricity, and gas.

The ACCC also strongly supports the Review Panel's recommendations in relation to roads, shipping and water, but considers the reform proposals could go further than articulated in the Draft Report. In particular, the ACCC considers that the reform agenda regarding roads would be enhanced if the Review Panel's final report were to set out further detail on the way forward for road reform, including principles and the intergovernmental process. In relation to water, the ACCC recommends that the Review Panel's final report go further than the Draft Report and set out specific areas with significant potential for reassessment and further reform. These areas could include strengthening water markets and building market integrity and opportunities for trade in areas outside of the Murray-Darling Basin.

The ACCC sees merit in actively considering the role of consumer choice in human services, although notes the many complexities that can arise in these areas.

Competition laws

The ACCC welcomes the Review Panel's recommendations relating to the operation of the *Competition and Consumer Act 2010* (Cth) (CCA). Broadly, the ACCC agrees with the Review Panel's endorsement of the underlying concepts, prohibitions and structure of the CCA as a sound basis for Australia's competition law framework.

In responding to the recommendations, the ACCC has focused on the ability of the proposed amendments to the CCA to achieve the aims identified in its Initial Submission.¹ That said, the ACCC acknowledges that such an exercise is finely balanced and cannot always be achieved with complete precision in all areas. With this in mind, the ACCC's views on the recommendations cover five themes.

Identifying the appropriate timing and implementation agenda

The ACCC agrees that simplification of various aspects of the competition provisions of the CCA would bring further clarity to its operation, and that a dedicated review is warranted. However, the ACCC considers that there are specific law reforms arising from the

¹ ACCC, Submission to Competition Policy Review Issues Paper (25 June 2014) pp. 8-9 ('ACCC Initial Submission').

recommendations of the Review Panel that should be implemented as a matter of priority. The ACCC considers that the standard Treasury-led process is the most appropriate way to initially progress the immediate law reform recommendations. The proposed simplification review could commence after these amendments, also with a standard Treasury-led process.

The ACCC considers that many of the Review Panel's proposed amendments are suitable for direct implementation by the Government and should not be delayed by the simplification review. Specifically, the proposed amendments relating to section 46, concerted practices, merger processes, simplification of the authorisation and notification provisions (as proposed by the ACCC), collective bargaining and boycott provisions, third line forcing, the application of the CCA to government when in 'trade or commerce', extra-territorial reach of the CCA, the intellectual property exemption in section 51(3), and the Part IIIA declaration criteria (as proposed by the ACCC) should be progressed and implemented as soon as possible.

Outside of these instances, the then focused simplification review could carefully review the other competition provisions of the CCA to ensure that all remain fit for purpose, as well as looking at other ways of improving the mechanics of the law without otherwise altering the existing policy settings.

The ACCC strongly considers that it would be inappropriate to confuse specific policy issues with a focused simplification agenda. These are quite separate exercises.

Strengthening the application and reach of the CCA

The ACCC agrees that strengthening the application and reach of the CCA, as identified by the Review Panel, is necessary to ensure that the law applies equally to all sectors of economy.

The ACCC considers that extending the CCA to apply to government activities in trade or commerce is important, given the potential for such conduct to harm competition. The ACCC recognises, though, that further consideration may need to be given to the precise wording of any amendment.

In addition, the ACCC agrees that the CCA should apply to firms engaging in conduct outside Australia if that conduct has an anti-competitive effect within Australia. The ACCC considers that there are various ways to achieve this.

The ACCC agrees that the CCA should be framed to take account of all sources of competition that affect markets in Australia, including actual and potential import competition. This is reflected in the current assessment of mergers by the ACCC.² In this regard, the ACCC considers the existing definitions of 'market' and 'competition' are sound and do not require amendment.

Defining prohibited conduct in the CCA

The ACCC generally supports the Review Panel's recommendations in respect of how the prohibitions in Part IV of the CCA should be described.

The ACCC supports the Review Panel's recommendation that a "concerted practices" provision should be introduced into Australian law. Consistent with approaches taken internationally, the ACCC considers that such a prohibition should be broader than the definition suggested by the Review Panel. Further consideration should also be given to prohibiting particular types of concerted practices on a per se basis.

In relation to the misuse of market power provisions, the ACCC supports the Review Panel's approach in so far as it recommends that:

² See: [ACCC Merger Guidelines, November 2008](#).

- section 46 should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in that or any other market;
- divestiture remedies should not be introduced for breaches of section 46; and
- the provision should be further simplified to repeal the additional subsections introduced since 2007.

The ACCC does not, however, support the introduction of a defence for unilateral conduct which substantially lessens competition in a market because:

- the 'substantial lessening of competition' test is sufficiently flexible to avoid overreach;
- the proposed defence would continue the significant current problems with 'take advantage' and would add unnecessary complexity and uncertainty; and
- the proposed defence would create an inconsistency with other provisions in the CCA which contain a substantial lessening of competition test.

The ACCC expects there would be very few, if any, matters where the lack of a defence would result in pro-competitive conduct being captured by the re-formulated provision. Efficiency enhancing conduct which is pro-competitive would rarely, if ever, substantially lessen competition in a market. For any matters involving 'offsetting' efficiencies, authorisation would be a suitable mechanism to allow potentially efficient conduct that may otherwise breach the provision to proceed.

The ACCC considers that concerns of large businesses that the new test would create uncertainty could be alleviated by the ACCC developing guidelines regarding the reformulated section 46, potentially before any changes are enacted. These guidelines would be publically released in draft form for consultation and would explain the ACCC's interpretation of the new prohibition and include worked examples of conduct that would be likely to breach or not breach the law.

The ACCC also supports the recommendation that third line forcing should only be prohibited if it has the purpose, effect or likely effect of substantially lessening competition. The ACCC does not, however, support the other amendments to section 47 proposed by the Review Panel. The ACCC considers that these amendments will inappropriately broaden the scope of the prohibition which, due to the anti-overlap provisions, will consequently narrow the application of the prohibitions on cartels and exclusionary provisions.

The ACCC has serious reservations regarding the specific changes to the cartel prohibitions suggested by the Review Panel. In the ACCC's view such changes would significantly weaken Australia's cartel laws. Whilst the ACCC supports simplification, any amendments should not fundamentally alter the existing scope of the prohibitions.

The ACCC also considers that the current prohibition regarding resale price maintenance is appropriate.

The ACCC considers the National Access Regime in Part IIIA of the CCA is an important part of Australia's competition policy and should be retained. The ACCC disagrees that there is a need to identify those services provided by means of facilities for which access regulation will be required under Part IIIA in the future. The rationale of Part IIIA is that it can flexibly adapt to apply (or cease to apply) to services provided by facilities in response to changes in technological or other market conditions.

The ACCC is firmly of the view that criterion (b) of the declaration criteria in Part IIIA of the CCA should be amended to reflect a 'natural monopoly' test rather than a 'privately profitable' test, as was always intended.

Improving the CCA's processes

Key recommendations the ACCC supports include the proposal for a combined formal merger clearance and merger authorisation process, and the introduction of a block exemption power. However, the ACCC does not support the introduction of a notification regime for resale price maintenance, because the ability of the ACCC to impose conditions and/or time limits (which are available with authorisations but not notifications) may be necessary to suitably balance the anti-competitive effects of such conduct against the public benefits.

The Review Panel is also encouraged to support the ACCC's proposals to broaden the applicability of the information gathering powers contained in section 155, and introduce more graduated and appropriate sanctions for non-compliance. In underpinning the capacity to effectively investigate alleged breaches of the CCA, such powers remain a critical component of sustaining effective competition laws.

The ACCC is open to changes which could enhance the prospects for private litigation of competition law, provided such changes do not compromise the effectiveness of public enforcement activity. However, the recommended change to section 83 may compromise the effectiveness of public enforcement if it significantly shifts the incentives of parties to cooperate with the ACCC under its cartel immunity policy, or otherwise settle matters the ACCC is litigating.

Reforms to support small business

The ACCC welcomes the Review Panel's recognition of the importance of introducing flexibility into the notification process for collective bargaining by small business. However, the ACCC encourages the Review Panel to make more detailed recommendations in this area to ensure that these important reforms to support small business are advanced as soon as possible.

The ACCC strongly considers that there is a need for reforms to make it more likely that small businesses lodge notifications for collective boycott arrangements where it would result in more efficient outcomes and more likely that such notifications would be approved by the ACCC because safeguards were available. Currently, the ACCC receives very few collective bargaining proposals that involve collective boycott activity. Collective boycotts should be able to be considered by the ACCC on a case-by-case basis because in certain circumstances they could significantly improve the outcomes from collective bargaining for small businesses.

First, the ACCC recommends amendments to introduce safeguards into the notification process such that:

- the ACCC could impose conditions, rather than having to object outright;
- there is a longer ACCC assessment period, because collective boycotts are more complex to assess; and
- the ACCC is given a limited 'stop power', subject to Tribunal review.

Second, the ACCC is concerned that small businesses do not use the simpler and faster notification process for collective bargaining to seek protection under the CCA as frequently as they use the authorisation process. The ACCC considers that this is because of some inflexibilities in the existing notification process. The ACCC has recommended amendments to introduce greater flexibility including in relation to the nomination of participants and counterparties and the timeframes for expiration of notifications.

Third, the ACCC considers the maximum threshold to notify a collective bargaining arrangement should be reviewed to ensure that it is not restricting participation by small business.

Small business complaints are a priority for the ACCC. This is reflected both in the ACCC's policies and enforcement activity. The ACCC regularly prioritises enforcement actions where the offending conduct has the potential to adversely impact the competitive process and small business.

The ACCC supports the role of alternative dispute resolution schemes and the support they provide to small business. A core part of the ACCC's role in respect of small business is the referral of small business to other more appropriate schemes or services, such as the relevant ombudsmen. The ACCC works closely with these bodies and with small business representatives to support and educate small business complainants.

The ACCC supports the introduction of a dispute resolution scheme for small business for matters covered by the CCA, and recommends that the Small Business and Family Enterprise Ombudsman be given legislative power to mediate all disputes involving small business, including CCA-related disputes.

Competition institutions

To achieve a sustainable competition policy, the Draft Report includes a range of recommendations relating to competition institutions. Several of these the ACCC supports; namely the:

- establishment of the Australian Council for Competition Policy (ACCP);
- appearance by the ACCC before a broadly-based Parliamentary Committee such as the House of Representatives Standing Committee on Economics; and
- development by the ACCC of a code of conduct for its dealings with the media.

However, there are three significant draft recommendations the ACCC does not support.

First, in the ACCC's view, separating infrastructure regulation from competition and consumer enforcement runs contrary to the Draft Report's objectives for competition policy.

The ACCC disagrees with the inference that because some different skills are required for different tasks, it follows that they should be undertaken by separate agencies. To the contrary, provided the overarching agency objectives are consistent, having a diversity of capabilities means a single agency is likely to be more effective in fulfilling such objectives. Furthermore, all of the ACCC's current regulatory functions have an economic basis, and so belong in a single, market-focused agency.

In this respect, a key feature of both competition law enforcement and economic regulation is, as the Review Panel notes, a promotion of competition for the benefit of consumers. That is, these are essentially complementary functions; a point the OECD has recognised.

Furthermore, most of the benefits the Review Panel identifies in having a cross-sectoral access and pricing regulator are already achieved under the current institutional arrangements. In fact, creating a separate access and pricing regulator would make it:

- harder for common issues to be addressed consistently across the agencies (or to prevent gaps where neither agency takes responsibility for the issue);
- more confusing and burdensome for both businesses and consumers who would have to deal with two agencies – contrary to the direction of the May 2014 COAG meeting; and
- significantly more costly for the Commonwealth government – creating a separate agency would require the Commonwealth to pay for duplicate corporate and in-house legal and economic services, along with additional staff needed to duplicate industry knowledge, enforcement expertise and consumer outreach skills.

The synergies between competition, consumer protection and economic regulation are evident when the practical operation of two separate agencies is considered. This submission provides additional detail, but by way of example:

- In telecommunications, the ACCC would investigate claims of anti-competitive conduct in the communications sector under Part XIB, and deal with consumer protection issues such as broadband advertising under the Australian Consumer Law (ACL). The new agency would assess and enforce terms of access to the NBN in the special access undertaking from NBN Co, assess and enforce Telstra's structural separation undertaking and plan to migrate its customers to the national broadband network (NBN), and set wholesale prices and wholesale terms of access for declared services under Part XIC of the CCA. Under this model, where an issue arises in relation to network access or NBN migration, telecommunications access providers, access seekers and end-user groups would have to engage with both the ACCC and the new agency.
- In energy, the ACCC would enforce the competition and consumer protection provisions, assess energy mergers and authorisations and perform the Australian Energy Regulator's (AER) function of monitoring retail energy markets and enforcing the laws regulating those markets. The new agency would set the prices charged by energy networks (electricity poles/wires and gas pipelines), and monitor wholesale energy markets and enforce the laws regulating those markets. Presumably, either the ACCC or the new agency would take over the AER's current function of publishing information on energy markets. As a consequence, 'gentailers' (combined generators and retailers in the electricity market) would lose the continuity in the current regime which reflects the integrated and changing nature of energy markets.
- In fuel, the ACCC would enforce Part IV of the CCA and the ACL in relation to issues such as discount fuel shopper docket, price signalling and industry structure. In contrast, the new agency would presumably monitor fuel prices under Part VIIA. This means that one agency would have the industry knowledge that the other agency needs to perform its functions.
- In rail, the new agency would assess and enforce the undertakings submitted by the Australian Rail Track Corporation (ARTC) under Part IIIA of the CCA in relation to the Hunter Valley coal chain and interstate rail tracks. The ACCC would be responsible for assessing applications for authorisation of coal supply chain capacity management systems, and assessing proposed rail infrastructure access regimes that form part of section 87B undertakings or court enforceable undertakings. Adding an additional regulator into the process would increase the burden on market participants, and lead to potential inconsistencies.
- In the Murray-Darling Basin, the ACCC would enforce the CCA with respect to water brokers, exchanges and irrigation infrastructure operators. The new agency would enforce the water market rules and water charge rules under the *Water Act 2007* (Cth), monitor and report under that regime, determine regulated charges, provide advice to the Commonwealth minister on development of water market rules and water charge rules, and provide advice to the Murray-Darling Basin Authority on the development of water trading rules. However, the advisory role of the ACCC in respect of issues such as trading rules derives from the ACCC's competition expertise rather than access and pricing. Along with increasing the regulatory burden on Murray-Darling Basin market participants, separating the agencies will make it more difficult for each agency to effectively perform its functions.

It follows from these examples that there would be considerable costs of separating out the access and pricing regulation functions from competition and consumer enforcement. However, the Panel has not made the case that there would be any particular benefits.

Second, the ACCC considers that the current ACCC structure (with full-time, non-executive, decision-making members) is a more appropriate governance model than the Board model (with both full-time staff and part-time non-executive members) proposed by the Review Panel.

The ACCC is already subject to many forms of scrutiny and accountability. Most particularly, it is the courts that ultimately make findings as to whether particular companies or individuals have breached competition law. Currently, there is clear separation between Commissioners as statutory office holders making approximately 15-20 decisions per week under the CCA; and ACCC staff undertaking the detailed analysis and making recommendations to the Commission. In these circumstances, creation of an ACCC Board will diffuse the line of accountability rather than enhance it. Put another way, it would be staff deciding to institute proceedings, authorise potentially ant-competitive conduct, or oppose a merger, rather than statutory office holders.

In relation to the Review Panel's alternative suggestion of an Advisory Board, it is unclear what role such a body would be expected to play. The ACCC considers it is already well informed of the diversity of views through its consultative committees, although recognises these could be reviewed to ensure there are no significant gaps.

A third issue concerns the Review Panel's view that a competition agency should not undertake advocacy and education. Internationally, advocacy and education are regarded as an essential part of a competition agency's functions. As part of this, many competition authorities conduct market studies (since the early 20th century in the case of the United States). Such a role for the ACCC would be helpful to governments, businesses and consumers by assisting in the identification of market problems and possible solutions – or, alternatively, in confirming that no action is needed, and that a market is in fact working effectively. In Australia, the ACCC is uniquely placed to undertake such a role as its day to day work in competition and consumer enforcement and infrastructure regulation means it has frequent and close exposure to real world issues for businesses and consumers.

Introduction

The ACCC welcomes the opportunity to comment on the Draft Report of the Competition Policy Review Panel (September 2014) (Draft Report). This submission follows previous submissions made by the ACCC to the Review Panel's Issues Paper (14 April 2014).³

The ACCC's submission follows the broad structure of the Draft Report, with three main sections covering competition policy, competition laws and competition institutions.

In providing its views, the ACCC has responded sequentially to the Draft Report's fifty-two recommendations. This submission is structured as follows:

- **Chapter 1** addresses the Draft Report recommendations on microeconomic reform (Draft Recommendations 1-16).
- **Chapter 2** addresses the Draft Report recommendations on changes to the *Competition and Consumer Act 2010* (Cth) (CCA) (Draft Recommendations 17-38).
- **Chapter 3** addresses the Draft Report recommendations on institutional structures and governance (Draft Recommendations 39-48).
- **Chapter 4** addresses the Draft Report recommendations in relation to small business (Draft Recommendations 49-50) and retail markets (Draft Recommendations 51-52).

The ACCC would be happy to provide further detail on any of the issues raised in this submission, and to respond to issues of interest to the Review Panel.

³ ACCC submissions in response to Review Panel's Issues Paper are available at the [ACCC's website](#).

1 Competition Policy

1.1 Competition principles

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.

ACCC view on Draft Recommendation 1

The ACCC supports the direction of Draft Recommendation 1. The Review Panel's reform agenda would be further strengthened by including competition principles relating to ownership, application of the CCA to government, social and equity objectives, consumer participation and economic regulation.

The ACCC endorses the Review Panel's key message that Australia needs to reinvigorate its competition policy, and that fostering competitive processes is an ever changing task. The ACCC agrees with the Review Panel that:

- the purpose of competition policy is to make the market economy serve the long-term interests of Australian consumers – it is about making markets work properly;
- an intergovernmental commitment to competition principles should be part of the framework to reinvigorate competition policy; and
- priorities should be assigned to reform initiatives so that those with the greatest potential benefit to Australia are progressed first.

In Draft Recommendation 1, the Review Panel identifies the competition principles that should guide Commonwealth, state, territory and local governments in implementing competition policy. The ACCC's Initial Submission (section 3.2) used the example of the electricity sector reforms to illustrate how the competition principles work together to reform a market. Most of these principles are reflected in Draft Recommendation 1. However, the following principles are also needed to support the Review Panel's priority areas for reform.

Government or private ownership

The competition principles proposed in the ACCC's Initial Submission included that:⁴

Governments should not retain ownership of business enterprises unless there is a clearly stated public policy reason for doing so, and government ownership is the best way to meet this objective. Privatisations should never be driven by budget goals at the expense of creating a competitive market structure.

This principle is reflected in chapter 9 of the Draft Report (Infrastructure). In particular, the Draft Report refers to:

- privatisation as part of the framework for reforming infrastructure markets;⁵
- public benefits from privatisation including more efficient management of assets and investments and greater responsiveness to changes in market demand;⁶ and
- the issue of how to privatise effectively so that a higher sale price does not come at the cost of a less competitive market structure or effective regulation to constrain monopoly power.⁷

The Review Panel sets out its view that:⁸

Well-considered privatisation of remaining infrastructure assets is likely to drive further consumer benefits through lower prices flowing from greater discipline on privatised entities. Governments need to approach privatisation carefully, to ensure that impacts on competition and consumers are fully considered and addressed.

The ACCC considers that this view should be reflected in the Review Panel's proposed competition principles. Before the principle of competitive neutrality arises, government should apply the framework developed by the Productivity Commission to enable governments to make coherent choices about ownership.⁹ If the better policy option is for the good or service to be supplied by the private sector, then the government's sale or procurement process should not be used to maximise government revenue at the expense of creating a competitive market structure or putting in place appropriate access or price

⁴ ACCC Initial Submission, sections 3.2.4 and 3.3.

⁵ Draft Report p. 117.

⁶ Draft Report p. 118.

⁷ Draft Report p. 119.

⁸ Draft Report p. 122.

⁹ See ACCC Initial Submission, section 3.2.4, and further discussion in section 3.3.1.

regulation. This issue is further discussed in section 2.2 of this submission (application of Part IV of the CCA to government activity in trade or commerce).

Application of the CCA to government

As discussed in section 2.2 of this submission, the ACCC supports Draft Recommendation 19 to apply Part IV of the CCA to government commercial transactions. This would ensure that the government body is subject to the same requirements as the other party to the contract.

The Review Panel may also wish to consider including, in the competition principles (or an equivalent to the Conduct Code Agreement 1995), principles on the application of the CCA to government. In research for the Competition and Consumer Policies Branch of the United Nations Conference on Trade and Development (UNCTAD), Fox and Healey recommend the following seven principles:¹⁰

- Competition laws should apply to state-owned enterprises, in law and in fact.
- Derogations should be narrow.
- Competition laws should apply to state officials who join and facilitate illegal private conspiracies and bid-rigging rings.
- Competition laws should apply to enterprises with exclusive privileges and special obligations, except as necessary to carry out a public mandate. European Union (EU) law is a guide to the scope of the 'public mandate' defence.
- A state action or no-autonomy defence to charges of private anti-competitive conduct should be narrowly limited.
- Federal systems with principles of federal supremacy should consider robust doctrines of pre-emption of excessively and unnecessarily anti-competitive state measures by federal competition law where the measure is incompatible with the competition law.
- In common markets, the law should integrate free movement, state restraint and competition principles along lines drawn by the EU.

This issue is also relevant to the Review Panel's recommendations in relation to regulatory restrictions and competitive neutrality, discussed in sections 1.7 and 1.8 of this submission.

Social and equity objectives

The ACCC's proposed competition principles included that:¹¹

Targeted social assistance policies are likely to remain necessary. However, governments should regularly review the merits of any community service obligations (CSOs) and the best means for funding and delivering any mandated CSOs.

This principle is needed to support the Review Panel's recommendations relating to human services (Draft Recommendation 2), road transport (Draft Recommendation 3), competitive neutrality (Draft Recommendation 13) and electricity, gas and water (Draft Recommendation 16).

¹⁰ See [Eleanor M. Fox and Deborah Healey, 'When the State Harms Competition – the Role for Competition Law' 2013\(4\) *New York University Law and Economics Working Papers* \(New York University School of Law\)](#).

¹¹ ACCC Initial Submission, section 3.2.5.

Consumer participation

The competition principles proposed by the ACCC noted that:¹²

Successful structural reform of a market may require measures designed to support effective consumer engagement in the market.

The examples referred to in the ACCC's submission included the AER's energy price comparator website.

The Draft Report refers to governments, when funding or providing goods and services, enabling informed choices by consumers (Draft Recommendation 1) which is directly relevant to the recommendations relating to human services (Draft Recommendation 2). However, the principle is also relevant to the Review Panel's recommendations relating to road transport (Draft Recommendation 3) and electricity, gas and water (Draft Recommendation 16). This issue is further discussed in section 1.9 of this submission (electricity, gas and water – consumer access to data).

Economic regulation

Draft Recommendation 1 proposes two principles relating to infrastructure regulation (subject to the public interest test):

- A right to third-party access to significant bottleneck infrastructure should be granted where it would promote a material increase in competition in dependent markets and would promote the public interest.
- Independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers.

The ACCC supports these principles. Regulation may be required where competition is not feasible. This may involve access regulation where access to a monopoly service is needed by businesses to compete in related markets, or price regulation where competitive pressures on a supplier of a good or service are not sufficient to achieve efficient prices and protect consumers.

However, the Review Panel would also be assisted by the additional principles for economic regulation set out at pages 19-20 of the ACCC's Initial Submission.¹³ These principles would underpin the reforms proposed by the Review Panel for road transport (Draft Recommendation 3) and electricity, gas and water (Draft Recommendation 16).

Architecture necessary to facilitate markets

The competition principles proposed by the ACCC noted that:¹⁴

In certain sectors, governments need to create the architecture necessary to facilitate trade; for example, as occurred for the national electricity market, access to wheat ports and water markets in the Murray-Darling Basin.

This is of particular relevance to the Review Panel's recommendations in relation to road transport (Draft Recommendation 3) and water (Draft Recommendation 16).

¹² ACCC Initial Submission, section 3.2.7.

¹³ See also ACCC Initial Submission, section 3.2.8.

¹⁴ ACCC Initial Submission, section 3.2.2.

1.2 Human services

Draft Recommendation 2 — Human services

Australian governments should craft an intergovernmental agreement establishing choice and competition principles in the field of human services.

The guiding principles should include:

- user choice should be placed at the heart of service delivery;
- funding, regulation and service delivery should be separate;
- a diversity of providers should be encouraged, while not crowding out community and voluntary services; and
- innovation in service provision should be stimulated, while ensuring access to high-quality human services.

Each jurisdiction should develop an implementation plan founded on these principles that reflects the unique characteristics of providing human services in its jurisdiction.

ACCC view on Draft Recommendation 2

The ACCC supports the direction of Draft Recommendation 2. This issue is addressed in section 3.3.9 of the ACCC's Initial Submission.

1.3 Road transport

Draft Recommendation 3 — Road transport

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

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

ACCC view on Draft Recommendation 3

The ACCC supports Draft Recommendation 3. The ACCC considers that the reform agenda regarding road transport could be further enhanced by the Review Panel, in its final report, setting out further detail on the way forward for road reform, including principles and the intergovernmental process.

The ACCC endorses the Review Panel's view that reform of road pricing and provision should be a priority, and that new technology will allow road provision to be more market based.

The Draft Report finds that investment in the road sector is either funded directly from budgets or by users across the network, rather than from users according to the costs they impose on the network. The ACCC's Initial Submission (section 3.3.3) noted that roads have been subject to investment bottlenecks and that a lack of proper road pricing leads to inefficient road investment and distorts choices between transport modes, particularly between road and rail freight.

The Draft Report identifies the road sector as the largest area still largely untouched by the competition reforms that have transformed other industries. Importantly, the Draft Report finds that technologies are available that allow for prices to reflect location, time and congestion. In the past, this has been a significant constraint on measuring activity and charging options.

The ACCC agrees with the Review Panel that revenue raised through road pricing should be channelled into road funds. As set out in the ACCC's Initial Submission, this will be important to better establish the link between expenditure on, and usage of, the road network. Ensuring that road providers are structured so that they respond to the incentives offered by these pricing and demand signals is a critical element of the reform, as the Productivity Commission recently recognised in its inquiry into public infrastructure. Linking charges on motorists to road delivery will also be important for building public confidence that the various charges that road users pay reflect the cost of providing the road system.

To this end, the Draft Report notes that as road pricing is introduced, fuel excise should reduce – and therefore be fiscally neutral. The ACCC agrees with this and notes the excise that is levied on fuel (at the rate of 38.143 cents per litre) can be thought of as a road user charge that is currently levied on all vehicles. In the case of heavy vehicles, this relationship is very clear: the fuel excise is adjusted to reflect the cost of the road network attributed to those vehicles. This logic extends to off-road vehicles being exempt from diesel excise. For light vehicles, better and more targeted road user charges could be implemented with reductions in excise so that overall motorists are not paying any more.

The ACCC considers that the reform agenda regarding road transport could be further enhanced by the Review Panel, in its final report, setting out further detail on the way forward for road reform, including principles and the intergovernmental process.

Building on the work of the Heavy Vehicle Charging and Investment reform group, the ACCC suggests the following as principles of economic reform for the road sector:

- charges should promote efficient, safe and sustainable road usage;
- charges should be linked to funding road infrastructure use and investment;
- the structure of prices should promote efficient use of, and investment in, road infrastructure;
- the level of prices necessary to recover the efficient costs of providing roads should be transparent; and
- community service obligations and any constraints on price setting that are required by governments should be transparent.

The Review Panel is well placed to point the way forward for implementing road reform. Foremost, road reform requires the cooperation of the three levels of government. COAG – through the Transport and Infrastructure Council and its associated Officials Group (TISOC) – could be tasked with implementing the reform. A working group that reports to TISOC could include local government representatives, and would be able to take a transparent, consultative approach that involves industry (e.g. road freight businesses) and individual users (e.g. represented by motorist associations). This will not only affirm the case for change, but also provide an estimate of the potential economic gains from greater efficiency

in the road sector. This information should then be developed into an implementation plan, which should consider the social and equity aspects that are part of such reforms.

The ACCC urges the Review Panel to develop a clear set of next steps to take forward the process of reforming road provision and pricing.

1.4 Shipping

Draft Recommendation 4 — Liner shipping

The Australian Government should repeal Part X of the CCA.

A block exemption granted by the ACCC should be available for liner shipping agreements that meet a minimum standard of pro-competitive features (see Draft Recommendation 35). The minimum standard of pro-competitive features to qualify for the block exemption should be determined by the ACCC in consultation with shippers and the liner shipping industry.

Other agreements should be subject to individual authorisation by the ACCC.

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

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

Draft Recommendation 5 — Coastal shipping

Noting the current Australian Government Review of Coastal Trading, the Panel considers that cabotage restrictions should be removed, unless they can be shown to be in the public interest and there is no other means by which public interest objectives can be achieved.

ACCC view on Draft Recommendations 4 & 5

The ACCC welcomes the proposed repeal of Part X of the CCA and supports the Review Panel's view that conference agreements could be assessed either as part of the CCA's authorisation procedure or under the proposed block exemption power.

The ACCC supports the Review Panel's view that cabotage restrictions should be removed, unless they can be shown to be in the public interest and there is no other means by which public interest objectives can be achieved.

The ACCC supports the Draft Report recommendation to repeal Part X of the CCA which provides cartel immunity to registered international shipping lines to enable them to cooperate with each other. The ACCC agrees that reform in this area is unfinished business from the original National Competition Policy (NCP) reforms and is long overdue.

The ACCC agrees with the Review Panel that:

- there is merit in considering the application of the proposed block exemption to liner shipping agreements to cover agreements that meet a minimum standard of pro-competitive features; and
- transitional arrangements would be appropriate to identify agreements that qualify for the proposed block exemption and for other agreements to either seek authorisation or be modified to comply with the CCA.

The ACCC shares the concern of the Review Panel to minimise compliance costs for shipping lines and recognises that transitioning to a new regulatory regime would represent a departure from some long-established practices. It is important to minimise the potential for service disruptions and business uncertainty for liner shipping companies and Australian shippers in making this transition.

On the appropriate duration of the transition period, the ACCC notes that the Productivity Commission, in its 2005 review of Part X, recommended a three-year transition period, beginning after a one-year delay of the repeal of Part X.¹⁵

The proposed block exemption power is further discussed in sections 1.6 (intellectual property) and 2.12 (authorisation and notification) of this submission.

1.5 Taxis

Draft Recommendation 6 — Taxis

States and Territories should remove regulations that restrict competition in the taxi industry, including from services that compete with taxis, except where it would not be in the public interest.

If restrictions on numbers of taxi licences are to be retained, the number to be issued should be determined by independent regulators focused on the interests of consumers.

ACCC view on Draft Recommendation 6

The ACCC supports the direction of Draft Recommendation 6. The issue of regulation and productivity is addressed in sections 3.2.1 and 3.3.9 of the ACCC's Initial Submission.

1.6 Intellectual property and parallel imports

Draft Recommendation 7 — Intellectual property review

The Panel recommends that an overarching review of intellectual property be undertaken by an independent body, such as the Productivity Commission.

The review should focus on competition policy issues in intellectual property arising from new developments in technology and markets.

The review should also assess the principles and processes followed by the Australian Government when establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements.

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

¹⁵ Productivity Commission, *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping* (Inquiry Report No. 32, February 2005) p. 81.

Draft Recommendation 8 — Intellectual property exception

The Panel recommends that subsection 51(3) of the CCA be repealed.

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.

ACCC view on Draft Recommendations 7, 8 and 9

The ACCC supports Draft Recommendations 7, 8 and 9.

The ACCC further suggests that should existing frameworks prove ineffective in ensuring efficient access to intellectual property, there may be a need to remove the intellectual property exclusion in Part IIIA of the CCA.

1.6.1 Productivity Commission review of intellectual property rights

The ACCC supports the Review Panel's recommendation for an overarching review of intellectual property by a body such as the Productivity Commission. The recommendation is in line with the ACCC's Initial Submission, and reflects the significance of intellectual property in Australia's future economy and the need to balance the costs and benefits of intellectual property protection.

1.6.2 Intellectual property and international agreements

The ACCC endorses the Review Panel's recognition that inappropriately applied intellectual property rights can "reduce exposure to competition and erect long-lasting barriers to entry that fail to serve Australia's interests over the longer term".¹⁶ Consistent with this, the ACCC supports the Review Panel's recommendation that international trade negotiations should be informed by an independent analysis of the costs and benefits to Australia of any proposed intellectual property provisions.

As outlined in the ACCC's Initial Submission, obligations arising under international agreements can have significant consequences for the granting and use of intellectual property (and consequently for competition) over many years, or even decades. Australia should consider the impacts on competition and the Australian economy in approaching future negotiations.

1.6.3 Competition law should apply to use of intellectual property rights

The ACCC welcomes the Review Panel's recommendation that section 51(3) of the CCA should be repealed, and that the CCA should apply to commercial transactions involving intellectual property rights in the same way it applies to other property rights. This would bring Australia into line with other major jurisdictions, such as the US, the EU and Canada.

Such repeal is also suitable for direct implementation, and need not be incorporated into the proposed further simplification review. Several other recent reviews have also recommended its repeal, and as noted above Australia is out of step with other major jurisdictions. Nor does

¹⁶ Draft Report p. 30.

the ACCC consider that repeal should be delayed by the proposed Productivity Commission inquiry, which should focus on the *extent* of intellectual property rights. Removal of section 51(3) is simply about treating the *use* of intellectual property rights in the same way as other property rights under the CCA, in line with international best practice.

As the ACCC outlined in its Initial Submission,¹⁷ where there are arrangements between intellectual property rights holders, or between intellectual property rights holders and users of the material, these may breach Part IV of the CCA. Parties can, via an application for authorisation or by lodging a notification, seek protection from legal action for conduct that risks breaching Part IV (with the exception of misuse of market power). The ACCC may grant authorisation, broadly speaking, if it is satisfied that the likely public benefits of the conduct outweigh the likely public detriment.

The ACCC also considers that the Review Panel's proposed introduction of a block exemption power (Draft Recommendation 35) to supplement the CCA's authorisation and notification framework would further strengthen the case for repeal of section 51(3). Should a block exemption provision be introduced, it could be used to clarify the scope of permissible conduct relating to the exercise of intellectual property rights, thereby providing additional certainty for businesses. For example, in March this year, the European Commission established a block exemption to this effect, relating to certain categories of technology transfer agreements.¹⁸

1.6.4 Parallel imports

The ACCC supports the Review Panel's recommendation on the removal of remaining parallel import restrictions. The Review Panel's recommendation is consistent with the views expressed in the ACCC's Initial Submission that parallel importation provides alternative sources of goods, which can promote competition, provide consumers with lower cost products, and improve the international competitiveness of user industries.

The ACCC recently provided a submission to the Department of Infrastructure and Regional Development Options Discussion Paper for the 2014 *Review of the Motor Vehicle Standards Act 1989*.¹⁹ In that submission, the ACCC supported the reduction of barriers for the parallel importation of vehicles.

1.6.5 Efficient access to intellectual property

The ACCC reiterates the view that, in respect of the *use* of intellectual property rights, there is no reason to treat intellectual property differently to other services in relation to access.

While the ACCC considers that intellectual property rights should be subject to the CCA in the same way as other property rights, it is important to recognise the inherent limitations in the application of standard competition law to certain conduct relating to intellectual property. For example, there may be no general competition law remedy for conduct that simply reflects an exercise of unilateral market power, such as monopoly pricing or poor service.

Currently, access regimes for certain types of intellectual property (e.g. the compulsory licensing regime for patents and the power of the Copyright Tribunal to determine charges and conditions for use of copyright materials) exist to provide an avenue for access to intellectual property as well as a deterrent for unreasonable refusal to licence. Such provisions exist in recognition of the potential for monopoly pricing and significant harm to competition and follow-on innovation from the withholding of supply by a rights-holder. In

¹⁷ Section 3.3.8.

¹⁸ Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.

¹⁹ ACCC submission to the Commonwealth Department of Infrastructure and Regional Development Options Discussion Paper for the 2014 review of the *Motor Vehicle Standards Act 1989*, p. 3 see www.accc.gov.au.

practice, however, they are used infrequently; for example, there have been only three applications for compulsory licensing of patents.

As noted in the ACCC's Initial Submission, there may be a need to consider the effectiveness of existing mechanisms for access to intellectual property, and in this context removing the intellectual property exclusion in Part IIIA of the CCA is worth further consideration. Many features of Part IIIA, such as the national significance, promotion of competition, and public interest tests, would appear to provide suitable thresholds for its application in this context. Provisions promoting efficient access to intellectual property exist in other jurisdictions; for example, section 32 of Canada's Competition Act provides for 'special remedies' to apply to intellectual property where the court finds that the exclusive rights have been used to unduly restrain trade or lessen competition. The Canadian Competition Bureau has indicated the strict criteria it will apply before requesting a special remedy, including that the intellectual property holder is dominant, the intellectual property is essential for competition, and the special remedy would not adversely affect incentives for research and development investment in the economy.²⁰

1.7 Planning and zoning and regulatory restrictions

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.

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.

²⁰ Competition Bureau Canada, 2014, *Enforcement Guidelines: Intellectual Property*, pp12-13.

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.

Draft Recommendation 12 — Standards review

Given the unique position of Australian Standards under paragraph 51(2)(c) of the CCA, the Australian Government's Memorandum of Understanding with Standards Australia should require that non-government mandated standards be reviewed according to the same process specified in Draft Recommendation 11.

ACCC view on Draft Recommendations 10, 11 and 12

The ACCC supports the direction of Draft Recommendations 10, 11 and 12.

The ACCC further recommends that section 51(1) of the CCA be amended so that any exemption by Commonwealth, state or territory governments to exclude conduct from the CCA is time limited.

The issues of regulation and productivity, land use and exemptions from competition law are addressed in sections 3.2.1, 3.3.2, 3.3.9, 3.3.10 and 4.2.5 of the ACCC's Initial Submission.

As set out in section 4.2.5 of that submission, the ACCC considers that section 51(1) of the CCA should be amended to provide a sunset clause for exemptions legislated by Commonwealth, state or territory governments (such as that which exists for exemptions by regulation). This would ensure that restrictions on competition are regularly reviewed by the legislature using the process proposed by the Review Panel in Draft Recommendation 11. This issue is of particular relevance to Draft Recommendation 19 relating to the application of Part IV of the CCA to government commercial transactions (see sections 1.1 and 2.2 of this submission).

1.8 Competitive neutrality

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).

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.

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.

ACCC view on Draft Recommendations 13-15

The ACCC supports the direction of Draft Recommendations 13-15. The issue of competitive neutrality is addressed in section 3.2.6 of the ACCC's Initial Submission, Attachment A to the ACCC's Supplementary Submission (No. 2) and sections 1.1 and 2.2 of this submission.

1.9 Electricity, gas and water

Draft Recommendation 16 — Electricity, gas and water

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

- application of the National Energy Retail Law with minimal derogation by all National Electricity Market jurisdictions;
- deregulation of both electricity and gas retail prices; and
- the transfer of responsibility for reliability standards to a national framework.

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

All governments should re-commit to reform in the water sector, with a view to creating a national framework. An intergovernmental agreement should cover both urban and rural water and focus on:

- economic regulation of the sector; and
- harmonisation of state and territory regulations where appropriate.

Where water regulation is made national, the body responsible for its implementation should be the Panel's proposed national access and pricing regulator (see Draft Recommendation 46).

ACCC view on Draft Recommendation 16

In relation to energy, the ACCC supports the direction of Draft Recommendation 16, and endorses the AER's submission to the Draft Report.

In relation to water, the ACCC supports Draft Recommendation 16. The ACCC considers that the reform agenda regarding water could be further enhanced by the Review Panel, in its final report, setting out specific areas with significant potential for further reform.

1.9.1 Water reform

The ACCC welcomes the Review Panel's recommendation that governments should recommit to reform in the water sector through an intergovernmental agreement (IGA) to establish a national framework for urban and rural water. The new IGA proposed by the Review Panel to establish a national framework for urban and rural water should build on the unfinished business of the 2004 National Water Initiative (NWI) and the reforms under the *Water Act 2007*.

The ACCC's Initial Submission (section 3.3.7) explained that implementing economic regulation in the water sector and improving the efficiency and depth of water markets has been an incremental process, requiring continual reform to build markets, remove barriers to trade, increase available information and educate market participants as to the requirements and benefits of new systems.

It is ten years since governments signed the IGA on the NWI, which built on the 1994 COAG water reform framework and committed state and territory governments to implementing a nationally-compatible market, regulatory and planning-based system of managing surface and groundwater resources for rural and urban use that optimised economic, social and environmental outcomes.

The ACCC agrees with the Review Panel's assessment that progress on water reform has been slow. While good progress has been made towards achieving many of the NWI commitments, other areas (such as nationally consistent pricing policies for water infrastructure and water planning and management, improving the scope and role of markets and the development of common water registers) have been beset by failure, delay and the prevalence of vested interests.

The reconsideration and renewal of existing NWI commitments offers a starting point from which to identify new opportunities to strengthen and deepen water markets and to apply the principles of sound economic regulation on a nationally consistent basis. A renewed commitment to future water reforms must draw on the experience of more recent reforms in the Murray-Darling Basin, and in particular the water trading, market and charge rules now in place. These rules are not location-specific and provide a sound foundation for nationally consistent water-market related regulation.

A commitment by governments to review and renewal would also help provide insight into the roadblocks to reform and how they can be addressed. The process needs to demonstrate the benefits of further reforms, given the 'reform fatigue' within some stakeholder groups.

The ACCC considers that the reform agenda regarding water could be further enhanced by the Review Panel, in its final report, setting out specific areas with significant potential for further reform.

As discussed in the ACCC's Initial Submission (section 3.3.7), the ACCC considers that areas with significant potential for further reform include:

- strengthening water markets and building market integrity and opportunities for trade in areas outside of the Murray-Darling Basin, including through the wider application of the water market, charge and trading rules in these areas;
- consideration of the benefits of further unbundling components of water access rights;
- exploring how contestability of urban supply options may benefit urban water users and rural water access right holders with whom they could trade; and
- critically assessing restrictions on the use or trade of water according to the identity of the water access right holder or the purpose for which the water is used.

Other areas with the potential for further reform include:

- improving water market efficiency and reducing transaction and information costs to market participants;
- providing a wider availability of accurate price and other information to the market;
- renewing government commitments to user pays and the transparency of charges and cost-recovery for water planning and management activities; and
- reducing and removing stakeholder conflicts in the administration and utilisation of water to promote sound incentive alignment mechanisms.

The Review Panel's recommendation relating to institutional arrangements is discussed in section 3.2 of this submission.

1.9.2 Consumer access to data

Review Panel's view – Consumer access to data to improve competition

Markets work best when consumers are engaged, empowering them to make informed decisions.

There is capacity to enhance Australian consumers' access to data on their own usage of utility services in a usable format to assist consumers to make better informed decisions.

ACCC view

The ACCC recognises the potential for consumer access to data to improve competition and consumer outcomes. The ACCC encourages further consideration of initiatives in this area.

The ACCC's work in the energy, telecommunications and private health insurance sectors has shown the complexity of these products and the difficulties that consumers have in comparing them. As choice can appear too difficult, consumers remain with their current provider leading to sub-optimal results for competition and Australian economic welfare.

As discussed in section 1.1 of this submission (competition principles), initiatives to allow consumers to effectively use their information, such as that underway in the UK and USA, have the potential to assist consumers to make better choices and drive competition.

- The UK government initiative 'midata' is designed to empower consumers to have greater access to their purchasing data, and to promote market conditions to

encourage the development of applications to enable consumers to analyse their data in meaningful ways.²¹

- The US government established a 'Smart Disclosure' agenda to drive the release of public and private sector data to help consumers make better choices about services in healthcare, finance and energy.²²

The ACCC also notes that the July 2014 Interim Report of the Financial System Inquiry sought information on options that could be explored to provide Australian consumers with more control over use of their data and/or better access to their own data in useful formats to improve decision-making and consumer outcomes.²³

The foundation already exists in Australia for consumers to access their consumption and transaction data held by businesses in order to improve competition. Australian consumers have the right to request access to their personal information held by businesses under the Privacy Act.²⁴ However, the Privacy Act does not specify how the information is to be provided to consumers other than that it must be in a manner requested by the individual if it is reasonable and practicable to do so.²⁵

The UK addressed accessibility issues by seeking voluntary compliance from businesses for consumers to be able to access their information in an electronic, portable and secure format. The UK's approach in engaging with businesses on a voluntary basis is also conducive to establishing the necessary market conditions for the creation of innovative technologies to help consumers analyse their data.

The UK's 'midata' experience indicates the importance of creating the appropriate frameworks to address accessibility issues. Based on the UK experience, further developments would need to take place in Australia for consumers to have access to their information in an electronic, portable and secure format, which might in turn support the market conditions for the creation of innovative technologies to aid consumers to easily compare prices and analyse their purchasing behaviours.

²¹ Department for Business & Innovation, [Better Choices: Better Deals: Consumers Powering Growth 2012](#).

²² See: www.data.gov/consumer/smart-disclosure-policy. Several significant developments include: the *Blue Button* public-private initiative to give patients access to their health data which may be used by consumers to compile their personal medical history, switch health insurance companies and set health goals; *Green Button* initiative for consumers to download their personal electricity data in a standard, electronic and portable format; and the *MyData Button* initiative for students to access their academic and financial aid data to create a personal learning profile and generate learning recommendations based on past performance and future goals.

²³ Financial Systems Inquiry, *Interim Report* (July 2014) at 4-55.

²⁴ Australian Privacy Principle (AAP) 12 – access to personal information, contained within Schedule 1 of the Privacy Act, sets out the minimum requirements on how government agencies and certain private organisations are to collect, use, disclose and store personal information.

²⁵ APP 12.4(b) – The information may not be provided in the form requested by the consumer but needs to be in a format which is 'intelligible'.

2 Competition Laws

2.1 Simplification of competition law

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.

Draft Recommendation 18 — Competition law simplification

The competition law provisions of the CCA should be simplified, including by removing overly specified provisions, which can have the effect of limiting the application and adaptability of competition laws, and by removing redundant provisions.

The Panel recommends that there be public consultation on achieving simplification.

Some of the provisions that should be removed include:

- subsection 45(1) concerning contracts made before 1977;
- sections 45B and 45C concerning covenants; and
- sections 46A and 46B concerning misuse of market power in a trans-Tasman market.

This task should be undertaken in conjunction with implementation of the other recommendations of this Review.

ACCC view on Draft Recommendations 17 & 18

The ACCC supports Draft Recommendation 17 and the direction of Draft Recommendation 18.

However, the ACCC considers that repeal of the specific subsections listed should only be considered after more detailed public review.

In relation to the proposed public consultation to achieve simplification, the ACCC does not consider that this task should be undertaken in conjunction with the implementation of other recommendations of the Review Panel. Rather, the specific recommendations for reform should be progressed separately more quickly, so as to not further delay their implementation.

The ACCC agrees that simplification of various aspects of the competition provisions of the CCA would bring further clarity to its operation and a dedicated review is warranted. However, the ACCC considers that there are specific law reforms arising from the recommendations of the Review Panel that should be implemented as a matter of priority. The ACCC considers that the standard Treasury-led process is the most appropriate way to progress both the proposed simplification review and the identified law reforms.

The ACCC considers that many of the Review Panel's proposed amendments are suitable for direct implementation by the Government and should not be delayed by the simplification review. Specifically, the proposed amendments relating to section 46, concerted practices, merger processes, simplification of the authorisation and notification provisions (as proposed by the ACCC), collective bargaining and boycott provisions, third line forcing, the application of the CCA to government when in 'trade or commerce', extra-territorial reach of the CCA,

the intellectual property exemption in section 51(3), and the Part IIIA declaration criteria (as proposed by the ACCC) should be progressed and implemented as soon as possible.

Outside of these instances, then focused simplification review could carefully review the other competition provisions of the CCA to ensure that all remain relevant and appropriate as well as looking at other ways of improving the mechanics of the law without otherwise altering the existing policy settings. The ACCC considers that the scope of any such review should be carefully confined to ensure that it does not duplicate the work of this Review Panel or seek to alter the scope or operation of the CCA. The review should be focused solely on “tidy-up” amendments that bring further clarity and refinement.

Before repeal of any provision is recommended, the ACCC considers that further consideration regarding the origin and potential need to retain these provisions is required. For example, in Draft Recommendation 18, the Panel suggests removal of subsection 45(1), sections 45B and 45C and sections 46A and 46B.

Each of these sections was introduced for a specific purpose and this purpose needs to be examined and reevaluated in a detailed manner. The ACCC has set out some further information in relation to section 46A to emphasise the complexity that must be examined prior to any recommendation that particular provisions be repealed.

Case Study – Background to section 46A

Section 46A demonstrates the complexity that can arise when considering the repeal of particular sections. In this case, the provision was introduced as a result of free trade agreements between New Zealand and Australia, as described below:

“Pursuant to Article 4 of the 1988 ANZCERTA Protocol on Acceleration of Free Trade in Goods, on 1 July 1990 Australia and New Zealand eliminated the availability of anti-dumping actions on goods originating in each other’s markets. In parallel, Australia and New Zealand simultaneously extended the application of their competition law prohibitions on the misuse of market power. The new provisions (s.46A of the Australian Trade Practices Act 1974 and s.36A of the New Zealand Commerce Act 1986) prohibit the use of substantial market power (Australian law) and dominant position (New Zealand law) in a “trans-Tasman market” for certain anti-competitive purposes. For the purposes of this legislation, a “trans-Tasman market” means a market in Australia, New Zealand or Australian and New Zealand for goods or services.”

Source: Department of Foreign Affairs and Trade, [Closer Economic Relations: Background Guide to the Australia New Zealand Economic Relationship](#), February 1997, paragraph 70.

2.2 Application of the CCA to government in trade or commerce

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.

ACCC view on Draft Recommendation 19

The ACCC supports Draft Recommendation 19. Commercial transactions entered into by the Crown can have profound and long-term effects on competition. Applying Part IV to governments in relation to these transactions simply places government bodies on the same footing as private parties.

In the Draft Report, the Review Panel expressed the view that:²⁶

- competition principles, particularly those promoting choice and a diversity of providers, should be incorporated into procurement guidelines; and
- the Crown, through commercial transactions entered into with market participants, has the potential to harm competition – the NCP reforms should be carried a step further by applying Part IV to the Crown insofar as it undertakes activity in trade or commerce.

The ACCC agrees with the Review Panel that government commercial activities can have profound and long-term effects on competition. These ultimately flow on to consumers in the form of higher prices or reduced levels of quality or innovation. Applying Part IV to government commercial transactions simply places government bodies on the same footing as private parties.

Government commercial activity: Potential impact on competition

As the Draft Report notes, under the NCP, governments extended Part IV of the CCA so that Crown immunity does not apply to the extent that the Commonwealth, state/territory or local government ‘carries on a business’.²⁷ The reform was intended to ensure that the public sector, where it acts as an ordinary economic player in a market, is subject to the same competition law provisions as the private sector.

However, since the 1990s, Australian governments have increasingly been participating in markets in ways that may not amount to ‘carrying on a business’ for the purpose of competition law. Market-based mechanisms are used by governments to finance, manage and provide government goods and services (described as ‘contractualised governance’ for the delivery of public services). Such mechanisms have the potential to significantly improve efficiency but also have the potential to harm competition – for example, by incorporating, in the contract, provisions that are likely to have the purpose or effect of restricting competition. The ACCC’s Initial Submission (section 3.3.1) includes the examples of:

- Sydney airport – where the Commonwealth government leased Sydney Airport with the right of first refusal to operate a second Sydney airport at Badgery’s Creek.

²⁶ Draft Report p. 180.

²⁷ For further detail on the interpretation of ‘carrying on a business’, see [Australian Government Solicitor, Legal Briefing No. 73 \(3 November 2004\)](#).

- Ports Botany and Kembla and the Port of Newcastle – where the NSW government leased the ports with clauses that may restrict Newcastle from competing against Botany and Kembla for container trade.

Ensuring that the government body, when it enters into the commercial transaction, is subject to the competition law is a logical extension of the NCP reforms. It:

- places the government body in the same position as the private party entering into the contract (as the private party is subject to Part IV of the CCA, whereas the government body is currently immune unless it is carrying on a business);
- treats government acquisitions of goods or services in the same way as private sector acquisitions of goods or services – provisions in Part IV explicitly acknowledge that anti-competitive conduct can arise in both supply and acquisition situations; and
- is consistent with the principles developed for UNCTAD on the application of the CCA to government discussed in section 1.1 of this submission (competition principles).

The ACCC recognises, though, that governments need to balance competing considerations, and that acting in ways that inhibit competition may sometimes be in the public interest. As discussed in section 3.3.9 of the ACCC's Initial Submission (human services), public services are likely to be of fundamental importance to Australians, and can involve complex market failures such as negative externalities imposed on other government services.

However, including anti-competitive provisions in confidential private contracts is not the preferable way to achieve this outcome. Authorisation under Part VII of the CCA provides a specific mechanism for exemption of conduct which restricts competition in order to address market failure where there is likely to be a net benefit.

In addition, section 51 in Part IV sets out a process by which governments may, by legislation, authorise conduct that would otherwise contravene Part IV. Section 51, when combined with the cost-benefit analysis proposed in Draft Recommendation 11, would make public the cost to competition from the government's policy decision, and invite scrutiny as to whether restrictions on competition are in fact the best way to achieve the desired policy goal. As set out in section 1.7 of this submission (regulatory restrictions), the ACCC also considers that section 51(1) of the CCA should be amended to ensure that such exemptions are time limited and, if they remain in the public interest, legislated again.

'Trade or commerce': Scope

International approaches to applying competition law to government activity have been reviewed by the International Competition Network,²⁸ the OECD²⁹ and UNCTAD.³⁰

The purpose of Draft Recommendation 19 should not be to capture all government activity that impacts on trade. For example, in New Zealand, the Commerce Act 1986 binds both Crown corporations and the Crown 'in so far as the Crown engages in trade'. Although a ministerial decision as to which pharmaceutical drugs to list for government subsidy to pharmacists impacts on trade, the Minister was not found to be 'engaging in trade'.³¹

Consequently, the competition principles proposed by the Review Panel in Draft Recommendation 1 need to augment the proposed CCA amendment to deal with broader activities of government, and will remain a key component of Australia's competition policy

²⁸ [Moroccan Conseil de la Concurrence, State-owned Enterprises and Competition](#) (Special Project prepared for the International Competition Network Annual Conference, 23-25 April 2014).

²⁹ Competition issues in public-private partnerships was discussed at an OECD conference in June 2014. See the [OECD website](#).

³⁰ See Eleanor M. Fox and Deborah Healey, 'When the State Harms Competition – the Role for Competition Law' 2013(4) *New York University Law and Economics Working Papers* (New York University School of Law).

³¹ *Glaxo New Zealand Ltd v Attorney General* [1991] 3 NZRL 129.

framework. In section 1.1 of this submission, the ACCC identifies additional principles relating to ownership, application of the CCA to government, social and equity objectives, consumer participation and economic regulation, to support the Review Panel's microeconomic reform agenda.

The purpose of the Panel's Draft Recommendation should be to extend Part IV of the CCA to apply to:

- the supply by a government body of goods or services in a commercial setting – for example, supply by a government business (currently covered by the 'carrying on a business' Crown immunity exemption) or in a commercial setting (such as the grant of a licence to exploit a state's minerals),^{32 33} and
- the acquisition by a government body of goods or services in a commercial setting – for example, acquisition for use by the government body, or as a market-based mechanism to provide public goods or services (such as the contracting-out of a welfare service or lease of government-owned infrastructure).

Further consideration may need to be given to the precise wording of any amendment to sections 2A-2C of the CCA (and the equivalent provisions in the state application legislation) to ensure that the phrase 'trade or commerce' covers commercial transactions entered into by government bodies even though the government body does not itself supply goods or services in a market. Such an approach would be consistent with the concept of engaging in conduct 'in trade or commerce' in section 18 of the ACL (misleading or deceptive conduct).³⁴

New Zealand provides an example of how, in other countries, competition agencies (in that case, the NZCC) assist other government bodies to ensure that government commercial activity does not contravene the competition law except where it has been subject to a cost-benefit analysis, and is in the public interest.

2.3 Market definition

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.

ACCC view on Draft Recommendation 20

The ACCC supports the finding that the CCA has been framed to take account of all sources of competition that affect markets in Australia, including actual or potential import competition. However, the ACCC does not support the recommendation that the current definition of 'competition' should explicitly include competition from potential imports.

³² See *Obeid v Australian Competition and Consumer Commission* [2014] FCAFC 155 at [36]-[39].

³³ Transactions such as lease of government-owned infrastructure could also be characterised as a supply.

³⁴ See, for example, *Houghton v Arms* [2006] HCA 59 where it was held that a representation can be made in trade or commerce even though it is not in the trade of the person making the representation, so long as it is in the trade of the person to whom the representation is made.

The ACCC supports the Review Panel's findings that the CCA allows consideration of both global and local markets and has been framed to take account of all sources of competition that affect markets in Australia, including import competition. This is reflected in the current assessment of mergers by the ACCC, which takes into account both existing and potential imports. As noted in the ACCC's merger guidelines, actual or potential direct competition from imported goods or services can provide an important competitive discipline on domestic firms.³⁵

The ACCC considers that the current definition of 'competition' is sufficiently clear to ensure that competition in Australian markets includes competition from actual and potential imports into Australia. Therefore, the ACCC does not support the Review Panel's recommendation (Draft Recommendation 20) to explicitly include competition from potential imports. The ACCC considers that this proposal is inconsistent with the Review Panel's objective that the law should be "as simple as it can be consistent with its purpose". The ACCC also notes that further consideration would need to be given to the potential implications of such a change for the enforcement of the CCA.

The ACCC notes the Review Panel's comments with respect to 'national champions' and calls by others for competition policy to be changed to allow formation of firms with efficient scale to compete more effectively in global markets.

The ACCC endorses the Review Panel's finding that the merger authorisation provisions have sufficient flexibility to allow public benefit considerations to be adjudicated, including issues concerning the creation of 'national champions'.

The ACCC considers that any public benefit of a merger achieving economies of scale to compete more effectively in global markets must be carefully weighed against any adverse effects on competition and likely detriment to Australian consumers. The existing CCA framework has sufficient flexibility to allow such public benefit issues to be determined, including whether it is in the public interest to allow a particular merger in order to achieve efficient scale to compete globally, notwithstanding that the merger adversely affects competition in Australia.

³⁵ ACCC Merger Guidelines (2008), p.41, paragraph 7.33.

2.4 Extra-territorial reach of the law

Draft Recommendation 21 — Extra-territorial reach of the law

Section 5 of the CCA should be amended to remove the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence and to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions.

The in-principle view of the Panel is that the removal of the foregoing requirements should also be removed in respect of actions under the Australian Consumer Law.

ACCC view on Draft Recommendation 21

The ACCC supports the recommendation to remove the requirement for private parties to seek ministerial consent before relying on extra-territorial conduct in private competition law actions. The ACCC also agrees with the Review Panel that the CCA should be amended to put beyond doubt that conduct which occurs overseas, but which has an anti-competitive effect in Australia, is prohibited.

The ACCC also supports the in-principle view of the Panel in respect of the ACL.

The ACCC supports the Review Panel's view that Australia's competition law should apply to firms engaging in conduct outside Australia if that conduct has an anti-competitive effect within Australia.

The ACCC considers that this may be achieved by either:

- clarifying the circumstances in which an overseas corporation is considered to be 'carrying on business within Australia' (see section 4.2.6 of the ACCC's Initial Submission); or
- the Review Panel's recommendation to repeal section 5(1)(g), (h) and (i), as long as this amendment made it clear that the CCA applied to foreign corporations.

In relation to the latter, with the Review Panel's proposed amendments, section 5(1) would then read "Each of the following provisions....extends to the engaging in conduct outside Australia **whether by a foreign corporation or otherwise.**"

The ACCC would be concerned if an amendment sought to limit the CCA to applying to firms engaging in conduct outside Australia 'if that conduct damages competition in markets in Australia'.

This could introduce substantive matters into the threshold extra-territorial test which would create an additional level of complexity in litigation and which could also undermine the scope of the substantive prohibitions (particularly those which are per se).

2.5 Cartels

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 intellectual property 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.

ACCC view on Draft Recommendation 22

The ACCC has serious reservations regarding the Review Panel's proposed changes to the cartel prohibitions. In the ACCC's view such changes would significantly weaken Australia's cartel conduct prohibitions.

Simplification of the cartel prohibitions is desirable, but the ACCC considers it should take place in a way that preserves criminal sanctions as an effective deterrent for cartel conduct. Any review of the cartel provisions should have particular regard to the additional complexity that arises in respect of criminal jury trials. A key consideration is that the provisions need to be crafted in a way that is capable of proof to the requisite standards established by the Criminal Code. A failure to do so would render the policy of criminalisation meaningless.

For these reasons, certain concepts for which there is well-established jurisprudence under the civil provisions of the CCA, such as 'market', may not be suitable in the criminal context, where such propositions require proof beyond reasonable doubt.

The ACCC notes the Review Panel made some specific recommendations for change as part of the simplification process. The ACCC has serious concerns with these and its response is set out below.

2.5.1 Narrowing 'in competition'

The Review Panel recommended the cartel provisions be confined to conduct involving firms that are actual or likely competitors, where 'likely' means 'on the balance of probabilities'.

The ACCC considers this recommendation raises a fundamental issue regarding the scope of the cartel provisions. In the ACCC's view, such a change would inappropriately reduce the protection afforded by the cartel provisions.

At present the word 'likely' is defined in relation to a supply, acquisition or production of goods or services for the cartel provisions to include 'a possibility that is not remote' (section 44ZZRB).

That clarification should be taken as endorsing the view of Justice Deane in *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees Union* (1979) 42 FLR 331. There Justice Deane held, after noting that 'likely' can mean either probably, as in more likely than not, or 'a real or not remote chance or possibility', that 'likely' in the context of section 45D of the CCA meant a 'real chance or possibility'.³⁶

The ACCC supported this interpretation and its application to the concept of when firms are in competition in its intervention in *Bradken v Norcast*³⁷ before the Full Federal Court.

Further, the approach taken by Justice Deane has been applied to whether persons are in competition with each other in relation to section 4D,³⁸ whether competition was likely to be substantially lessened³⁹ and to consumer law provisions regarding whether a person was 'likely' to be misled.⁴⁰

As such, the ACCC expects implementation of the draft recommendation would require the insertion of a new definition of 'likely' for purposes of the cartel prohibitions. In so doing, it would create inconsistencies with the application of the term elsewhere in the CCA and further complication.

More substantively, it would potentially allow firms engaging in conduct that meets the OECD's definition of a hard core cartel (such as market sharing) to escape sanction under the cartel provisions.

2.5.2 Restricting application to goods or services supplied or acquired 'in Australian markets'

The Review Panel recommended the cartel provisions should only apply to cartel conduct affecting goods or services supplied or acquired 'in Australian markets'. It came to this view on the basis that:

- the cartel provisions should not operate differently from the other competition law prohibitions; and
- the *Bradken* case held that the cartel prohibitions were applicable to an arrangement concerning a tender conducted outside Australia, for the sale of a Canadian company with business operations outside Australia.

The ACCC is concerned that if the draft recommendation was adopted, there would be a risk that the reach of the criminal cartel offence would be limited to supply or acquisition 'in Australian markets' and would consequently require proof of 'market', to a jury, to beyond reasonable doubt.

As noted above, for the cartel provisions to be meaningfully enforceable they need to be crafted in a way that is capable of proof to the requisite standards established by the Criminal Code. The Explanatory Memorandum to the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 indicates a policy decision was made not to reference the cartel provisions to a 'market' to avoid issues of proving a market beyond

³⁶ *Tillmans Butcheries Pty Ltd v Australian Meat Industry Employees' Union* (1979) 42 FLR 331 at 346-7. Justice Deane reached the view that 'likely' is not more synonymous with 'more likely than not' in circumstances where s45D allowed for consideration of whether conduct 'would have or be likely to have' a particular consequence. Similarly, the competition condition in section 44ZZRD(4) requires that at least two parties 'are or are likely to be' or, but for any CAU, 'would be or would likely to be... in competition'.

³⁷ *Bradken Limited v Norcast S.ár.L* [2013] FCAFC 123

³⁸ *News Limited v Australian Rugby League Football Ltd* (1996) FCR 410 at 564-565 – 'In our view, the same approach should be taken to the construction of section 4D(2) of the TP Act'.

³⁹ *Australian Gas Light Company v ACCC (No 3)* [2003] FCA 1525.

⁴⁰ *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* [1984] FCA 180.

reasonable doubt before a jury. Having to meet this evidentiary standard would make the offence almost un-prosecutable.⁴¹

Further, the case study below highlights how apparently minor changes to the legislation may have significant unintended consequences, even in a civil context.

Case Study – ACCC investigation and litigation of alleged cartel conduct re air cargo

Between 2008 and 2010, the ACCC commenced proceedings against fifteen international airlines for alleged cartel conduct in relation to the imposition of surcharges on air cargo services. Thirteen of the fifteen airlines settled with the ACCC, with the court imposing a combined penalty of \$98.5 million and other relief, including injunctions, upon those airlines. The ACCC's proceedings against the two remaining airlines, Air New Zealand and Garuda Indonesia, were defended and the matter was heard over 56 days during 2012 and 2013. The proceedings concerned alleged collusive behaviour in the fixing of surcharges and fees in the carriage of air cargo by these airlines (and others) from Singapore, Hong Kong and Indonesia into Australia. The ACCC's case was that this conduct was deemed (via section 45A of the TPA) to have had the purpose, effect or likely effect of substantially lessening competition in markets in Australia contrary to section 45 of the TPA.

On 31 October 2014, Justice Perram dismissed the ACCC's proceedings against Air New Zealand and Garuda. His Honour concluded that a significant portion of the alleged collusive conduct was established, and accepted that the relevant markets for consideration were those for the carriage of air cargo from the origin country to airports in Australia. However, he also found that such markets did not constitute "markets in Australia", as required by section 4E of the TPA. Accordingly, there was no contravention of section 45 of the TPA.

Justice Perram found that part of the services were provided in Australia (including of course delivery of the cargo), that the airlines competed against each other in Australia in respect of some aspects of the service provided (such as destination ground handling services) and that the source of demand for the services was at least in part located in Australia. However, His Honour concluded that, as the relevant substitutable services could only be provided to consumers of those services at origin (in Hong Kong, Indonesia and Singapore), that was where the market was relevantly located. His Honour concluded that, as such, the collusive conduct did not affect competition in a market in Australia.

Justice Perram expressly acknowledged that the conduct may well have affected prices in Australia, but that this did not mean the competition between the airlines was in a market in Australia. His Honour distinguished the requirement of 'market in Australia' under s 45 of the TPA, from the effects doctrine in the United States under the *Sherman Antitrust Act*, 15 USC §§ 1 – 7 (1890) (USA) where a price effect will suffice to bring the antitrust legislation into play.

Whilst the ACCC is still considering the impact of this judgment and the prospects of any appeal, some preliminary observations can be made. First, this judgment demonstrates that including a territorial limitation in the cartel provisions (whether by way of a 'market in Australia' element or otherwise) carries a risk that cartel conduct that has a price effect in Australia may not be captured. Further, the ACCC notes that the application of the law by His Honour means that the outcome in this case does not achieve the object of the CCA, which is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

⁴¹ Canada moved away from a criminal cartel offence which required proof that competition had been unduly lessened, in favour of a *per se* offence, because of the difficulty in establishing complex economic concepts beyond reasonable doubt.

Consequently, the ACCC considers the cartel provisions should not be amended to be limited to markets in Australia. It would risk substantively undermining the efficacy of the cartel provisions.

Furthermore, the ACCC considers such a change unnecessary. The extra-territorial operation of the cartel provisions is consistent with the extra-territorial operation of other provisions of Part IV, through subsection 5(1). The extra-territorial reach of certain other prohibitions in Part IV is also explicitly extended without an assessment of whether conduct occurred in an Australian market (see for example the extra-territorial reach provided by subsection 5(2) in relation to the prohibitions on exclusive dealing and resale price maintenance; and subsection 5(1A) in relation to misuse of market power in trans-Tasman markets).

Cartel conduct that materially affects Australian businesses and consumers can involve issues of extra-territoriality in many and various forms (a simple example being trade between a foreign country and Australia). The ACCC therefore does not support a reduction in the extra-territorial scope of the cartel prohibitions to conduct affecting an Australian market.

However, should the Review Panel conclude that the extra-territorial reach of the cartel prohibitions be confined, the ACCC strongly recommends against a limitation based on the term 'market'.

2.5.3 Broadening joint venture exemptions

The Review Panel considers that joint ventures should be considered under a competition test and that the joint venture exemptions to cartel conduct (in section 44ZZRO for criminal conduct and s44ZZRP for civil conduct) are too narrow and increase business compliance costs.

The current joint venture exemption for cartel conduct applies if the person points to evidence that tends to indicate:

- the joint venture is for the production or supply of goods or services; and
- the restriction on competition is contained in a contract (whether it is oral or written) and is for the purpose of the joint venture.

A 'contract' means a legally enforceable agreement. Other elements of the substantive provision, namely 'arrangements or understandings', were omitted from the exception because they represent a broad spectrum of consensual dealings including dealings not enforceable at law.

The majority of cartels prosecuted by the ACCC involve legally unenforceable arrangements or understandings rather than legally enforceable contracts. This is perhaps unsurprising. Given the per se illegality of cartel conduct much conduct of concern is likely to be clandestine in nature.

While the Review Panel's assessment of the joint venture provisions focuses on the possibility that legitimate joint ventures would not be exempted from the prohibition, this is only one side of the equation.

Any joint venture defence needs to balance *two* equally important objectives, not only allowing parties to embark on pro-competitive projects that might not otherwise be undertaken, but also guarding against joint venture agreements being designed as cover for anti-competitive agreements.

The ACCC's experience is that parties to a legitimate joint venture will quickly point to matters that establish they are not in a cartel. However, cartelists have claimed their collaboration is a joint venture and the ACCC is aware of overseas experience where cartels have sought to be disguised as joint ventures as a way to avoid the law.

In light of the criminalisation of cartel conduct, any joint venture defence must also be suitable for use in a criminal cartel environment. Presently, if a party claims the joint venture defence it will only need to *point to evidence that tends to indicate* their claim. The onus would then lie with the CDPP to prove beyond reasonable doubt that the joint venture defence does not apply. If a joint venture defence was based on a restriction on competition not having the likely effect of substantially lessening competition, the CDPP would need to establish the conduct was likely to substantially lessen competition beyond reasonable doubt to a jury.⁴² This would greatly impair the viability of the cartel prohibition.

It follows from the above that any amendments to the joint venture exemptions in sections 44ZZRO and 44ZZRP to ensure legitimate joint ventures fall within its umbrella, must have careful regard to the need for a joint venture exemption / defence to work in a criminal cartel environment.

If there is legitimate business that is being conducted on terms that are not legally enforceable as a contract, but perhaps as an equitable obligation which is distinct from contract, then one option may be for the Review Panel to expand the joint venture defence to obligations that are enforceable at law.

2.5.4 Broadening exemptions for vertical supply or acquisition arrangements

The Review Panel recommended a broader exemption be introduced to prevent vertical supply or acquisition restrictions being picked up by the cartel provisions.

It notes that the CCA contains exemptions for vertical relationships that constitute exclusive dealing, although it is of the view that this exemption is too narrow. It considers that vertical supply restrictions should be assessed under a competition test rather than under a *per se* prohibition.

The ACCC suggests very careful consideration should be given to any broadening of the exemptions relating to vertical arrangements.

The cartel prohibitions as they stand are directed squarely at horizontal agreements. A restriction on competition, in the form of a provision in a contract, arrangement or understanding (CAU) to allocate customers, fix prices etc., will only be prohibited by the cartel prohibitions if the 'competition condition' is met. That is, at least two parties 'are or are likely to be' or, but for any CAU, 'would be or would likely to be... in competition'.⁴³ As a result, the cartel prohibitions only apply to the extent that the restriction relates to when the parties are actual or potential competitors.

Furthermore, section 44ZZRS operates to explicitly prevent exclusive dealing arrangements being considered under the *per se* cartel prohibitions, by forcing a Court to consider any exclusive dealing arrangement under section 47. This anti-overlap provision is modelled on subsection 45(6), which similarly operates to force consideration of exclusive dealing arrangements under section 47, rather than under section 45.

The Courts have noted that the interrelationship between sections 45 and 47 can present issues of some complexity. The anti-overlap provision itself is highly complex and arguments over whether conduct should or should not be transferred from section 45 to section 47, by the operation of this provision, were the subject of consideration in the 'Super League' cases⁴⁴ and in proceedings in the High Court between the ACCC and Visy.⁴⁵

⁴² In order to prove a substantial lessening of competition, it would be necessary to also define the relevant market, thereby raising similar issues to those identified above in section 2.5.2.

⁴³ Subsection 44ZZRD(4).

⁴⁴ *South Sydney District Rugby League Football Club Ltd v News Limited* [2001] FCA 862, *South Sydney District Rugby League Football Club Ltd v News Limited* [1999] FCA 1710.

⁴⁵ *Visy Paper Pty Limited v ACCC* [2003] HCA 59

Case Study – Franchising

The Review Panel specifically raised the issue of vertical supply relationships in the context of franchising, where it notes that territorial restrictions can have a pro-competitive effect and indicated such matters could fall for consideration under the cartel prohibitions.

While in some instances a franchisor may have some corporate stores/outlets and technically competes with nearby franchisees, it is not clear this automatically means a franchisor confining a franchisee to a geographic territory will breach the cartel provisions.

It is quite possible that the anti-overlap provision would ensure such a restriction would be considered under subsection 47(4), rather than under the cartel prohibitions or section 45.⁴⁶

The ACCC has not received any applications for authorisation to provide reassurance in this regard and the ACCC has also not prosecuted any franchise for breach of the cartel provisions for such arrangements.

The ACCC is acutely aware that in the digital age, there is an increasing prevalence of firms utilising multiple channels to market to end users their goods or services. In particular, online distribution provides suppliers with a way of dealing more directly with ultimate consumers than historically may have been possible. However, such channels are unlikely to be a firm's sole form of distribution, so business relationships may increasingly involve companies being in a supply or an acquisition relationship at one level, and competing, or potentially competing at another.

In such circumstances, determining whether particular supply restrictions are a form of vertical or horizontal conduct may be a question of degree, and ultimately a question of fact.

To the extent that firms are, or are likely to be, in competition with one another, the ACCC considers it critical that the cartel provisions apply to arrangements between them which constitute price fixing, restrictions on output, market sharing or bid-rigging. A concern with broadening the exemption for vertical restrictions as proposed by the Review Panel is that it may create a loophole for firms to establish (vertical) contractual arrangements which serve little purpose other than to ensure substantively horizontal agreements are technically excluded from the cartel provisions.⁴⁷

While the Draft Report suggests the Bill currently under consideration in New Zealand might be a useful model, it should also be noted that the New Zealand law does not contain an equivalent provision to Australia's section 47. Furthermore, the criteria the New Zealand Bill sets out for the exemption to apply⁴⁸ might be read as simply guiding an assessment of

⁴⁶ Applying the restriction through the lens of sections 4ZZRS or 45(6) would result in the following (and transfer of the matter to section 47) – A franchisee engages in the practice of exclusive dealing if the franchisee acquires services from the franchisor on condition that franchisor will not supply competing goods or services supplied in particular places.

⁴⁷ For example, two direct competitors could establish reciprocal agency arrangements that neither ever utilise.

⁴⁸ The New Zealand Commerce Commission's Revised Draft *Competitor Collaboration Guidelines* note that there are four criteria that must be met for the vertical supply exemption to apply:

- A supplier or likely supplier of goods or services (A) and a customer or likely customer of that supplier (B) must have entered into a contract. The exemption is not available where the parties only have an arrangement or understanding. This means the exemption is only available where the parties have entered into a legally enforceable supply contract for consideration.
- The contract must contain a cartel provision. If there is no cartel provision, then there is no need for the exemption in the first place.
- The cartel provision in the contract must relate to the supply or likely supply of goods or services by A to B, including to the maximum price at which B may resupply the goods or services supplied by A to B ('B's maximum resale price').
- The cartel provision must not have the dominant purpose of lessening competition between A and B.

whether the relevant restrictions relate to the vertical supply relationship between the parties or to their horizontal relationship.

In section 2.9.1 below, the ACCC notes that the Review Panel's proposed amendments to section 47 would appear to significantly broaden the application of that section, and by virtue of the anti-overlap provisions, correspondingly reduce the scope of the cartel provisions. This would be a significant change to the policy settings.

In light of the various considerations above, the ACCC recommends exercising considerable caution before amending section 44ZZRS or section 47 in relation to this issue.

That said, the ACCC sees value in considering how anti-overlap provisions in sections 44ZZRS and 45(6) could be simplified. However, any amendment must not be so broad as to allow cartel conduct to slip through.

2.5.5 Exclusionary provisions

Draft Recommendation 23 — Exclusionary provisions

The CCA should be amended to remove the prohibition of exclusionary provisions in subparagraphs 45(2)(a)(i) and 45(2)(b)(i).

ACCC view on Draft Recommendation 23

The ACCC is opposed to Draft Recommendation 23 to remove the prohibition on exclusionary provisions unless the full scope of section 4D is carried across into the new cartel prohibitions.

Draft recommendation 23 is based on the view that the prohibition of exclusionary provisions is no longer necessary. The Draft Report sets out the view that the definition of exclusionary provisions overlaps substantially with the definition of market sharing in the new cartel prohibitions.

The definition of market sharing in the cartel provisions (paragraph 44ZZRD(3)(b)) does overlap with the definition of exclusionary provisions. However the new cartel provisions have less coverage than is provided by section 4D in relation to restrictions on *acquisitions*. As such, a simple repeal of the prohibitions on exclusionary dealing would be problematic.

The cartel prohibitions are narrower than section 4D in three ways:

- restricting outputs: Put simply, paragraph 44ZZRD(3)(a) relates to restrictions on supply (but not acquisition) but otherwise mirrors section 4D;
- allocating customers, suppliers or territories: paragraph 44ZZRD(3)(b) picks up restrictions on acquisition. However, it is more limited than section 4D as it applies to 'allocation' only and does not cover simple restrictions as to quantity; and
- bid rigging: paragraph 44ZZRD(3)(c) addresses bid rigging although only applies in the event of a request for bids.

In contrast, the provisions in the *New Zealand Commerce (Cartels and Other Matters) Amendment Bill* includes the full scope of New Zealand's existing prohibition on exclusionary provisions, under the new 'cartel provisions' addressing both restrictions on supply and acquisition of goods or services.⁴⁹

⁴⁹ See in particular proposed section 30A(3) of the New Zealand Bill Commerce (Cartels and Other Matters) Amendment Bill. The current scope of New Zealand's prohibition on exclusionary provisions is set out in section 29 of its Commerce Act 1986.

The ACCC therefore opposes Draft Recommendation 23 to remove the prohibition on exclusionary provisions unless the full scope of section 4D is carried across into the new cartel prohibitions.

2.6 Concerted practices

Draft Recommendation 24 — Price signalling

The ‘price signalling’ provisions of Division 1A of the CCA are not fit for purpose in their current form and 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.

ACCC view on Draft Recommendation 24

The ACCC supports the Review Panel’s recommendation that a ‘concerted practices’ provision should be introduced into Australian law. Consistent with approaches taken internationally, the ACCC considers that such a prohibition should be broader than the definition suggested by the Review Panel. Further consideration should also be given to prohibiting particular types of concerted practices on a per se basis.

2.6.1 A concerted practices prohibition would address a gap in Australia’s law

The ACCC continues to hold the view that there is a critical gap in Australia’s law relating to anti-competitive activity by firms which falls short of an ‘arrangement or understanding’ as interpreted under Australian law. Currently, firms may lawfully engage in conduct (‘concerted practices’) which eliminates strategic uncertainty between competitors and which facilitates coordination. Such conduct can lead to less competitive markets to the detriment of consumers.

This gap was partly mitigated by the introduction of the price signalling laws which focused on anti-competitive information disclosures. However, these laws currently only apply to the banking sector.

Some submissions to the Review Panel, such as that from the Business Council of Australia,⁵⁰ argue that most anti-competitive unilateral information disclosures are prohibited by the existing law as they can be characterised as attempts to enter into a contract, arrangement or understanding (or an attempt to induce).

It is true that some forms of unilateral information disclosure may, as a matter of fact, involve an invitation to a competitor to reach an agreement to collude. However, this will not be the case in respect of all harmful disclosures or other forms of concerted practices. In some markets, simply disclosing or signalling prices to a competitor, without anything further, will have an anti-competitive effect in that market. In those circumstances, a firm may disclose such information without any intention of reaching an arrangement or understanding (as interpreted under Australian law) regarding its conduct, or that of the recipient.

Rather than being dependent on any commitment to act in a particular way, the disclosure increases the ability and/or incentive of firms in the market to act in a concerted manner and reduce the competition between them, acting purely in their own self-interest, but with the benefit of the competitor’s information.

⁵⁰ Business Council of Australia, Submission to Review Panel, 70.

Establishing the elements to make out an offence of attempt in the circumstances of an anti-competitive unilateral price disclosure is a high threshold, adding unnecessary complexity to the task of deterring business from engaging in, for example, anti-competitive price disclosures. To prove a prohibited attempt in this context, it must be shown that a person has intended, by its disclosure, that a contract, arrangement or understanding be formed and that the disclosure was a step that was not merely remotely connected or preparatory to the entry into the contract, arrangement or understanding. This is highlighted by the following passage from Toohey J in *TPC v Tubemakers of Australia Ltd* (1983) 76 FLR 455:

... a statement relied upon to found an allegation of attempt must carry within its terms the potential for an arrangement or an understanding. A statement made quite unilaterally of intention to do something or to refrain from doing something, with no suggestion express or implied that others might act in the same way, is hard to visualize as an attempt to make an arrangement or arrive at an understanding ...

The law of attempt in this context does not therefore adequately or sufficiently clearly address the identified gap in the current law. The existing legal lacuna should be addressed by a new prohibition against concerted practices, particularly if the existing provisions are repealed or not extended to apply across the economy.

2.6.2 Proposal would be consistent with international approaches

The ACCC supports the Review Panel's view that there should be amendments to rectify the gap in the law and bring Australia more in line with approaches taken internationally.

International approaches to concerted practices

Internationally, Europe and the UK have led the way regarding addressing and prohibiting concerted practices. Other jurisdictions introducing new competition law regimes have followed this approach, such as Hong Kong and Singapore.⁵¹

In the UK and Europe, the principle at the heart of establishing whether an unlawful concerted practice exists is whether "the parties, even if they did not enter into an agreement, knowingly substituted cooperation between them for the risks of competition".⁵² A further governing principle underpinning the law of concerted practices is that each economic operator must determine independently the policy which it intends to adopt in the market.⁵³

In the US and Canada, facilitating practices including 'price signalling' are generally dealt with through the prohibitions against cartel conduct where information exchanges can be led as evidence that there is an agreement (more broadly defined than in Australia) between firms to fix prices, capacity or share a market. Where the practices are not related to cartel activity, these arrangements are analysed under a rule of reason analysis.⁵⁴

⁵¹ Hong Kong, Competition Ordinance, section 6; Singapore, *Competition Act 2004*, section 34. Note that this law is yet to come into effect.

⁵² *ICI v Commission* [1972] ECR 619 ("Dyestuffs") at paragraph 64; Office of Fair Trading, *Agreements and concerted practices: Understanding competition law*, 2004, para 2.12; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (European Guidelines), para 60.

⁵³ *Suiker Unie v Commission* [1975] ECR 1663 at paragraph 173.

⁵⁴ See: US Federal Trade Commission, Submission to the Harper Review Issues Paper; American Bar Association, Submission to the Harper Review Issues Paper.

2.6.3 Defining “concerted practices” in the Australian context

The definition proposed by the Review Panel (that is, “a regular and deliberate activity undertaken by two or more firms”⁵⁵) is unduly limiting because anti-competitive concerted practices do not necessarily involve conduct which is ‘regular’ or which is common or symmetrical as between the participants.

That definition would exclude concerted practices that are prohibited in Europe and the UK such as unilateral conduct where one firm discloses information and another firm accepts it (without repetition or regularity),⁵⁶ unilateral public announcements with strategic public responses from competitors⁵⁷ and ‘hub and spoke’ arrangements where information is exchanged through an intermediary.⁵⁸ Whilst the regularity of conduct may be relevant to whether conduct will infringe Article 101 of the TFEU, importantly the absence of regularity does not provide a safe harbour for conduct such as anti-competitive information sharing, price signalling or most favoured nation clauses.

To this end, it may be instructive to consider the following passage from the UK Competition Appeal Tribunal⁵⁹ citing the Court of Appeal judgement by Lloyd LJ in *Toys and Kits*:⁶⁰

[partial quote]...concerted practices can take many different forms, and the courts have always been careful not to define or limit what may amount to a concerted practice for this purpose.

The above passage, in our judgement, rightly emphasises the fact-specific nature of any assessment as to whether a concerted practice exists. It also highlights the way in which the courts have refrained from seeking to define the concept of a concerted practice with a degree of precision that would artificially restrict the breadth of the concept of a ‘concerted practice’. **A concerted practice is a versatile concept** (emphasis added).

Further, where laws are overly prescriptive, sophisticated firms will more readily be able to innovate to find ways to collude in a way which circumvents the law. It is therefore important that the law is sufficiently adaptable to the myriad ways in which firms can coordinate their conduct to the ultimate detriment of consumers.

The ACCC therefore recommends that the Review Panel not recommend amendments which attempt to prescriptively or exhaustively define the conduct which falls within the concept of a ‘concerted practice’.

In the ACCC’s view, the proposed prohibition should focus on conduct which facilitates coordination and eliminates strategic uncertainty between competitors – by “substituting coordination between them for the risks of competition”. This will often comprise direct or indirect contact between competitors, the purpose or effect of which is to influence the conduct in the market of an actual or potential competitor, or to disclose to a competitor the course of conduct which a market participant has itself decided to adopt or contemplates adopting in the market.

It is of course important that such conduct is distinguished from conscious parallelism or oligopolistic interdependence, in that the law should not prevent companies from “adapt[ing]

⁵⁵ Draft Report, page 230.

⁵⁶ European Guidelines, para 62 and *T-Mobile Netherlands & Ors* [2009] ECR I-4529, paragraph 59 “*Depending on the structure of the market, the possibility cannot be ruled out that a meeting on a single occasion between competitors, such as that in question in the main proceedings, may, in principle, constitute a sufficient basis for the participating undertakings to concert their market conduct and thus successfully substitute practical cooperation between them for competition and the risks that that entails.*”

⁵⁷ European Guidelines, para 63.

⁵⁸ Single judgment of the Court of Appeal, [2006] EWCA Civ 1318 in relation to the Tribunal’s decisions in Cases 1021 & 1022/1/1/03 *Allsports Ltd and JJB Sports plc v OFT* [2004] CAT 17 and Cases 1014 & 1015/1/1/03 *Argos Ltd and Littlewoods Ltd v OFT* [2004] CAT 24 (*Toys and Kits*).

⁵⁹ *Tesco & ors v Office of Fair Trading* [2012] CAT 31, paragraph 55

⁶⁰ *Toys and Kits* [2006] EWCA Civ 1318.

themselves intelligently to the existing or anticipated conduct of their competitors”.⁶¹ Concerted practices may be thought of as “oligopoly plus”. That is, additional conduct which tends to move market outcomes to a less competitive position, and which, by increasing transparency and/or changing incentives, makes it easier for the firms to anti-competitively coordinate their behaviour and/or make it easier to detect and punish cheating.

Examples of concerted practices that would not be caught by the Review Panel’s proposed definition

A single meeting between competitors

In *T-mobile*,⁶² representatives of five mobile telephone operators held a meeting where they discussed, amongst other things, the future reduction in fees to be paid to mobile phone dealers.

The Dutch competition authority found that the operators had entered into agreements or a concerted practice. The case was appealed to the European Court of Justice to clarify whether a concerted practice could be found where the firms have participated in only a single meeting.

The court found that “what matters is not so much the number of meetings held between the participating undertakings [firms] as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition.”⁶³

Indirect communication between competitors

In the UK cases commonly known as “Toys” and “Kits”⁶⁴ indirect communication between competitors was found to be a concerted practice.

In “Toys”, it was found that Hasbro, a toy manufacturer, entered into agreements or concerted practices with Argos and Littlewoods, both catalogue retailers, to fix retail prices for certain Hasbro toys and games. Hasbro received information regarding the pricing intentions of each of Argos and Littlewoods (retail competitors) and then communicated the pricing information received from one to the other.

In “Kits”, it was found that a number of sportswear retailers, Manchester United plc, the Football Association Ltd and Umbro Holdings Ltd entered into arrangements to price the price of replica football kits. The supplier received information regarding the pricing intentions of each of the competing retailers of the sports kits. The supplier was then able to reassure each of the retailers that their competitors would not discount below the recommended price.

⁶¹ European Guidelines, para 61; *Suiker Unie v Commission* [1975] ECR 1663 at paragraph 174.

⁶² *T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlandse Mededingingsautoriteit* [2009] ECR I-4529.

⁶³ [European Commission Press Release No 47/09, Judgment of the Court of Justice in Case C-8/08, 4 June 2009.](#)

⁶⁴ *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318 (*Toys and Kits*).

The court found that a concerted practice will be found where:

- retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one),
- B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B, and
- C does, in fact, use the information in determining its own future pricing intentions.⁶⁵ (C will be presumed to have used the information if it is not rejected and C remains active in the market – the so-called ‘*Anic presumption*’).

2.6.4 Some types of concerted practices should be prohibited outright

The ACCC also considers that the Review Panel should give further consideration to prohibiting particular categories of concerted practices on a per se basis, rather than only when they are found to have the purpose or effect of substantially lessening competition.

Where conduct comprising a concerted practice leads to cartel-like outcomes, the ACCC considers that it should be prohibited on a per se basis, consistent with other cartel offences. As was outlined in the ACCC’s Initial Submission, conduct such as anti-competitive information disclosures can be just as harmful as hard core cartels and are recognised as such in international best practice.⁶⁶

In both the EU and the UK, particular classes of concerted practices are prohibited “by object”. Conduct which is prohibited by object means that the conduct is considered, by its very nature, to be harmful to normal competition. Therefore, where that type of conduct is found, its actual or likely effects on the market need not be proven.

The ACCC notes the Review Panel’s concern regarding the potential overreach from any per se prohibition regarding anti-competitive price disclosures (page 42). However, the ACCC considers that these challenges could be overcome by appropriate and careful drafting of the prohibition and sound judicial interpretation.

Further consideration would be required to consider the most appropriate legislative mechanism to prohibit a sub-set of ostensibly egregious concerted practices on a per se basis. This will need to follow further clarity regarding details of the new prohibition regarding concerted practices. Options for reform could include:

- Deeming the relevant elements required to make out a concerted practice to be satisfied where the conduct is by its very nature harmful to the ordinary competitive process (akin to a per se prohibition). For example, where parties privately share information which is commercially sensitive or which relates to future prices, such conduct could be deemed to have the purpose or effect of substantially lessening competition, without further evidence.
- A prohibition which is focused on prohibiting a particular anti-competitive outcome rather than by prohibiting (as the price signalling laws do) the specific methods or conduct by which that outcome is achieved. For example, the previous section 45A

⁶⁵ *Toys and Kits*, paragraph 141.

⁶⁶ The OECD 1998 recommendation against hard core cartels noted:

A “hard core cartel” is an anticompetitive agreement, **anticompetitive concerted practice**, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.⁶⁶ (emphasis added)

prohibited contracts, arrangements or understandings between competitors which had the purpose or effect of *fixing, controlling or maintaining a price* regardless of whether they had the purpose or effect of substantially lessening competition.

- Including a ‘concerted practices’ concept into the per se civil cartel prohibitions.

As is the case for other prohibitions in Part IV, a number of common exemptions such as those relating to joint ventures would need to be considered. The ACCC also notes that the CCA provides for the authorisation (and in some cases, notification) of conduct which is potentially prohibited by the CCA but which has public benefits that outweigh any public detriments.

2.7 Misuse of market power

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.

ACCC view on Draft Recommendation 25

The ACCC supports Draft Recommendation 25 in so far as it recommends that:

- section 46 should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in that or any other market;
- divestiture remedies should not be introduced for breaches of section 46; and
- the provision should be further simplified to repeal the additional subsections introduced since 2007.

The ACCC does not support the introduction of a defence for unilateral conduct which substantially lessens competition in a market because:

- the concerns of overreach which the defence seeks to address reflect a misconception of the economic and legal meaning of “substantial lessening of competition in a market” - the test should be and has been interpreted as a substantial effect on the competitive process, rather than a test which looks purely at the structure resulting from the conduct, and is sufficiently flexible to avoid overreach;
- the proposed defence would continue the significant current problems with “take advantage” and would add unnecessary complexity and uncertainty; and
- the proposed defence would create an inconsistency with other provisions in the CCA which contain a substantial lessening of competition test.

The ACCC expects there would be very few, if any, matters where the lack of a defence would result in pro-competitive conduct being captured by the reformulated provision. Efficiency enhancing conduct which is pro-competitive would not generally substantially lessen competition in a market. For any matters involving ‘offsetting’ efficiencies, authorisation would be a suitable mechanism to allow potentially efficient conduct that may otherwise breach the provision to proceed.

The ACCC considers that concerns of business that the new test would create uncertainty could be alleviated by the ACCC developing guidelines regarding the reformulated section 46, potentially before any changes are enacted. These guidelines would explain the ACCC’s interpretation of the new prohibition and include worked examples of conduct that would be likely to breach or not breach the law.

The ACCC strongly supports the Review Panel’s recommendation to re-frame section 46 in line with the ‘standard test’ in Australia’s competition law – an assessment of whether the conduct has the purpose, effect or likely effect of substantially lessening competition (SLC test).⁶⁷

The SLC test is recognised by the Review Panel as a consistent standard which is used across Part IV of the CCA to identify what is prohibited anti-competitive conduct. In light of the proposed reframing of the test, the ACCC also supports the recommendation to further simplify section 46 by repealing amendments to the provision since 2007.

The ACCC considers that the SLC test is a more appropriate mechanism for capturing anti-competitive conduct than the existing test in section 46. The problems with the existing test are described in some detail in the ACCC’s Initial Submission (see section 4.2.1). The ACCC agrees with the Review Panel that the threshold for amending the law should be an assessment of whether the existing law is “sufficiently clear and predictable in interpretation

⁶⁷ Draft Recommendation 25 makes reference to “proposed” conduct. The ACCC notes that section 46 should be formulated in broader terms.

and application to distinguish between anti-competitive and pro-competitive conduct”.⁶⁸ The ACCC agrees that it is less about finding a ‘gap’ in the law and more about the “...broader and overdue questions about the logic and utility of section 46...”⁶⁹

To summarise, the ACCC considers that the existing provision is flawed because:

- it focuses on harm to competitors, rather than harm to competition; and
- the ‘take advantage’ test is not an appropriate filter to distinguish between pro-competitive and anti-competitive conduct, particularly because it does not recognise the potentially very different effects of conduct by a firm with market power as compared to a firm without market power. It also leads to a cumbersome analysis of similar conduct by a hypothetical firm facing hypothetical competition, rather than an analysis of the actual conduct engaged in by the actual firm in the actual market.

Consequently, the existing prohibition does not effectively capture unilateral anti-competitive conduct by firms with market power.

In contrast, the SLC test is one which businesses are already accustomed to considering in relation to most other aspects of their commercial dealings as a result of section 45 (prohibition against contracts, arrangements or understandings which SLC), section 47 (prohibition against vertical arrangements which SLC) and section 50 (prohibition against mergers or acquisitions which SLC). The use of this test in section 46, therefore, would not require a significant change to the way in which businesses assess whether their conduct is likely to breach the competition law.

The Substantial Lessening of Competition test

The assessment of whether conduct is anti-competitive is generally determined in Australian law by reference to whether that conduct had the purpose, effect or likely effect of substantially lessening competition (the SLC test). This test is driven by the assessment of the impact, or potential impact, of the relevant conduct on the competitive process in affected markets. A finding of SLC does not rest in any mechanistic way on the structural outcome of conduct.

The SLC test in the context of Part IV is, in the ACCC’s view, essentially targeted at distinguishing between conduct which has the purpose or effect of impeding the competitive process rather than conduct by a firm which is ‘competition on the merits’. Competition on the merits which results in the elimination of competitors, or even in a monopoly, does not amount to an SLC.

It assesses the actual, likely, or intended effect of conduct where it prevents or hinders competition⁷⁰ as well as where its impact is to exclude existing competition. It is a test which is concerned with the purpose, effect or likely effect of the conduct on the process of competition as well as, but not only, the resultant outcome.

As the High Court found in *Rural Press Ltd v ACCC* (2003) 216 CLR 53 at [41], in the context of s 45, ‘...the relevant questions in this case are whether the effect of the arrangement was substantial in the sense of being meaningful or relevant to the **competitive process**, and whether the purpose of the arrangement was to achieve an effect of that kind’⁷¹ (emphasis added).

⁶⁸ Draft Report p. 209.

⁶⁹ Rod Sims, [Bringing more economic perspectives to competition policy and law](#), RBB Economics Conference, Sydney (7 November 2014).

⁷⁰ Section 4G of the CCA provides that ‘for the purposes of this Act, references to the lessening of competition shall be read as including references to preventing or hindering competition’.

⁷¹ Applied in *Australian Gas Light Company* (ACN 052 167 405) v *Australian Competition & Consumer Commission* (No 3) (2003) 137 FCR 317 at [351].

Further, the jurisprudence offers a more useful test to assess the impact upon the competitive process (in comparison to take advantage), as seen in the application of an SLC test under the existing sections: "... It is rather a matter of considering the future state of competition in the market with and without the impugned conduct..."⁷² In other words, the test assesses the impact of the actual conduct by the actual firm in the actual market.

In the ACCC's view, the SLC test analyses the conduct in question beyond the static limits of structural characteristics which affect competition in a market (such as effect upon market share, concentration and barriers to entry) to also include strategy and the dynamic competitive constraints upon conduct within a market.⁷³

Although regulators and policy makers internationally continue to grapple with the regulation of abuse of dominance behaviour, the introduction of the SLC test for assessing unilateral conduct by a firm with market power is broadly consistent with international best practice in regulating conduct of this nature. The International Competition Network states that:⁷⁴

The effects-based approach allows for an analysis of the circumstances in the particular case, and is therefore particularly suitable where neither economic theory nor empirical research predicts ex-ante a pro-competitive or exclusionary explanation for a certain type of conduct with a high degree of certainty.

The SLC test has also been recognised by the New Zealand Productivity Commission as having a "stronger logical foundation" to avoid efficiency losses than the current formulation.⁷⁵

In respect of many other international jurisdictions, there is an underlying effects rationale from which assessing abuse of dominance is approached.⁷⁶

The ACCC therefore considers that reformulating section 46 to include an SLC test will make it a more logical and reliable mechanism to appropriately prohibit anti-competitive conduct by dominant firms.

To do otherwise would stifle the potential for Australian markets to continue to grow in a dynamic manner in future.⁷⁷

⁷² *Stirling Harbour Services Pty Ltd v Bunbury Ports Authority* (2000) ATPR 41-783 at 40-731 (applying *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238 at 259; *Outboard Marine Australia Pty Ltd v Hecar Investments No 6 Pty Ltd* (1982) 44 ALR 667 at 669-670). Most recently cited with approval in *ACCC v Liquorland (Australia) Pty Ltd* (2006) ATPR 42-123 at [802]: "It can be readily accepted that one must, to assess effect, analyse the world with the conduct and without the conduct."

⁷³ The Australian Competition Tribunal has also agreed with this approach albeit in the authorisation context: *Re Qantas Airways Ltd* [2004] ACompT 9 at [304] and [438].

⁷⁴ International Competition Network (Unilateral Conduct Working Group), ['Unilateral Conduct Workbook Chapter 1: The Objectives and Principles of Unilateral Conduct Laws'](#), p14 (Presented at the 11th Annual ICN conference Rio de Janeiro, Brazil, April 2012)

⁷⁵ For example, where the New Zealand Productivity Commission has pointed to an unreliable focus upon counterfactual approaches which lack an assessment of actual, or likely, market outcomes and which result in filters that are too lenient: [New Zealand Productivity Commission, 'Boosting Productivity in the Services Sector' \(May 2014\)](#) p.132.

⁷⁶ International Competition Network, above n 78, p.11: 'In reality, most jurisdictions apply a hybrid approach that combines a formalistic approach with varying degrees of analysis of effects, usually using rebuttable legal presumptions'.

⁷⁷ In this vein, the ACCC agrees with the following sentiment - "The decisions firms make about how to structure their activities should be driven by considerations of economic efficiency, not by their desire to find the path of least antitrust resistance": T.W. Ross, "Proposals for a New Canadian Competition Law on Conspiracy" (1991) 36 *Antitrust Bulletin* 851.

2.7.1 The introduction of a defence is unnecessary

The ACCC does not support the recommendation to introduce a defence in section 46.

An SLC test has the strength to operate on its own

The ACCC considers a defence is unnecessary to improve the effectiveness of the SLC test and mitigate the potential risk of overreach. The risk of overreach, as raised in submissions to the Review Panel and in the media,⁷⁸ reflects a misconception of the SLC test and there appears to be a significant degree of misunderstanding regarding the conduct that is likely to be prohibited by an SLC test.

Damage to competitors, even to the extent of competitors being forced out of business, is not necessarily evidence of a lessening of competition. Furthermore, most examples offered to date tend to highlight the problems with the existing test rather than the proposed SLC test. It is the existing test that is concerned with harm to competitors whereas the SLC test would only be concerned with harm to the process of competition. Therefore, businesses 'competing' through offering better products or services or by undertaking a successful promotional campaign, undertaking research and development which results in better products or more efficient processes, or passing savings through to consumers will be enhancing competition, not lessening it. The application of the SLC test is also likely to be sufficiently flexible to cater for unintended or collateral impacts on markets.

Given the SLC test has been consistently applied in line with existing jurisprudence with respect to commercial agreements and other conduct, the ACCC does not consider that the test would 'overreach'. Further, the jurisprudence regarding SLC will continue to develop and courts will build upon existing work to provide even clearer guidance regarding the conduct which is likely to lead to an SLC and that which is not.

2.7.2 The drafting of the proposed defence introduces uncertainty

The ACCC further considers that the limbs of the defence as currently proposed by the Review Panel are problematic. Specifically, the defence:

- Carries over the existing significant problems regarding the application of 'take advantage' particularly, the uncertainty and difficulties arising from the need to consider the actions of a hypothetical firm. Such problems, as outlined in detail the ACCC's previous submission to the Review Panel, should be avoided entirely rather than re-introduced into a defence. The ACCC notes that the first limb of the proposed defence would exacerbate the problems as it is a narrower application of 'take advantage' and only imports the counterfactual test rather than any of the other factors that may be considered in its interpretation, as enumerated in sub-section 46(6A).
- Is likely to lead to further uncertainty and complexity for business by importing untested concepts into Part IV of the CCA, particularly the concept of a 'rational' business decision and the 'long-term interests of consumers'.
- The concepts in the defence may undermine the scope of the provision, resulting in anti-competitive conduct not being prohibited. For example, while profit maximising conduct is 'rational' for firms, it may also have the purpose, or effect, of substantially

⁷⁸ For example, Stephen King and Graeme Samuel, The effect of the ACCC's ambitions is dangerous', *Australian Financial Review*, 12 Aug 2014, p. 47; Wesfarmers Ltd, Submission to Competition Policy Review (undated), pp14-15; Business Council of Australia, Submission to Competition Policy Review, June 2014, pp113-115.

lessening competition and therefore, is more appropriately judged by the SLC test than the proposed defence.⁷⁹

- Has a level of duplication with the concepts embedded in the 'offence' elements of the provision. For example, if conduct results in a substantial lessening of competition, it is difficult to see how it could be in the 'long-term interests of consumers'.
- Would create an inconsistency with other provisions of the CCA in which the SLC test is used without such a defence.

The ACCC considers that the proposed defence underestimates the rigour and scope of an SLC analysis to filter pro-competitive conduct from anti-competitive conduct. Introducing a defence would risk adding complication and uncertainty to the operation of the proposed prohibition.

Authorisation would better complement the SLC test

The ACCC expects there would be very few matters in which the lack of a defence would potentially result in pro-competitive conduct being captured by the re-formulated provision. For any matters involving 'offsetting' efficiencies, the ACCC supports the introduction of authorisation for section 46 conduct. While the practicalities of implementing such a proposal would need to be examined in further detail, the ACCC considers that authorisation would be a suitable mechanism to ensure that the few instances of efficient conduct which may SLC in a market are able to be exempted from the prohibition. It would also bring section 46 into line with the other provisions of Part IV which have authorisation currently available.

2.7.3 ACCC guidelines have the potential to assist with uncertainty for business

The fear that a change in the law will create uncertainty needs to be assessed by weighing the short term costs of any uncertainty against the long term benefits of the proposed change. The uncertainty should not be unduly significant as the change is to an existing test with which businesses are already familiar. As was the experience when the merger test in section 50 was amended to an SLC test in 1993, the period of uncertainty with section 46 will be short and can be mitigated (as it was with section 50) by the ACCC publishing guidelines.

The ACCC currently publishes educative materials which are tailored for big and small business regarding many of the provisions of the CCA and the types of conduct that are likely to be unlawful.⁸⁰ The ACCC also publishes extensive guidelines on the processes related to obtaining cartel immunity, or seeking clearance/immunity for merger and non-merger conduct.⁸¹ These guidelines are produced in consultation with key bodies such as the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia and often broader public consultation.

The ACCC would propose to develop additional materials in relation to any changes that arise as a consequence of the Review Panel's recommendations in relation to section 46. The ACCC would aim to prepare those guidance materials, for public consultation in draft

⁷⁹ To put it more bluntly, anti-competitive conduct is by definition likely to be rational profit-maximising conduct for a firm.

⁸⁰ See, for example: [Merger Guidelines](#), [Business snapshot – Anti-competitive price signalling and information disclosures](#), [Cartels – what you need to know: a guide for business](#) and [Competition issues in franchiser supplier arrangements](#).

⁸¹ See: [ACCC immunity and cooperation policy for cartel conduct](#), [Authorisation Guidelines](#) and the [Informal Merger Review Process Guidelines](#)

form, prior to the revised provision becoming law, as contemporaneously as the legislative process allows.⁸²

Such guidance material would be similar to that produced by other international competition agencies prior to the introduction of legislation which is based on jurisprudence (where available) and the economic theories of harm that form the rationale for prohibiting the conduct.⁸³ These materials would not be a substitute for case law but rather the guidelines would supplement the legislation by providing greater transparency, clarity and predictability to the general framework of analysis undertaken by the ACCC when it considers potential breaches. The utility of guidelines in this context has been recognised by the International Competition Network.⁸⁴

2.7.4 Divestiture is an unnecessary remedy

The Review Panel has rejected the suggestion that divestiture should be introduced as a remedy for breaches of section 46. The ACCC supports this recommendation, for the reasons the Review Panel articulates in its Draft Report.

2.8 Price discrimination

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.

ACCC view on Draft Recommendation 26

The ACCC supports the Review Panel's view that a specific prohibition on price discrimination should not be reintroduced into the CCA. Further detail regarding the ACCC's views are contained in section 4.6.2 of its Initial Submission to the Review Panel.

⁸² In 1992 the Trade Practices Commission published Draft Merger Guidelines when the legislation (re)introducing the SLC test into section 50 was before Parliament.

⁸³ For example, the abuse of dominance guidelines issued in Hong Kong in anticipation of its competition law coming into effect: Competition Commission of Hong Kong and Communications Authority of Hong Kong, [Draft Guideline on the Second Conduct Rule \(2014\)](#); as well as the cartel guidelines relating to proposed collaborative activity amendments in [New Zealand: Commerce Commission of New Zealand, Competitor Collaboration Guidelines: revised draft \(August 2014\)](#).

⁸⁴ International Competition Network (Unilateral Conduct Working Group), '[Unilateral Conduct Workbook Chapter 1: The Objectives and Principles of Unilateral Conduct Laws](#)', p14 (Presented at the 11th Annual ICN conference Rio de Janeiro, Brazil, April 2012), p.15.

2.9 Vertical restrictions (other than resale price maintenance)

2.9.1 Third line forcing

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.

ACCC view on Draft Recommendation 27

The ACCC supports the Draft Recommendation 27 that third line forcing should only be prohibited if it has the purpose, effect or likely effect of substantially lessening competition.

The ACCC supports the recommendation that third line forcing should be brought into line with the rest of section 47 and only prohibited where it substantially lessens competition. The large number of uncontroversial third line forcing notifications that the ACCC receives each year indicates that the current prohibition has clear overreach and prohibits much pro-competitive or benign conduct.

The ACCC notes that there may be some third line forcing conduct that may not result in a substantial lessening of competition but which may cause detriment to consumers. For example, this can occur where:

- commissions are paid to the primary seller to provide them with an incentive to force third party goods or services;
- the primary product is so important to the consumer it is difficult for them to avoid purchasing an unwanted forced good or service; or
- the primary offer is so compelling or enticing that the consumer does not have proper regard to the forced good or service.

The ACCC would support the Commonwealth-led review of the ACL, scheduled to commence in 2016, considering whether the existing protections in the ACL are sufficient to prevent consumer detriment from third line forcing conduct that would be permitted should the Review Panel's proposed amendment to section 47 be adopted.

2.9.2 Exclusive dealing

Draft Recommendation 28 — Exclusive dealing coverage

Section 47 should apply to all forms of vertical conduct rather than specified types of vertical conduct.

The provision should be re-drafted so it prohibits the following categories of vertical conduct concerning the supply of goods and services:

- supplying goods or services to a person, or doing so at a particular price or with a particular discount, allowance, rebate or credit, subject to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition; and

- refusing to supply goods or services to a person, or at a particular price or with a particular discount, allowance, rebate or credit, for the reason that the person has not agreed to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

The provision should also prohibit the following two reciprocal categories of vertical conduct concerning the acquisition of goods and services:

- acquiring goods or services from a person, or doing so at a particular price or with a particular discount, allowance, rebate or credit, subject to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition; and
- refusing to acquire goods or services from a person, or at a particular price or with a particular discount, allowance, rebate or credit, for the reason that the person has not agreed to a condition imposed on the person that has the purpose, or has or is likely to have the effect, of substantially lessening competition.

ACCC view on Draft Recommendation 28

The ACCC does not support the proposed amendments to section 47 as proposed by Draft Recommendation 28. The ACCC considers that these amendments will inappropriately broaden the scope of the prohibition which, due to the anti-overlap provisions, will consequently narrow the application of the cartel and exclusionary dealing provisions.

Support for simplification but caution regarding change to existing policy settings

The ACCC supports the Review Panel's view that section 47 should be retained in the CCA.

The ACCC also supports efforts to further clarify the CCA and reduce its complexity. However, where such reform is for simplification rather than addressing a deficiency in the law, any proposed amendments should retain the policy intent of the existing provisions. The ACCC considers that the proposed amendments set out in Draft Recommendation 28 will result in a significant change to the scope of section 47 and it therefore does not support them.

The current section 47 defines exclusive dealing according to specific types of conduct in vertical supply arrangements. In contrast, the proposed section 47 is very broad as it removes the existing prescription regarding the types of conditional arrangements that are subject to the prohibition. By de-coupling the prohibition on exclusive dealing from particular kinds of conduct, the proposed section 47 has potentially far wider application which has significant implications.

Expanding section 47 will limit the operation of the cartel prohibitions

The CCA's anti-overlap provisions mean that where a vertical restraint would be prohibited under section 47 (but for the consideration of whether or not the conduct would SLC) the conduct cannot also breach the CCA's cartel provisions or section 45. An expanded section 47 potentially broadens the currently limited exception for particular classes of exclusive dealing from the cartel provisions.

Where cartel conduct also falls within the revised section 47 it will only be prohibited if it has the purpose, effect or likely effect of substantially lessening competition, rather than being prohibited per se (see example below).

This would be a substantial change to the existing policy settings which the ACCC strongly opposes. These implications are also discussed in section 2.5.4.

Case study – Suppliers and distributors in competition

The internet's growth as a distribution platform for firms to reach consumers directly means some producers are often able to readily compete downstream with non-related distributors of their goods or services.

Producers can do this by utilising multiple distribution channels. For example, the company sells its goods or services directly to consumers through its own website, while also selling those same goods and services to a distributor who then sells the products on its own website or bricks and mortar shop front.

Should a supplier and distributor enter or seek to enter an arrangement to ensure neither one is undercutting the other on the price offered to consumers, this conduct should be prohibited per se by the cartel or resale price maintenance prohibitions.

If section 47 were to be broadened, the supply arrangement between producer and distributor could more easily be constructed to fit within that prohibition. If that was successful, the conduct would only be prohibited if it had the purpose, effect or likely effect of substantially lessening competition.

2.10 Resale price maintenance

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.

ACCC view on Draft Recommendation 29

The ACCC supports retaining resale price maintenance (RPM) in its current form as a per se prohibition. However, the ACCC does not support the introduction of a notification regime for RPM as it considers that it is more appropriate that efficiency enhancing RPM arrangements be considered via the authorisation process.

The ACCC supports amending the provision to include an exemption for RPM conduct between related bodies corporate, as is the case under sections 45 and 47.

The ACCC considers that RPM can cause significant harm to the competitive process (see section 4.6 of the ACCC's Initial Submission) and agrees that it should continue to be prohibited on a per se basis.

RPM limits or prevents retailers from competing with one another on price because they cannot offer the product for sale below a specified price. It is likely to result in some customers paying more for a product. In certain circumstances, RPM can also reduce

competition and potentially lead to higher prices by facilitating coordinated conduct between manufacturers or retailers in setting their prices.

However, the ACCC recognises that there may be a need to include an exemption for RPM conduct between related bodies corporate, as is currently the case with sections 45 and 47 of the CCA. The ACCC supports a proposed amendment to this effect.

The ACCC does not support the introduction of a notification regime for RPM. The ACCC considers that the authorisation process, with the ability for the ACCC to impose conditions and a time limit if necessary, is the most appropriate way to balance anti-competitive effects of RPM conduct against any pro-competitive and efficiency promoting public benefits.

The ACCC recognises that RPM can, in certain circumstances, address failures in the market and thereby generate benefits to the public. The ACCC's assessment of efficiency promoting RPM conduct will depend heavily on the facts and circumstances of each case and the ACCC considers that this assessment is not suited to the notification process.

Although ACCC authorisation of RPM conduct has been available since 1995, the ACCC is currently considering the first RPM application for authorisation.⁸⁵ The ACCC has recently issued a draft determination proposing to grant conditional authorisation to RPM conduct for three years (see Tooltechnic case study). Under the notification process, however, the ACCC would not have the option to impose conditions or a time limit on the CCA exemption.

Once the ACCC's assessment of this application is complete the final determination may provide guidance for future applicants, which may, in turn, prompt more applications and enable the ACCC and business to become more familiar with the issues relevant to efficiency enhancing RPM conduct.

Case study – RPM authorisation lodged by Tooltechnic Systems (Aust) Pty Ltd (Tooltechnic)

On 21 October 2014, the ACCC issued a draft determination proposing to grant conditional authorisation to Tooltechnic to set minimum retail prices (RPM) on Festool branded power tools for three years.⁸⁶

On balance, the ACCC considered that the public benefit resulting from the increase in the quality of retail services will be likely to outweigh the clear, but limited, detriment resulting from the fact that some customers will face a higher retail price for Festool products.

Given the ACCC's finely balanced assessment and that this is the first application for authorisation of RPM conduct, the ACCC proposed to grant authorisation for three years rather than the five years sought by Tooltechnic.

The ACCC also proposed to impose conditions which require Tooltechnic to provide certain information over the period of authorisation. The proposed conditions will allow the ACCC to monitor the impact of the RPM conduct and will inform consideration of any future application for reauthorisation by Tooltechnic.

The ACCC is currently considering submissions from interested parties in relation to the draft determination, before making a final decision.

⁸⁵ A91433 lodged by Tooltechnic Systems (Aust) Pty Ltd available on the [ACCC's public register](#).

⁸⁶ ACCC, Draft Determination, Application for authorisation A91433 lodged by Tooltechnic Systems (Aust) Pty Ltd in respect of resale price maintenance, 21 October 2014.

2.11 Mergers

Draft Recommendation 30 — Mergers

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

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

- the ACCC should be the decision-maker at first instance;
- the ACCC should be empowered to approve a merger if it is satisfied that the merger does not substantially lessen competition or it is satisfied that the merger results in public benefits that outweigh the anti-competitive detriments;
- the formal process should not be subject to any prescriptive information requirements, but the ACCC should be empowered to require the production of business and market information;
- the formal process should be subject to strict timelines that cannot be extended except with the consent of the merger parties; and
- decisions of the ACCC should be subject to review by the Australian Competition Tribunal under a process that is also governed by strict timelines.

ACCC view on Draft Recommendation 30

Informal merger review process

The ACCC supports the Review Panel's finding that the informal merger review process should not be interfered with and will undertake further consultation to consider proposals to improve the efficiency of the informal merger review process.

Formal merger exemption process

The ACCC supports the recommendation to combine the formal merger clearance process with the merger authorisation process (together, the formal merger exemption process).

The ACCC also agrees with the Review Panel that the ACCC be the first instance decision-maker in a formal merger exemption process, that decisions of the ACCC should be subject to merits review by the Tribunal, that the ACCC be empowered to require the production of business and market information, and that the formal merger exemption process timelines be able to be extended with the consent of the merger parties.

The ACCC supports the Review Panel's recommendation to remove unnecessary restrictions and requirements that might impede use of the formal merger exemption process but suggests that the Review Panel give consideration to ensuring there is a balance achieved between reducing the up-front information requirements imposed on applicants under the formal merger exemption process and ensuring that the ACCC has sufficient information to commence a review.

2.11.1 Informal review process

The ACCC supports the Review Panel's finding that the informal review process should not be interfered with and is working quickly and efficiently for the majority of mergers. The ACCC acknowledges the Review Panel's view that there is scope for further consultation between the ACCC and business representatives with the objective of developing an informal review process that delivers more timely decisions.

The ACCC has ongoing consultation with the Competition and Consumer section of the Law Council and conducted an extensive consultation process prior to the release of the revised Informal Merger Process Guidelines in 2013. The ACCC will undertake further consultation with the Competition and Consumer Committee of the Business Law Section of the Law Council, business representatives and other interested stakeholders to consider proposals to further improve the efficiency of the informal review process.

2.11.2 Formal merger exemption process

Combining formal merger clearance and authorisation and ACCC as first instance decision maker

The ACCC considers that there is considerable merit in the Review Panel's proposal to combine the existing formal merger clearance process with the merger authorisation process (together, the formal merger exemption process). The ACCC supports the recommendation that the ACCC be the first instance decision maker in a formal merger exemption process, and that decisions of the ACCC should be subject to merits review by the Tribunal.

In a formal merger exemption process subject to strict timelines, it is imperative that the onus is on the parties to satisfy the ACCC that the merger does not substantially lessen competition or results in public benefits that outweigh the anti-competitive detriments. If the onus was on the ACCC to make a positive finding of SLC, there would be no incentive for the parties to cooperate and provide relevant information to facilitate the assessment.

The Review Panel's recommendations would result in greater alignment between the Australian and New Zealand formal merger clearance regimes. While New Zealand retains two separate processes for clearance and authorisation of mergers, a merger can also be cleared on the grounds of no SLC under the merger authorisation process. Such convergence is consistent with the objectives of the competition policy stream of the Single Economic Market Outcomes Framework agreed between Australia and New Zealand in 2009 and will build on the increasingly close cooperation between the ACCC and the NZCC in merger reviews under the cross-appointment arrangements.

A related benefit of the ACCC determining merger authorisations in the first instance is that businesses seeking authorisation for both an acquisition as well as related non-merger conduct may have their related applications considered by the same decision-maker. Relative to the existing framework where separate applications would need to be made to the Tribunal (for the acquisition) and the ACCC (for non-merger conduct), the Review Panel's proposal is likely to increase efficiency and aid consistency of decisions.

Minimum information required with application

The ACCC acknowledges concerns raised as to the prescriptive requirements associated with the existing formal merger clearance and merger authorisation processes and supports the Review Panel's objective in reforming the process to remove unnecessary restrictions and requirements which may have acted as an impediment to its use.

While the ACCC broadly supports Draft Recommendation 30, the proposal that the formal merger exemption process should not be subject to *any* prescriptive information

requirements appears to go beyond the Review Panel's objective of removing unnecessary restrictions and is likely to ultimately undermine the related objective of achieving timely decisions through a formal merger exemption process.

The ACCC considers it is important that there is a balance achieved between reducing the up-front information requirements imposed on applicants under the formal merger exemption process and ensuring that the ACCC has sufficient information to commence a review at the time of receiving the application. While the merger parties have an incentive to provide relevant information, this will generally be limited to information supportive of their position and will not necessarily ensure the provision of all information required to commence the ACCC's review.

The provision of relevant information up-front promotes an informed and timely assessment of the relevant issues. In other jurisdictions, such as New Zealand, certain information is required to be provided up-front with an application. Last year the NZCC introduced a new, less prescriptive, application form for merger clearance applications.⁸⁷ However, while it is less prescriptive in form, the NZCC still requires applicants to provide information regarding the transaction, the commercial rationale for the merger, details of overlap between the parties, contact details for key customers, suppliers and trade/industry associations and copies of relevant transaction documents. The NZCC requests applicants submit supporting evidence and documents, including reports prepared in contemplation of the merger. In addition, the NZCC requires a declaration from an officer or director of the notifying party that all information relevant to the notice has been provided and is accurate.⁸⁸

Requiring a minimum set of key factual information at the outset of the process will assist the efficiency and timeliness of the ACCC's review, enabling the ACCC to gain a detailed understanding of the relevant aspects of the industry and an appreciation of the key issues to be tested shortly after commencement of the process.

Amending potentially onerous information requirements to a minimum set of information requirements would reduce the burden on applicants while ensuring the ACCC has sufficient information. To further increase the flexibility of the system, consideration could be given to enabling the ACCC to waive the requirement to produce certain information if it is not relevant or necessary to be produced in the review of a particular proposed acquisition.

The ACCC suggests that the Review Panel give consideration to ensuring that applications under the formal merger exemption process include a minimum set of up-front information, which may be waived by the ACCC upon request. Consistent with international best practice, this information should include:

- description of the parties;
- details of the proposed transaction, including a description of the rationale for the transaction and a copy of the transaction agreements and relevant board papers;
- description of the products/services offered by the parties;
- information relevant to market definition;
- contact details for key customers, suppliers, and competitors;
- information relevant to the competition assessment, including the parties' sales and shares, the estimated shares of market participants, and information on each of the merger factors set out in section 50(3) of the CCA (to the extent relevant); and

⁸⁷ Available at the [NZCC website](#).

⁸⁸ The NZCC's 'Notice seeking clearance' application form is available at the [NZCC website](#).

- a signed declaration from an officer or director of the notifying party that all information relevant to the notice has been provided and is accurate. This requirement would be consistent with the requirements in the current formal clearance/merger authorisation applications forms as well as in other jurisdictions such as New Zealand.

Need for mandatory information gathering powers

The ACCC supports the Review Panel's recommendation that the ACCC be empowered to require the production of business and market information, but notes that the scope for using mandatory information gathering powers is limited by the strict time constraints of a formal merger process and should not be regarded as an effective 'fix' where no up-front information requirements exist.

The exercise of mandatory information gathering powers during a review can be both time consuming and inefficient, relative to relevant information being provided at the outset of the process. In the absence of any up-front information requirements, an increased dependence on mandatory information gathering powers by the ACCC in a formal merger exemption process has the potential to necessitate an extension to the decision timeframes while the ACCC awaits further information from the applicant once the review has commenced. A formal merger regime heavily reliant on the exercise of mandatory information gathering powers is likely to undermine a key objective of ensuring a formal merger exemption process achieves timely decisions.

Extension of timelines by consent

The ACCC supports the Review Panel's recommendation that the formal merger exemption process timelines be able to be extended with the consent of the merger parties. The opportunity for merger parties to consent to an extension of the timeline is important. Based on the ACCC's experience of the informal merger review process, the ability to consent to an extension of timelines is likely to be valued by merger parties – this provides merger parties with the additional time to address complex issues and in some matters, to prepare remedies for the ACCC's consideration. Such flexibility is afforded in overseas jurisdictions, such as in New Zealand, where merger parties are able to consent to a time extension. As only a very small number of mergers reviewed are opposed by the ACCC, the opportunity to extend timelines may enable some contentious matters to be resolved and avoid the cost and time involved in matters being reviewed by the Tribunal.

Consultation on the formal merger exemption process

The Review Panel has proposed that the specific features of the formal merger exemption process should be settled in consultation with business, competition law practitioners and the ACCC.

The ACCC considers that such change should be considered directly by the Government and if endorsed, should then proceed through a Treasury-led process of public consultation as the appropriate route to settle any new processes and enable key stakeholders, including the ACCC, to provide important input.

ACCC decisions subject to limited merits review by the Tribunal

The ACCC considers that formal merger exemption decisions of the ACCC should be subject to review by the Tribunal. However, such a review should limit the extent to which new information and evidence are considered by the Tribunal. While it is clearly desirable for truly new information and market developments to be taken into account by the Tribunal, the ACCC suggests that the Review Panel give consideration to limiting the Tribunal to material that the ACCC took into account when making its decision to ensure that the review can be

conducted efficiently within the timeframe and reduce the risk that parties fail to provide relevant information up-front. Provision could then be made to enable the Tribunal to allow new information that was previously not available to be considered.

The Review Panel may also wish to consider the timeframe for the Tribunal to make a decision on review of an ACCC decision under the formal merger exemption process. The existing formal merger clearance provisions in Part IX Division 3 of the CCA provide a tight timeframe for the Tribunal to make a decision (30 business days, which may be extended by an additional 60 business days). This contrasts with the existing timeframe for the Tribunal to consider merger authorisation applications (three months, which may be extended by an additional three months).

2.12 Employment related matters

Draft Recommendation 31 — Secondary boycotts enforcement

The ACCC should include in its annual report the number of complaints made to it in respect of secondary boycott conduct and the number of such matters investigated and resolved each year.

ACCC view on Draft Recommendation 31

The ACCC does not consider that Draft Recommendation 31 is required. Enforcement of the secondary boycott provisions of the CCA remains an enduring priority for the ACCC.

In the ACCC Supplementary Submission (No. 2), the ACCC set out its views on the relationship between the CCA and industrial relations legislation.

The ACCC considers that the principles it applies to achieve compliance with the law, and the level of existing reporting of the ACCC's enforcement activities, are adequate. As noted in the ACCC's supplementary submission, the ACCC takes non-compliance with the secondary boycott provisions extremely seriously. The ACCC investigates all substantive complaints in relation to these provisions and is strongly committed to enforcing the law.

Draft Recommendation 32 — Secondary boycotts proceedings

Jurisdiction in respect of the prohibitions in sections 45D, 45DA, 45DB, 45E and 45EA should be extended to the state and territory Supreme Courts.

ACCC view on Draft Recommendation 32

The ACCC has no comment on this recommendation.

Draft Recommendation 33 — Restricting supply or acquisition

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.

The Panel invites further submissions on possible solutions to the apparent conflict between the CCA and the Fair Work Act including:

- **a procedural right for the ACCC to be notified by the Fair Work Commission of proceedings for approval of workplace agreements which contain potential restrictions of the kind referred to in sections 45E and 45EA, and to intervene and make submissions;**
- **amending sections 45E and 45EA so that they expressly include awards and enterprise agreements; and**
- **amending sections 45E, 45EA and possibly paragraph 51(2)(a) to exempt workplace agreements approved under the Fair Work Act.**

ACCC view on Draft Recommendation 33

The ACCC does not support the changes set out in Draft Recommendation 33 or the suggestion that the ACCC have a greater role in relation to enterprise agreements.

The ACCC notes the Review Panel's Draft Recommendation 33 which proposes amendments to sections 45E and 45EA of the CCA. The ACCC does not support change to these provisions and would be particularly concerned if these sections were amended to specifically exempt workplace agreements. The ACCC considers that an amendment to this effect has the potential to inappropriately remove from the scope of Part IV of the CCA anti-competitive conduct that is not properly related to employment matters (but is nonetheless included in a workplace agreement).

In relation to the option advanced by the Review Panel that the ACCC be granted a procedural right to be notified by the Fair Work Commission of proceedings for approval of workplace agreements, the ACCC considers that this additional role would potentially create a very high volume of work.

2.13 Exemption process

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.

ACCC view on Draft Recommendation 34

The ACCC supports the simplification of the authorisation and notification tests.

However, the ACCC is concerned that the introduction of a new test for authorisation and notification in the terms proposed in Draft Recommendation 34 could increase the complexity and burden in lodging and assessing applications.

The ACCC therefore recommends that the current public benefit/detriment test be maintained but consolidated and simplified rather than the new test proposed in the Draft Report.

Should the Review Panel maintain its recommendation regarding substantive changes to the tests, the ACCC considers that conduct which would otherwise breach the per se prohibitions should be deemed to substantially lessen competition for the purpose of applying the proposed test.

The ACCC supports simplification of the authorisation and notification forms. In particular, the ACCC supports the ability for a single application for authorisation to be lodged in respect of a single business arrangement.

2.13.1 Simplification of the authorisation and notification tests and forms

Proposed change to tests increases burden

The Review Panel proposed a new two-pronged test whereby the ACCC would be empowered to grant an exemption (including for per se prohibitions) if it was 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 (**proposed test**).

The ACCC is concerned that an effect of this proposed test could be to increase the complexity and burden around lodging and assessing applications for authorisation and notifications. In particular:

- The proposed test could result in significantly more applications being lodged as businesses seek a decision from the ACCC that their proposed arrangements do not substantially lessen competition as an alternative to relying upon their own legal advice and taking their own risk. This could significantly increase the burden on the ACCC from assessing a greater number of applications than are currently lodged under the public benefit/detriment test. In addition, for each application lodged the ACCC consults with interested parties which will potentially increase the burden on relevant businesses, representative groups, government entities and individuals in response to the greater volume of applications received.

- Applicants could have an increased burden if they address both elements of the proposed test. Currently applicants generally provide submissions addressing the likely public benefit and detriment from proposed conduct. Under the proposed test they may also consider that they need to provide detailed information to the ACCC regarding the relevant market, and whether or not the proposed conduct would be likely to substantially lessen competition in that market. This type of information is generally not currently provided by applicants seeking an exemption for non-merger conduct, particularly where the arrangements are not complex. Often these parties are small businesses or industry associations and they do not use lawyers to assist them with their applications.

Further, amendments to the CCA to provide the ACCC with the ability to issue a block exemption for a category of conduct, because it is almost always either unlikely to substantially lessen competition or result in a net public benefit, is a more efficient way to provide certainty for conduct that does not have a significant effect on competition than through amending the authorisation test as proposed. The views of the ACCC on the possible introduction of a block exemption power are outlined in section 2.13.3 of this submission.

Should the Review Panel continue to recommend the proposed test, the ACCC considers that where an application for authorisation or a notification is lodged for conduct that would otherwise breach the per se prohibitions, that conduct should be deemed to substantially lessen competition for the purpose of applying the test. Without this change, the proposed test would undermine the rationale for making the conduct a per se breach of the CCA, which would be a significant change to the existing policy settings.

Alternative solution to simplify the tests

In practice, for all authorisations and the majority of notifications, the ACCC broadly applies a public benefit test that requires the ACCC to be satisfied that the conduct would result or be likely to result in a public benefit that outweighs the likely public detriment including from any lessening of competition (public benefit/detriment test).⁸⁹

This public benefit/detriment test is relatively simple to apply and is reasonably well understood by the Tribunal, applicants and interested parties. It provides the ACCC with the flexibility to assess both simple and complex arrangements, and the ability to impose conditions where the ACCC considers it important to the overall public interest.

The ACCC therefore recommends that the current public benefit/detriment test be maintained in the CCA as the basis for assessing all applications for authorisation and notifications.

However, the ACCC supports simplification of the tests to reduce unnecessary complexity and variation.⁹⁰

2.13.2 Simplification of the authorisation and notification forms

In some cases proposed conduct for which authorisation is sought may risk breaching multiple provisions of the CCA. In these cases applicants must lodge a separate application form to obtain statutory protection from legal action for each relevant provision of the CCA.

The ACCC agrees that the authorisation lodgement process could be simplified by enabling parties to lodge a single form for all initial applications replacing the current requirement to

⁸⁹ While there are multiple versions of the authorisation tests and they are worded differently, the ACCC considers there is little difference between them in practice.

⁹⁰ For example, the authorisation tests in sub-sections 90(5A), 90(5B), 90(6), 90(7) and 90(8) of the CCA vary in terms of the language but the ACCC applies them in the same broad way and they could be consolidated and the wording simplified. The notifications tests are set out in subsections 93(3), 93(3A), 93AC(1) and 93AC(2).

lodge separate forms for where a single business arrangement risks breaching a number of the competition provisions in the CCA.

The ACCC considers that the authorisation and notification lodgement forms should be separate, given the different processes that apply. However, the ACCC supports the simplification of the notification lodgement forms. Consideration should be given as to whether there is a need to continue with separate forms for the notification of collective bargaining conduct and exclusive dealing conduct.

2.13.3 Block exemptions

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.

ACCC view on Draft Recommendation 35

The ACCC supports supplementing the authorisation and notification framework by providing the ACCC with the ability to issue block exemptions to exempt specified classes of conduct from particular prohibitions in the CCA

As is noted in the Draft Report, competition authorities in a number of countries are able to issue block exemptions, where defined categories of conduct are exempted from certain provisions of the competition law. The Draft Report also noted that in Australia, ASIC is able to grant class exemptions in respect of many parts of the *Corporations Act 2001* (Cth).

Currently, the ACCC is not able to issue block exemptions. Rather, businesses may seek an individual exemption from the operation of certain competition provisions on net public benefit grounds by lodging an application for authorisation or notification in respect of specific arrangements or conduct.

Supplementing the authorisation and notification framework of the CCA with a new block exemption power would provide an efficient means for the ACCC to grant exemptions for defined categories of conduct that are almost always either unlikely to substantially lessen competition or are likely to result in a net public benefit. In particular, if there was a block exemption in place businesses would not need to lodge individual applications for exemption in respect of their specific arrangements.

Further, as noted in the Draft Report, a block exemption issued by the ACCC, in consultation with industry, could be an effective way to deal with shipping conference agreements that contain certain minimum standards and pro-competitive features in the event that Part X of the CCA is repealed and the liner shipping industry is subject to the operation of the CCA. See section 1.4 of this submission for further discussion.

Similarly, a block exemption could be an efficient way to manage the repeal of the intellectual property related exemption in section 51(3) of the CCA. See section 1.6 of this submission regarding intellectual property.

The ACCC acknowledges that further work is required to consider the mechanism by which the ACCC would issue a block exemption (for example whether by way of legislative instrument pursuant to the *Legislative Instruments Act 2003* (Cth) as ASIC does for class exemptions) and the particular circumstances and process that would be followed.

The ACCC has identified some key features that the process for issuing a block exemption power should incorporate:

- The basis for the ACCC issuing a particular block exemption should either be because the conduct is almost always either unlikely to substantially lessen competition or because it results in a net public benefit.
- The ACCC should have the ability to set parameters which exclude or limit the benefit of the block exemption in certain circumstances and to revoke or amend the block exemption in particular circumstances, subject to an appropriate consultation and notice period.
- It should be possible for the ACCC to impose a time limit on the operation of the block exemption, after which it may review and reconsider the terms of the block exemption and issue a new one if the public benefit/detriment test is met.
- The ACCC should publically consult and issue a draft document prior to issuing the block exemption.

2.14 ACCC Investigative Tools

2.14.1 Further information regarding ACCC use of section 155s

General comments by the Review Panel on the ACCC's use of section 155 notices

- The ACCC's primary investigative power is contained in section 155 of the CCA.
- The section 155 powers have been a longstanding feature of Australia's competition law framework.
- Contraventions of competition laws, particularly cartel-type conduct, are often clandestine. It is thought necessary to give the competition regulator strong coercive powers to uncover such contraventions.
- A range of submissions criticise the ACCC's use of its current section 155 powers, citing the scope of the notices and the costs of compliance.
- Comment is also made on the use of section 155 powers in the context of applications for merger clearance.

ACCC view on its use of section 155 notices

- Section 155 notices are an essential tool in the ACCC's investigations to uncover contraventions of the CCA, particularly those which are clandestine.
- Section 155 notices are not issued lightly. There is an extensive process of internal consideration and review prior to the Chairman issuing a section 155 notice. Considerations focus on:
 - whether the notice is really necessary or whether alternative means of obtaining relevant information to investigate a contravention or possible contravention of the CCA would suffice;
 - the recipient's ability to provide the requested information and documents;
 - whether the requested information and documents sought can properly be said to fall within the scope of the matters alleged in the notice; and
 - the burden of the notice, including the volume and type of information and documents sought and the time within which a response is required.

ACCC use of section 155s

In each investigation, consideration is given to how best to obtain relevant information. Section 155 notices are issued for various reasons including:

- to ensure that critical evidence relating to potentially unlawful conduct is not destroyed;
- where the information has not been provided in response to an earlier voluntary request or where there are concerns that all relevant evidence may not be provided if the information is requested voluntarily;
- where the company or trader has previously failed to respond to a voluntary request;
- where the issuing of a notice will avoid protracted negotiations around a voluntary request; or

- where interested parties request that the ACCC use its powers to compel their cooperation. From time to time, parties request that the ACCC issue them with a section 155 notice in circumstances including to:
- overcome obligations of confidentiality, so the party is able to provide the documents to the ACCC (e.g. often a party is unable to provide a contract to the ACCC on a voluntary basis due to the obligation to keep the terms of that contract confidential); or
- protect the party against retaliation for cooperating with the ACCC.

A section 155 notice may only be issued where the ACCC, its Chairperson or Deputy Chairperson has **reason to believe** that a party has information, documents or evidence relating to a matter that constitutes, or may constitute, **a contravention of the CCA**.

The ACCC's power to issue a section 155 notice must also be exercised in good faith and with regard to the effect that the exercise of that power will have on the recipient. This can include balancing the expected burden on the recipient against the benefit from the information requested.

The vast majority of section 155 notices issued by the ACCC relate to matters being investigated by the Enforcement Division.

Merger Transactions

Section 155 notices are used in a very small proportion (two to four per cent) of merger transactions assessed by the ACCC each year. The ACCC generally seeks to rely upon the voluntary provision of information by merger parties and other parties with relevant information to the greatest extent possible.

In certain matters, requiring information and documents on a compulsory basis is the most prudent and efficient method of investigating a merger. It can be necessary for the ACCC to review a party's direct evidence, such as first-hand internal materials of a company which relate to a relevant issue, and which have not been extracted for the ACCC's review. In addition, compulsory examination of particular company employees can provide relevant information in a manner that may not be obtained on a voluntary basis.

In informal merger reviews, the recipients of section 155 notices are usually merger parties, however there are occasions where it is necessary to compulsorily require the production of information from third parties.

Similarly to enforcement matters, it may be necessary to compulsorily require information to be provided in a range of circumstances, including:

- where there is a lack of cooperation in providing the relevant information;
- where market inquiries reveal information inconsistent with what is being put forward by the merger parties;
- where a party is unable to provide the relevant information on a voluntary basis (often due to legal restrictions on the disclosure of the information); and
- where a party requests that the information be compulsorily required (such as when a party is concerned to be seen to be cooperating with the ACCC).

The standard internal processes followed prior to issuing a section 155 notice, both for Enforcement matters and Mergers, are set out below.

Overview of ACCC internal process for issuing a section 155

Consideration of information required and preparation of a draft notice

1. A matter under in-depth investigation or merger review is overseen by the relevant committee of Commissioners, the Enforcement Committee or Mergers Review Committee. The relevant committee considers the scope and strategy for the investigation/review.
2. The Enforcement Committee provides high level oversight of in depth investigations including endorsement of investigation plans which include reference to the proposed use of compulsory evidence gathering powers. The Enforcement Committee also provides direction on investigations at key milestones and will often contribute to options of investigations which include use of section 155 notices.
3. The investigation team identifies what information must be gathered to progress the matter. The investigation team considers the range of options available for gathering the information, namely, obtaining the information from publically available sources, requesting the party to provide the information voluntarily, issuing a section 155 notice or obtaining a search warrant.
4. The investigation team drafts a section 155 notice and prepares a 'reason to believe' minute which sets out:
 - an outline of the allegations which may constitute a contravention of the CCA;
 - the background to the investigation;
 - the basis on which the investigation team is of the view that the addressee is capable of providing information, documents or evidence in relation to the alleged contraventions;
 - the reasons why a section 155 notice is necessary; and
 - the burden of the notice on the addressee, having regard to the volume and type of information sought and the time allowed for the address to respond to the notice.

Legal and senior management review of the draft notice

5. The draft notice is reviewed by ACCC internal lawyers (and external lawyers, if relevant). The legal review includes consideration of whether the information and documents sought can properly be said to fall within the scope of the matters alleged in the notice and identification of any ambiguity in the request for information and documents, as well as providing a further test of the necessary breadth and likely burden of the notice.
6. The draft notice and reason to believe minute are then reviewed by relevant senior executive staff, for example, the relevant General Manager and the Executive General Manager.

Chairperson (or in the Chairperson's absence, the Deputy Chairperson)

7. The Chairperson/Deputy Chairperson considers the notice and the reason to believe minute. If the Chairperson/Deputy Chairperson is satisfied with the notice and has the requisite reason to believe, the notice is signed and returned to the investigation team for processing and service.
8. The section 155 notice is served on the addressee. The notice is accompanied by a letter notifying the addressee of the obligation to comply and inviting the addressee to contact the ACCC as soon as possible if it considers it has genuine reasons why it will not be able to comply within the required time.

9. The exercise of the section 155 power is reported to all Commissioners at the following Commission meeting through the “Exercise of Delegations, Instruments and Authorities” report. The relevant committee of Commissioners will also usually receive an update regarding the issuing of section 155 notices and progress toward compliance.

2.14.2 ACCC guidelines and reasonable search requirements for section 155s

Draft Recommendation 36 — Section 155 notices

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

Either by law or guideline, the requirement of a party to produce documents in response to a section 155 notice should be qualified by an obligation to undertake a reasonable search, taking into account factors such as the number of documents involved and the ease and cost of retrieving the documents.

ACCC view on Draft Recommendation 36

The ACCC will review its internal processes for the issuing of section 155 notices in view of the submissions received by the panel. The ACCC will also, in consultation with key stakeholders, review its external guidelines on section 155.

The ACCC does not support the introduction of a “reasonable search” provision in respect of compliance with section 155 notices. The “reasonable search” principle is likely to lower the threshold for compliance with section 155 notices and reduce the effectiveness of these notices.

If the Review Panel proposes to recommend the introduction of a “reasonable search” test the ACCC considers this would be most effectively implemented through ACCC guidelines accompanying the existing legislation, or by the introduction of a defence to subsection 155(5)(a) of the CCA, with the ACCC providing guidelines as to the meaning of reasonable search in the context of section 155 notices.

Review of existing guidelines

The ACCC will review its processes and guidelines for section 155 notices. In reviewing the ACCC’s processes consideration will be given to the comments by the Review Panel about the increasing burden to comply with section 155 notices resulting from the storage of electronic communications.

The ACCC will also take into account submissions made to the Review Panel raising concerns about the impact of section 155 notices, particularly on small business. The ACCC recognises that section 155 notices are at times issued to small and medium sized business that are not familiar with the ACCC’s investigative processes. The ACCC will move to provide greater guidance to notice recipients, particularly small and medium sized businesses, to assist them understand what steps they should take upon receipt of a notice.

As part of its internal processes, the ACCC considers the reasonableness of the search required to comply with a section 155 notice in its assessment of the likely burden of each notice. In many circumstances, there is also negotiation between notice recipients and the ACCC on the scope of the search required in order to comply with the ACCC’s request.

Proposed ‘reasonable search’ requirement

The ACCC is concerned that the introduction of a ‘reasonable search’ requirement may set an inappropriately low threshold for compliance with section 155 notices and would increase the difficulties of detecting non-compliance.

The ACCC does not consider that a case has been established to support a lowering of the threshold for compliance from the current test of ‘capable’ of complying.

Further, it will be more difficult for the ACCC to detect non-compliance where notice recipients are able to make their own assessment of how to balance competing factors (e.g. the cost and burden of production versus the likely relevance of material) in order to, in effect, unilaterally “read down” the scope of what needs to be produced under a notice, in circumstances where the ACCC is likely to have little or no visibility over what has been omitted as a result of this assessment.

A lowering of the threshold for compliance with section 155 notices, combined with a reduced ability to deter non-compliance, has the potential to significantly undermine the ACCC’s ability to investigate and prosecute CCA breaches.

Accordingly, the ACCC does not support the introduction of a “reasonable search” requirement for compliance with section 155 notices.

The ACCC does, however, recognise the need to address the concerns raised in the Draft Report in relation to moderating the compliance burden of responding to section 155 notices in the digital age, and will review its current processes and guidelines accordingly.

ACCC guidelines for ‘reasonable search’

If the Review Panel proposes to recommend the introduction of a ‘reasonable search’ principle, the ACCC considers that it is well placed to prepare guidelines explaining what this concept involves in the context of section 155.

Such guidelines will be able to draw upon many of the practices and principles established in respect of reasonable searches in standard discovery under the Federal Court Rules.

However, the differences between the discovery process and ACCC investigations of potential contraventions of the CCA will mean that there needs to be some differences in approach to what constitutes a reasonable search in the context of section 155 notices.

The ACCC could prepare guidelines in consultation with key stakeholders. Such guidelines would be designed to assist notice recipients by clearly setting out what steps a party should reasonably undertake to comply with a section 155 notice, particularly in circumstances where potentially responsive material may be voluminous or its recovery involves substantial cost.

If legislative amendments are preferred, the ACCC considers that the most effective approach is to introduce a defence to a ‘refusal or failure to comply with a notice’ under s155(5)(a) of the CCA which would be available to a notice recipient who can demonstrate that a reasonable search was undertaken in order to comply with the notice.

Again, the ACCC considers that it would be well placed to provide guidelines on what constitutes a ‘reasonable search’ in the context of section 155 notices that would assist notice recipients in understanding their obligations and the availability of the defence.

So that the value of section 155 notices to the enforcement of competition law is not undermined, the ACCC considers that any introduction of a reasonable search requirement would need to be supported by a civil regime enabling the ACCC to seek injunctions to comply with a section 155 notice and seek appropriate penalties for non-compliance.

2.14.3 Penalties for non-compliance

The Panel's view on penalties for non-compliance with section 155

The current sanction for a corporation failing to comply with section 155 of the CCA is inadequate.

ACCC view on penalties for non-compliance with section 155

The ACCC welcomes the Review Panel's view that the current sanction for a corporation failing to comply with section 155 of the CCA is inadequate.

The ACCC submits it would be appropriate for the Review Panel to make recommendations:

- introducing civil provisions allowing a court to order a party to comply with a section 155 notice upon action by the ACCC;
- introducing civil penalties for non-compliance; and
- increasing the monetary criminal penalties for non-compliance.

The need for civil sanctions for non-compliance

The ACCC maintains, as was outlined in its initial submission to the Review Panel, that non-compliance with a section 155 notice limits the ACCC's ability to conduct a thorough investigation into alleged anti-competitive conduct and to deter contraventions of the CCA more generally.

Non-compliance with a section 155 notice can have a significant impact, not only on the ACCC's investigation but on the parties that have been impacted by the conduct. Private individuals or third parties rely on the ACCC's enforcement of the CCA to protect their rights.

The ACCC reiterates its initial submission that there is a need for a graduated enforcement response to address non-compliance with section 155 notices.

The ACCC believes that the addition of a civil penalties regime, coupled with civil provisions enabling the ACCC to seek an order compelling a party to comply with a section 155 notice, would provide the right mix of enforcement tools to address non-compliance.

First, there is a need to be able to compel the production of responsive materials where a notice is not complied with.

Currently, where a recipient of a notice does not comply with the notice, the sanctions able to be imposed (a fine or 12 months imprisonment) do not require production of the responsive materials. Accordingly, even if a party is successfully prosecuted for non-compliance with a notice, this will not further the ACCC's investigation of the original potential contravention.

A mechanism under the CCA which would allow a Federal Court to order compliance with a section 155 notice would allow an investigation to proceed accordingly. Such an order, which could be made on the ACCC's application and subject to the Court's approval, would only be granted in circumstances where there is a validly issued section 155 notice and accordingly would be entirely proper.

Secondly, it is appropriate to have a range of sanctions available for non-compliance to reflect the range of circumstances in which non-compliance with a notice occurs.

For example, the appropriate sanction for a party who is capable of providing information but deliberately chooses not to provide that information in order to hide a contravention of the CCA from the regulator may be different to the appropriate sanction for a party who fails to

produce responsive material because they did not allocate sufficient time and resources to searching for material – in the latter case, an order compelling production of the responsive material might suffice.

The current regime of criminal penalties may in some cases be an inappropriate course of action for the alleged contravention. Consequently, in these cases the ACCC/CDPP does not currently pursue the alleged contravention. However, the lack of enforcement of non-compliance with section 155 notices may undermine the effectiveness of the ACCC's information gathering powers as there is inadequate deterrence for non-compliance.

Introducing a wider range of sanctions for non-compliance with section 155 notices will allow the ACCC (in the case of a civil regime), and, where appropriate the CDPP (in the case of the existing criminal regime), to pursue appropriate and proportionate action and sanctions based on the severity of the conduct.

Current criminal penalties are inadequate

The ACCC agrees with the Review Panel that the current criminal fines are too low.

The current criminal fines are up to \$3 400 for individuals and up to \$17 000 for companies.

As the Review Panel noted, penalties for a similar contravention under the *Australian Securities and Investments Commission Act 2001* (ASIC Act) are substantially higher. Those penalties have been applicable since the introduction of that legislation in 2001.

The ACCC considers that the fine that may be imposed for criminal non-compliance should be comparable to the penalties under the ASIC Act and increased to 100 penalty units, \$17 000 for individuals and \$85 000 for a corporation.

The current regime does not provide appropriate deterrence, as the likelihood of a successful criminal prosecution for non-compliance remains low. The difficulty in establishing a contravention, coupled with the low penalties, particularly for a corporation, creates a situation where a business may impede an investigation into alleged anti-competitive conduct. Being liable for a low penalty for non-compliance with a section 155 notices compared to being liable for significant civil or criminal penalties for anti-competitive conduct may be a risk that corporations will look to exploit.

2.14.4 Extending section 155 notices in a broader range of circumstances and to other conduct in the CCA

ACCC view on extending the use of section 155 notices

The ACCC submits that the Review Panel should consider extending the availability of section 155 notices to a broader range of circumstances.

The ACCC submits that clarifying the scope of the ACCC investigative powers and extending the circumstances in which section 155 notices can be issued will increase the ACCC's effectiveness in the administration of the CCA.

As detailed in the first submission to this review, the ACCC submits that section 155 notices should be available in relation to investigating potential breaches:

- of section 87B undertakings;
- of access undertakings and access codes under Part IIIA;
- after the ACCC has commenced proceedings seeking injunctive relief, but prior to the close of pleadings;

- by parties not yet named as respondents in multi-party investigations and staggered litigation; and
- of the ancillary liability provisions, clarifying the ACCC's current interpretation that conduct which is characterised as an attempt to contravene, an attempt to induce a contravention, aiding and abetting or being knowingly concerned or conspiring to contravene, are clearly captured by the provisions of section 155.

The ACCC's initial submission sets out the ACCC's rationale for advocating for these reforms. The ACCC reiterates its view that extending section 155 notices to these situations will allow the ACCC to determine whether or not there are concerns under the CCA that need to be addressed by the ACCC in administering the CCA.

The ACCC notes the Review Panel, at page 260 of the Draft Report, did not support the ACCC's proposal that section 155 powers be available for use after the ACCC has commenced proceedings in respect of an alleged contravention. The Review Panel stated this power would interfere with the court process and that there are appropriate discovery and subpoena powers available. The ACCC agrees with these comments made by the Review Panel.

By way of clarification, the ACCC's submission was intended to suggest the limited extension of the power to issue a section 155 notice in circumstances where the ACCC has made an interlocutory application seeking interim injunctions prior to pleadings being finalised. As outlined in the hypothetical case studies below there are various reasons why the ACCC seeks an interim injunction and requires an ability to issue a section 155 notices as part of a broader investigation.

Case studies – examples of situations where continued use of section 155 notices would be appropriate

Mergers

The ACCC may need to seek urgent interim injunctive relief from the Federal Court to prevent a likely anti-competitive merger from proceeding in circumstances where:

- the ACCC has had little or no opportunity to investigate the proposed merger; and
- the ACCC's investigation of the proposed merger is ongoing and the parties decide to proceed with the merger.

When seeking urgent interim injunctive relief, the ACCC is likely to seek additional remedies (such as declaration) at or around the same time (and hence section 155(4) may not apply).

It is in the public interest that the ACCC makes timely decisions on proposed mergers, having particular regard to the commercial imperatives of the parties involved. It is also in the public interest for the ACCC to continue its investigation in the above circumstances where urgent interim injunctive relief is sought to prevent a merger from occurring.

Amendment to section 155(4) to clarify that the ACCC is able to issue section 155 notices in circumstances where the ACCC has sought urgent interim injunctive relief as part of a proceeding for a broader range of remedies would enable the ACCC to continue to reach informal merger decisions in a timely manner, and have confidence that it will have the ability to continue its investigation, until the close of pleadings.

Misleading and deceptive conduct / unconscionable conduct

The following hypotheticals demonstrate the kinds of circumstances in which the ACCC may consider it needs to act quickly to seek an injunction to prevent harmful conduct, but where further investigation of the conduct is still required which would be assisted by the use of section 155 notices.

The ACCC receives multiple complaints of a trader visiting remote indigenous communities engaging in the following conduct:

- false or misleading representations in relation to the value of the goods being sold by the trader and consumers' refund rights; and
- entering into contracts with consumers which contain an unfair contract term, giving the trader the right to automatically debit the whole of the remaining amount from the consumer's bank account or credit card if the consumer misses a single payment.

Currently, the ACCC must seek to balance the need to gather further evidence for the purposes of seeking final orders, against the need to immediately prevent significant consumer harm to vulnerable consumers by way of an interlocutory application for interim injunctions to prevent the conduct. If the ACCC decides to make an urgent interlocutory application prior to issuing section 155 notices in order to prevent harm immediately, it risks being unable to obtain the necessary evidence for final orders which involve a higher burden of proof.

The ability to use section 155 powers after making the interlocutory application but prior to pleadings being finalised would enable the ACCC to better prevent significant consumer detriment by particular traders in both the short and longer term without interfering with court processes.

Product safety investigation

The ACCC identifies a new product on the market that poses a significant risk of harm to young children.

If the ACCC immediately makes an interlocutory application to prevent ongoing supply, it is then unable to use its 155 powers to obtain details of supply which have already occurred. Such information may be critical in preventing harm to young children whose parents have already purchased the product.

Multi-party investigations

The following hypothetical demonstrates the kind of scenario that can arise where the ACCC has a sufficient basis for commencing proceedings against one participant in an alleged contravention, but needs to continue its investigation against other potential participants, which ongoing investigation would be assisted by the use of section 155 notices.

The ACCC is investigating cartel conduct that has several limbs and multiple parties. The ACCC considers it has gathered sufficient evidence to institute proceedings against some parties for some aspects of the cartel.

The ACCC may wish to commence proceedings against the clearly identified parties to enable the matter to be finalised more quickly while other aspects of its investigation are ongoing, which also has the benefit of providing some certainty to those respondents and to acting in the public interest to resolve matters expeditiously.

In these circumstances, there is a lack of clarity around whether the ACCC may issue section 155 notices to those parties who are not respondents to that matter, for the purposes of gathering information against those parties in relation to the same cartel.

2.14.5 Whistle-blower protections under the CCA

ACCC view on whistle-blower protections under the CCA

The ACCC submits that the CCA or other legislation be strengthened to support whistle-blowers from intimidation or victimisation.

The ACCC reiterates its previous submission that there is a need under the CCA for appropriate whistle-blower protections.

The ACCC has previously advised that whistle-blower protections are an important component for cooperation from individuals with ongoing investigations. There is limited protection for individual informants afforded under section 162A of the CCA in respect of intimidation or other coercive conduct as a result of the informant's cooperation with the ACCC.

The ACCC also notes the release of the Senate Economics Committee Report into ASIC.⁹¹ The Committee considered in detail whistle-blower protections under the *Corporations Act 2001* (Cth) and recommended a comprehensive review of Australia's corporate whistle-blower framework.

The ACCC supports a broader review of the corporate whistle-blower framework. The ACCC's enforcement of the CCA relies on the valuable cooperation provided by individuals who provide that cooperation at risk to themselves.

A stronger protection regime for whistle-blowers is likely to lead to a higher quality of material that is provided to the ACCC. This will enable the ACCC to achieve efficiencies in the investigation of anti-competitive conduct, particularly cartel conduct. Equally, businesses which approach the ACCC can receive various protections under the ACCC's Immunity Policy whereas individual informants, not party to the illegal conduct, do not receive similar protections.

⁹¹ The Senate Economics References Committee, *Performance of the Australian Securities and Investments Commission*, 2014

2.15 Private actions

Draft Recommendation 37 — 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.

ACCC view on Draft Recommendation 37

The ACCC is open to changes which could enhance the prospects for private litigation of competition law, provided such changes do not compromise the effectiveness of public enforcement activity.

The recommended change to section 83 may compromise the effectiveness of public enforcement if it significantly shifts the incentives of parties to cooperate with the ACCC under its cartel immunity policy, or otherwise settle matters the ACCC is litigating.

The ACCC further recommends that it be given the capacity to seek redress for victims of competition law breaches, similar to the power currently available under the ACL.

The ACCC recognises that private enforcement can be a significant complement to public enforcement in building compliance and deterring anti-competitive conduct. Effective deterrence occurs where sanctions, having regard to the likelihood of detection and conviction, outweigh the gains associated with a contravention. The threat of increased 'sanctions' in the form of damages payouts resulting from private litigation can play a vital role in a firm's consideration of the costs and benefits of engaging in anti-competitive conduct.

There are two main categories of private litigation that are relevant to the Review Panel's considerations, first instance litigation and follow-on actions.

First instance litigation matters are those run by private parties from commencement, with no material involvement by the ACCC. By contrast, follow-on actions are those where private parties seek damages against a firm that has already been found to be in contravention of the CCA by virtue of litigation by the ACCC.

The Review Panel's recommendation regarding section 83 relates particularly to these latter types of action.

While in principle the ACCC agrees that greater deterrence would be achieved if – all else equal – it were simpler for private firms to pursue such follow-on actions, in practice it is difficult to achieve this outcome without to some extent compromising the effectiveness of public enforcement activity. That is, all else is unlikely to be equal.

This is because the prospect of follow-on action can impact on a firm's decision to cooperate with the ACCC in its first instance investigations of alleged anti-competitive conduct. For this reason any amendment to private action provisions of the CCA must be carefully balanced with its impact on the ACCC's immunity policy and settlement procedures.

The ACCC immunity policy enables it to detect and successfully prosecute breaches of the CCA and in particular, cartel conduct. In fact, the majority of cartels are detected via applications for immunity and the ACCC relies heavily on the policy to prosecute cartels effectively. The ACCC's ability to efficiently enforce breaches of the law is also facilitated by its ability to resolve court proceedings by consent. Consent settlements usually proceed from

agreement with the alleged contravener as to facts that evidence a breach of the law in relation to which the court may order a penalty and from which findings of fact can be made.

The ACCC therefore has some concerns that the amendment to section 83 proposed by the Review Panel would impact negatively on the ACCC's ability to enforce the law by shifting incentives away from firms seeking to cooperate with the ACCC under its immunity policy. The ACCC believes that firms will be less likely to come forward to seek immunity if there is an increased potential for the admissions they make to be used against them in follow-on proceedings. If for instance a two party cartel is uncovered by the ACCC under the immunity policy, a finding of fact involving the "settling" respondent may, by the proposed operation of section 83, also amount to prima facie evidence of those matters against the immunity applicant. Fewer applicants coming forward with information on the existence of cartels could affect the number of breaches that the ACCC detects and prosecutes each year.

The proposed amendment could also impact on the ACCC's ability to reach settlements in competition law matters. From the ACCC's experience in negotiating settlements, it is clear that defendants place considerable emphasis on the prospect of follow-on proceedings, particularly in relation to the content of agreed facts. The proposed amendment could result in defendants being less willing to settle, less willing to agree to facts, or being willing only to agree to limited facts, if they know the facts are able to be used in a follow-on proceeding. A reduction in the number of matters being resolved by consent would lead to more matters having to be fully litigated. There is a significant public benefit resulting from settling matters, including reduced spending on litigation, faster resolution of matters and freeing up of court resources.

Other submissions to the Harper Review raise a number of options designed to enhance private actions, and some of these may have the added benefit of bolstering ACCC enforcement. The ACCC does not wish to comment on each of these proposed reforms in this submission, but encourages the Review Panel to give them careful consideration whilst remaining mindful of any effect an overall package of changes would have on the ability of the ACCC to enforce the law efficiently and effectively.

The ACCC wishes to highlight that currently the Federal Court Rules give judges discretion to award costs in circumstances where the matter is in the public interest. However, this discretion is rarely used as courts tend to take the view that a party should not be deprived of their right to seek costs if successful merely because the matter is in the public interest.⁹² The Review Panel may wish to look into the effectiveness of the current Rules in relation to competition law matters, rather than introduce specific 'no cost' orders under the CCA.

The ACCC also notes that section 239 of the ACL allows the ACCC to seek orders from a court for consumer redress (other than damages) after a contravention has been found. It may be useful if this power was also available for it to seek redress on behalf of identifiable classes of persons, such as consumers or small businesses, impacted by anti-competitive conduct. For example, the ACCC might seek an order requiring the offending firm to honour existing contracts while offering a discount corresponding to the anti-competitive surcharge to its customers.

⁹² Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009).

2.16 National Access Regime

Draft Recommendation 38 — National Access Regime

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

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

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

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

The Panel invites further comment on:

- **the categories of infrastructure to which Part IIIA might be applied in the future, particularly in the mining sector, and the costs and benefits that would arise from access regulation of that infrastructure; and**
- **whether Part IIIA should be confined in its scope to the categories of bottleneck infrastructure cited by the Hilmer Review.**

ACCC view on Draft Recommendation 38

- The National Access Regime is an important part of Australia's competition policy and should be retained. The ACCC disagrees that there is a need to identify those facilities for which access regulation will be required under Part IIIA in the future. One of the benefits of Part IIIA is that it can flexibly adapt to apply (or cease to apply) to facilities in response to changes in technological or other market conditions.
- Criterion (b) of the declaration criteria in Part IIIA of the CCA should be amended to reflect a 'natural monopoly' test rather than a 'privately profitable' test.

2.16.1 Role of the National Access Regime

The Draft Report identifies the following issues with Part IIIA:

- the bottleneck infrastructure cited by the Hilmer Review is now subject to a range of industry-specific access regimes;⁹³
- few infrastructure services are currently declared under Part IIIA;⁹⁴
- airports and ports are not vertically integrated – issues of monopoly pricing can be addressed through regulatory frameworks other than Part IIIA;⁹⁵ and

⁹³ Draft Report p. 269.

⁹⁴ Draft Report p. 267.

- unless it is possible to identify the infrastructure facilities for which access regulation will be required under Part IIIA in the future, it is difficult to conclude that the costs imposed by Part IIIA outweigh the benefits.⁹⁶

The ACCC takes a different view to the approach in the Draft Report. The ACCC considers that Part IIIA is, and will continue to be, an important part of Australia's policy to promote Australian competitiveness, domestically and internationally.

Few current declarations

The fact that governments have legislated for industry-specific access regimes, and that relatively few services have been declared and arbitrated under Part IIIA should not be seen as a sign that the National Competition Policy model and Part IIIA are redundant.

In 1995, Australian governments, as part of the Competition Principles Agreement, agreed to a set of principles governing access to infrastructure services which were then reflected in Part IIIA. While each industry has its own characteristics, Australian governments recognised that there are important similarities across infrastructure industries, and that a common framework promotes consistency including consistency of investment incentives.

Part IIIA is an integral component of the institutional framework for competition policy. If a state or territory government does not establish an access regime that implements the competition principles, a private party may apply to the National Competition Council (NCC) under Part IIIA for declaration of the infrastructure service.

Along with the competition principles, Part IIIA provides an umbrella or template from which the industry-specific access regimes are drawn. Part IIIA has been influential in underpinning key principles in industries such as energy, telecommunications, ports, water and rail.

The framework of Part IIIA also underpins private negotiations and dispute resolution, allowing parties to reach agreement on commercial terms and conditions for infrastructure access.

The limited number of declarations and arbitrations under Part IIIA shows the success of the National Competition Policy institutional framework in encouraging Commonwealth and state/territory access and economic pricing regimes that promote:⁹⁷

- the efficient operation of, use of, and investment in the bottleneck infrastructure (where competition is not feasible); and
- competition in markets where access to bottleneck infrastructure is required to compete.

Overall, the National Competition Policy model contributes to national productivity, and consumers benefit through enhanced competition, price and product results.

Application of Part IIIA to vertically separated infrastructure services

The Draft Report appears to question whether Part IIIA is an effective mechanism to constrain the conduct of a structurally separated monopoly access provider. The Draft Report states (at page 267):

Although airports and ports are bottleneck facilities, the operators of those facilities are not vertically integrated into upstream and downstream markets. Hence, they have limited incentive to reduce competition in dependent markets, but they have power to impose monopoly charges on users of their facilities. Issues of monopoly pricing can be addressed through regulatory frameworks other than Part IIIA.

⁹⁵ Draft Report p. 267.

⁹⁶ Draft Report p. 267.

⁹⁷ See the objects clause in Competition Principles Agreement 1995 clause 6(f) and Part IIIA, section 44AA of the CCA.

Whilst this may in some cases reflect the current state of affairs, this is a static assessment, and does not allow for potential structural changes in those industries over time. For example, infrastructure operators may acquire other businesses upstream or downstream, and/or expand into other markets.

Further, contrary to the Draft Report view, port service providers are often vertically integrated into related markets. Most of the Part IIIA access undertakings accepted by the ACCC have been in relation to suppliers of port terminal services who are vertically integrated into grain exporting markets.

However, even where a service provider is not vertically integrated (such as the Australian Rail Track Corporation (ARTC)), Part IIIA can be a highly effective tool to constrain monopoly conduct.

The access undertaking provisions enable the ACCC to take a tailored approach that addresses particular characteristics of an industry while maintaining high-level consistency across the regulatory principles applying to different industries.

For example, the access undertakings accepted in recent years covering access to certain wheat port terminals and railway networks each establish (in a similar manner) a legal right to negotiate, backed up by the availability of arbitration by the ACCC if commercial negotiations are unsuccessful. Beyond this, the various undertakings are tailored to suit the specific characteristics of the relevant industry. For example, the wheat access undertakings contained obligations prohibiting discriminatory conduct, given that the vertical integration of port terminal operators with grain exporters was and remains a concern in that industry. In contrast, in the case of ARTC's structurally separated railway networks, a major focus of the regulatory arrangements has been on the financial model and pricing principles applicable to relevant networks.

The availability of a built-in consultation process has been another effective feature of the access undertaking provisions, often leading to a level of industry consensus on controversial issues. For example, the consultation process involved in the assessment of ARTC's proposed access undertaking for the Hunter Valley coal railway facilitated collaboration between ARTC and users of its network, which ultimately led to an industry-wide agreement on the controversial issue of ARTC's rate of return.

Case study – ARTC's Hunter Valley rail network

The Hunter Valley coal supply chain transports coal from the region's mines to the Port of Newcastle for export. It is one of the largest coal export operations in the world. Approximately 14 coal producers have either existing or planned operations in the region. The rail network is also used by passenger trains, grain trains, north-south freight trains crossing the network, and coal trains supplying domestic users such as power stations.

The ACCC has a central role in supporting the efficient operation of the Hunter Valley coal supply chain. In addition to the authorisation function under Part VII of the CCA, the ACCC assesses, and oversees the operation of, ARTC's Part IIIA access undertaking in respect of ARTC's below-rail services in the Hunter Valley. The rail network is a natural monopoly as road transport is not a substitute for transporting coal.

The ACCC accepted an access undertaking from ARTC for the Hunter Valley rail network in 2011, for a five year term, following an extensive assessment process.

Effective features of this undertaking are:

- a consultative arrangement whereby ARTC provides producers with information about potential capital investments on the rail network and they vote on whether it would be prudent for it to be carried out;
- a revenue cap model and pricing principles intended to constrain monopoly pricing by ARTC and foster efficient use of, and investment in, the Hunter Valley rail infrastructure;
- a pathway towards the implementation of performance incentives for ARTC; and
- a 'backstop' user-funding option for producers in the event that ARTC were to not invest in a specific project.

These measures are facilitating more efficient use of, and investment in, ARTC's infrastructure and competition in related markets.

Future application of Part IIIA

The Draft Report suggests (page 269, Draft Recommendation 38) that:

Unless it is possible to identify those facilities or categories of facilities [for which access regulation will be required under Part IIIA in the future], it is difficult to reach a conclusion that the regulatory burden and costs imposed by Part IIIA on Australian businesses are outweighed by economic benefits, or that the benefits can only be achieved through the Part IIIA framework.

Contrary to the Draft Report, the ACCC considers that the competition principles relating to access regulation and the back-stop role of Part IIIA mean that Australia's competition policy can flexibly adapt to apply (or cease to apply) to facilities in response to changes in technological or other market conditions.

As the Review Panel notes, one of the three major forces affecting the Australian economy is new technology and the 'digital disruption'. Changes in demand and technology can alter the natural monopoly characteristics of an infrastructure facility. In some industries, demand growth can make it economical to duplicate a previously natural monopoly facility. In other cases, technological change can undermine a natural monopoly by creating substitute infrastructure or products. However, technological and demand changes do not always reduce natural monopoly characteristics – for example, in the early 1900s, technological change resulted in electricity supplanting gas for lighting, leading to an increase in the natural monopoly character of electricity networks.⁹⁸

Part IIIA specifically provides for the scope of regulation to adapt over time in line with such changes. Services subject to regulation (declared services) must have an expiry date, which ensures that the regulation is reviewed. Further parties can seek revocation of declarations at any time.

The framework provided by the competition principles and the background role of Part IIIA thus allows Australia's competition policy to respond to the challenges for regulation posed by more rapid changes in technology highlighted by Crew and Kleindorfer.⁹⁹ For example, the framework:

- would support the priority reforms proposed by the Review Panel for road transport (Draft Recommendation 3) and electricity, gas and water (Draft Recommendation 16);

⁹⁸ Hannah, Leslie, *One Hundred Years of Government Control over Utilities*, Paper presented to the ACCC's 2009 Regulatory Conference, Queensland, 30-31 July 2009, available at www.accc.gov.au.

⁹⁹ Michael Crew and Paul Kleindorfer, 'Regulatory Economics and the Journal of Regulatory Economics: A 30-year Retrospective' (2012) 41 *Journal of Regulatory Economics* 3.

- is relevant to monopoly port infrastructure (particularly those facilities likely to be privatised in the coming years);
- is relevant to the Review Panel's recommendations on intellectual property (Draft Recommendation 7 and 8) – as set out in section 3.3.8 of the ACCC's Initial Submission and section 1.6 of this submission, in respect of the use of intellectual property rights, there is no reason to treat intellectual property any differently to other services in relation to access. In future, access to intellectual property may be of increasing significance and effective access regimes may become more important;¹⁰⁰ and
- supports the Review Panel's vision of the ACCP as a driver of an evolving competition reform agenda in response to changes in the economic landscape.

The ACCC notes that the rationale behind regulating access to infrastructure and the retention of Part IIIA was considered by the Productivity Commission in its 2013 report. As part of its 12 month process, the Productivity Commission considered 76 submissions, conducted roundtables with key stakeholders, and held public hearings. The ACCC has previously referred the Review Panel to the ACCC's submissions to the Productivity Commission inquiry (dated February 2013 and July 2013). These submissions are also available at www.pc.gov.au (following the links to 'National Access Regime').

2.16.2 Declaration criteria

In respect of declaration criterion (b), the Draft Report supports the 'privately profitable' test on the basis that it is easier than a 'natural monopoly' test to assess in practice.¹⁰¹ The ACCC disagrees with the Review Panel's view as a privately profitable test:

- does not focus on the proper question relevant to the consideration of what infrastructure should be subject to regulation, and therefore could have adverse impacts on economic efficiency and productivity; and
- can be more difficult than a natural monopoly test to assess in practice.

As the Draft Report notes, the appropriate interpretation of criterion (b) was a key issue in the Productivity Commission's National Access Regime review. The Productivity Commission concluded that the interpretation of criterion (b) should be a 'natural monopoly test' (whether the facility can meet expected demand at a lower total cost than two or more facilities).

The Productivity Commission's view was supported by the NCC and the ACCC. The ACCC, in its submission to the Productivity Commission, advocated for a 'net social benefit test' (applying a natural monopoly test using a broad economic definition of efficiency – that is, taking into account the implications of natural monopoly for productive, allocative and dynamic efficiency). However, the ACCC's submission recognised that, in practice, when combined with the other declaration criteria, there is little practical difference between the net social benefit test and the natural monopoly test. Accordingly, the ACCC supported the Productivity Commission's recommended natural monopoly test (which takes into account the total demand for the market, and production costs).

Natural monopoly characteristics are typically the key justification for the economic regulation of industries such as energy and telecommunications.¹⁰² Such regulation aims to:

¹⁰⁰ As discussed in section 3.3.8 of the ACCC's Initial Submission and section 1.6 of this submission, one way of achieving this might be to remove the intellectual property exclusion from Part IIIA of the CCA in section 44B(E).

¹⁰¹ Draft Report p. 271.

¹⁰² The term 'natural monopoly' is used in the competition principles proposed by the Panel in Draft Recommendation 1.

- achieve the productive efficiency benefits of a single infrastructure operator while preventing the allocative and dynamic efficiency losses that would result from the monopolist's use of its market position; and
- as foreshadowed by the Hilmer Report, improve economic efficiency in related markets by promoting competition.

The ACCC considers that the privately profitable test has the potential to lead to adverse impacts including:

- socially wasteful duplication of infrastructure facilities – duplication of natural monopoly facilities, despite being privately profitable in some cases (for example, where economic rents are earned in downstream markets), would waste resources that could have improved the total welfare of Australians in alternative uses;
- restriction or foreclosure of competition in related markets where potential competitors (who may have offered innovative products more highly valued by consumers than the existing products in the market) are unable to obtain access to the essential input provided by the natural monopoly infrastructure;
- monopoly pricing for the use of the incumbent's infrastructure;
- under investment in infrastructure in related markets.

However, it could also result in mandated access where this is economically inefficient. A privately profitable test can be easier than a natural monopoly test for an access seeker to manipulate by setting up its business case, based on its own assumptions about parameters such as demand and its firm-specific costs, to demonstrate that investing in its own facility would not be commercially profitable and that it should therefore be given access.

A privately profitable test also creates uncertainty for an infrastructure operator about whether its facility will be subject to regulated access. This is because private profitability will depend, in large part, on the prices obtained for, and costs of producing, the potential access seeker's products. For example, it may be profitable for an iron ore miner to duplicate a railway track to transport its ore to port when global iron ore prices are high but no longer profitable if global prices were to fall on a sustained basis. Uncertainty about whether the railway would be privately profitable to duplicate, and thus whether regulated access would be required, could have adverse impacts on the railway operator's operations and investment.

The ACCC thus supports the Productivity Commission's recommendations in respect of the retention of Part IIIA and the amendment to declaration criterion (b). The scope of the information that may be considered by the Tribunal is discussed in section 3.5 of this submission.

3 Competition Institutions

3.1 Competition advocacy and market studies

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.

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.

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.

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.

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.

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.

ACCC view on Draft Recommendations 39-44

The ACCC supports the Draft Recommendations in relation to:

- quantifying the expected net benefits of the reform agenda;
- competition policy payments to ensure that revenue gains from reform accrue to the jurisdictions undertaking the reform; and
- a statutory body to undertake monitoring and transparent reporting on outcomes, including where government commitments to competition reform are not being delivered.

The ACCC disagrees with the view expressed in the Draft Report that the ACCC should not perform a market study function.

The competition policy reform agenda proposed by the Review Panel has the potential to deliver major benefits for Australians. The ACCC agrees with the Review Panel that the institutional framework should be designed to sustain this reform agenda.

As discussed in section 5.1 of the ACCC's Initial Submission, the ACCC supports the Review Panel's Draft Recommendations in relation to:

- an intergovernmental commitment to competition principles;
- the Productivity Commission to quantify expected net benefits from the proposed reforms, and impact on government budgets;
- if disproportionate effects across jurisdictions are estimated, competition policy payments to ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform; and
- a statutory body to undertake monitoring and transparent reporting on outcomes, including where commitments are not being delivered.

Where the ACCC disagrees with the Draft Report is the suggestion that:¹⁰³

- a competition regulator should not perform an advocacy or education role; and
- a market study function would conflict with the investigation and enforcement responsibilities of a competition regulator.

3.1.1 Competition advocacy and education

The International Competition Network (ICN) defines ‘competition advocacy’ as:¹⁰⁴

those activities conducted by the competition agency related to the promotion of a competitive environment by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.

Advocacy activities include promoting compliance with the law, and promoting a competitive environment by examining markets, seeking to understand barriers to competition and then proposing ways to remove those barriers. These barriers include public restrictions on competition.

The Draft Report view that ‘the ACCC should not undertake competition policy advocacy and education, as this may compromise stakeholder perceptions of impartiality’¹⁰⁵ is completely inconsistent with international experience, public administration literature and actual practice in Australia.

Internationally, competition review of public restrictions on competition is usually a core responsibility for competition agencies. An even more formal competition advocacy function has been conferred on many overseas competition agencies. For example, the Korean Fair Trade Commission has a specific power to assess government regulation and then recommend anti-competitive rules be amended or set aside. The Italian Competition Authority has time set aside twice a year in the Parliamentary schedule to propose legislation to repeal competition restrictions in Italian law.

In public administration literature, education and advocacy is regarded as an essential function of a regulator. For example:

- Research on tax compliance by the Australian National University Regulatory Institutions Network found that compliance is most likely when the regulator displays and employs an explicit enforcement pyramid. The regulator starts with educative and/or persuasive strategies and then moves to increasingly punitive strategies if voluntary compliance fails. Voluntary compliance is significantly increased where the law is perceived as fair and in the interests of society including the relevant individual. Effective education and advocacy by the regulator is crucial to building a voluntary compliance culture, and reducing the need for costly enforcement action.¹⁰⁶
- The model of public administration developed by Mark Moore from the Harvard University Kennedy School of Government recognises that legislation cannot be designed so as to resolve all uncertainties and forestall all implementation problems. To be effective, the public administrator must form a view as to what public value the authority should produce after taking into account what will be substantively valuable and politically and administratively feasible, and then manage the authority and mobilise support from others beyond the authority so as to produce this value.¹⁰⁷

¹⁰³ Draft Report pp 281 & 284.

¹⁰⁴ International Competition Network, *Advocacy and Competition Policy* (2002) www.internationalcompetitionnetwork.org.

¹⁰⁵ Draft Report p. 292.

¹⁰⁶ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

¹⁰⁷ Mark Moore, *Creating Public Value: Strategic Management in Government* (1995).

- Malcolm Sparrow, also from the Kennedy School, argues that regulators, instead of responding to complaints on an ad hoc basis, should adopt a ‘risk-control’ or ‘problem-solving’ approach (or as Sparrow puts it, ‘pick important problems and fix them’). This requires a competition agency to actively review Australian markets to identify significant problems and to tailor a compliance and enforcement action plan to address the problem.¹⁰⁸ Education and advocacy can be a key component of the action plan.

Further, the Review Panel’s conception of a competition agency is not supported by actual practice in Australia. Given the insights that the ACCC gains from administering Australia’s competition law, it is common for governments to request advice from the ACCC to inform a policy process. For example:

- In relation to the Murray-Darling Basin, the *Water Act 2007* provides for the ACCC to advise the Commonwealth Minister on the water market rules and water charge rules, and advise the Murray-Darling Basin Authority on the water trading rules.
- In relation to the allocation of spectrum licences by auction under the *Radiocommunications Act 1992* (Cth), the ACCC has at various times provided advice to the Minister on request in relation to ‘competition limits’ to be included in the procedures for allocating the spectrum licences.

The ACCC’s education and advocacy role is also reflected in section 28 of the CCA which provides that ACCC has functions in relation to the dissemination of information, law reform and research. This includes:

- providing information to guide people on the functions of the ACCC;
- conducting research on matters affecting the interests of consumers; and
- examining and reporting to the Minister on laws relating to the protection of consumers in respect of matters referred to the ACCC by the Minister.

This is consistent with international practice. For example, the US Federal Trade Commission’s review included the following discussion on ‘advocacy’:¹⁰⁹

As an important complement to its law enforcement mission, the FTC engages in competition and consumer protection advocacy before other policymakers, including state legislatures, regulatory boards, and officials; state and federal courts; other federal agencies; and professional organizations, such as bar associations. In response to requests or where public comments are sought, the FTC issues advocacy letters, comments, and amicus briefs, providing policymakers with a framework to analyse competition and consumer protection issues raised by pending governmental actions or ongoing judicial disputes. Advocacy can play a particularly important role in addressing governmentally imposed restraints on competition, where other tools may be unavailable. There was strong support among those consulted for the FTC’s advocacy efforts.

Advocacy is regarded as complementary to the functions of a competition agency. The agency’s day-to-day experience in enforcing the competition law provides the agency with the knowledge to:

- advise policy reviews on the operation of legislation (e.g. the ACCC’s work in supporting the criminalisation of cartel conduct and effective industry codes, and in calling for laws to address anti-competitive facilitating practices across the economy);

¹⁰⁸ Malcolm K. Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (2000).

¹⁰⁹ US Federal Trade Commission, [*The Federal Trade Commission at 100: Into our 2nd Century* \(January 2009\)](#) p. xvi.

- assist other government bodies in considering the impact on competition of government decisions (e.g. ACCC's work in advising on spectrum licences); and
- interact with constituencies across society to raise awareness of rights and obligations under the CCA, and the benefits that competition policy can bring (e.g. ACCC's targeted education campaigns).

The ACCC therefore strongly suggests that the recommendations arising from this major review of competition policy should not be based on the misconception that competition regulators should have no advocacy or educative role.

However, the ACCC acknowledges it need not be the only body with such a role. The proposed ACCP could play a significant role over and above the work of the ACCC.

3.1.2 Market studies

The Draft Report suggests two concerns with the ACCC performing a market study function:¹¹⁰

- a market study function is part of competition advocacy; advocacy is a 'policy function' which may compromise stakeholder perceptions of impartiality; and
- enforcement under the CCA is adversarial – having the ACCC conduct market studies could encourage the perception that a market study is a precursor to enforcement action, which in turn could impact on participation including the provision of information.

The advocacy and educative role of competition agencies is discussed above. In the ACCC's view, the perceived conflict between a market study function and competition enforcement is not supported by international experience. The ICN makes the point that market studies have a long history (since the early 20th century in the United States, and in Japan, since 1947) and that many overseas competition authorities use market studies as part of their portfolio of tools. As set out in section 5.2.1 of the ACCC's Initial Submission, a 2003 OECD report found that close to all of the respondent competition authorities conducted general sector investigations or economic studies; a 2012 ICN report found that 40 ICN member authorities were using market studies. The performance by the ACCC of a market study function should therefore not be regarded as an unusual suggestion; rather it is a mainstream one.

The purposes for which a market study could be used by the ACCC were listed in the ACCC's Initial Submission, and further discussed in the ACCC's Supplementary Submission (No 2). Such a role could be helpful to governments, businesses and consumers by assisting in the identification of market problems and possible solutions – or, alternatively, in confirming that no action is needed, and that a market is in fact working effectively. The identification of important problems and the appropriate response is essential to maximising the benefits for Australians from the resources available to the ACCC.

¹¹⁰ Draft Report p. 281-283 and 284.

3.2 Institutional design

Draft Recommendation 45 — ACCC functions

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

Draft Recommendation 46 — Access and pricing regulator functions

The following regulatory functions should be transferred from the ACCC and the NCC and be undertaken within a single national access and pricing regulator:

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

Consumer protection and competition functions should remain with the ACCC.

The access and pricing regulator should be established with a view to it gaining further functions as other sectors are transferred to national regimes.

ACCC view on Draft Recommendation 45 & 46

The ACCC supports Draft Recommendation 45 but does not support Draft Recommendation 46. The competition policy reform agenda proposed in the Draft Report is best supported by retaining a single economy-wide body responsible for competition enforcement, consumer protection and economic regulation with the single objective of making markets work to enhance the welfare of Australians.

Draft Recommendation 46 proposes the creation of a new statutory agency, responsible for access and pricing. The Draft Report lists three benefits of a single national independent access and pricing agency:

- a single agency will have the scale of activities that enables it to acquire broad expertise and experience across a range of industries, and acquire and retain staff who have that expertise;
- a single agency regulating a range of infrastructure industries reduces the risk of capture; and
- a single agency will reduce the costs associated with multiple regulators and regulatory frameworks, and promote consistency in regulatory approaches.

However, these benefits are already achieved under the current institutional arrangements, with the ACCC/AER regulating across multiple industry sectors. The current structure already minimises the risk of capture. In relation to scale of activities and the cost of multiple regulators, creating a separate access and pricing regulator would in fact make it:

- more confusing and burdensome for both businesses and consumers who would have to deal with two agencies – contrary to the direction of the May 2014 COAG meeting;¹¹¹
- harder for common issues to be addressed consistently across the agencies (or to prevent gaps where neither agency takes responsibility for the issue);
- significantly more costly for the Commonwealth government – contrary to the stated objective of the National Commission of Audit,¹¹² creating a separate agency would require the Commonwealth to pay for duplicate corporate and in-house legal and economic services, along with the additional staff needed to duplicate industry knowledge, enforcement expertise and consumer outreach skills; and
- more difficult to attract and retain staff, along with high calibre external legal and economic services.

The Draft Report suggests two other factors relevant to its Draft Recommendation; namely that:

- the culture and analytical approach required for a competition enforcement function and an access and pricing function are incompatible; and
- over time, states and territories could transfer functions to the new agency such as the national regulation of urban and rural water.

Culture and analytical approach of regulators

The Draft Report states that, in comparison to competition and consumer functions, there are fewer synergies between competition enforcement and access and pricing regulation. The Draft Report provides three arguments as to why competition enforcement and economic regulation functions are incompatible:

- economic regulation requires an ongoing and collaborative relationship with the industry it regulates; competition law is more likely to involve adversarial interactions;
- the views of an industry regulator about the structure of a particular market could influence a merger decision; and
- there are tensions between competition-related regulatory tasks and the ACCC's role in protecting consumers.

The ACCC disagrees with these findings, in particular the inference that because some different skills are required for different tasks (albeit all with a strong economic base), it follows that they should be undertaken by separate agencies. To the contrary, provided the overarching agency objectives are consistent, having a diversity of capabilities within a single agency is likely to be more effective in fulfilling them.

Synergies between competition, consumer protection and economic regulation

It must be emphasised that both the ACCC and proposed new agency would be economic regulators. They would have a common base in economics.

As the Draft Report notes, the purpose of competition policy is to make the market economy serve the long-term interests of Australian consumers – it is about making markets work properly.¹¹³ The ACCC's Initial Submission (section 5.2.1) provided a range of points in

¹¹¹ COAG Communique, 2 May 2014. COAG agreed to look closely at improving the performance of regulators and the benefits of consolidating regulatory functions, including through the amalgamation of regulators, so that businesses, community organisations and individuals need to interact with as few regulatory bodies as is necessary.

¹¹² National Commission of Audit (Tony Shepherd, Chair), *Towards Responsible Government: The Report of the National Commission of Audit – Phase One* (February 2014) p. xxvi.

¹¹³ Draft Report p. 15.

support of the case that a single agency is the most effective means of achieving this outcome, including:

- The objective of competition policy (making markets work to ‘enhance the welfare of Australians’) and the need to ‘join-up’ the tools to achieve this: competition law focuses on supply side efficiency;¹¹⁴ consumer law focuses on demand side efficiency, economic regulation focuses on replicating, as far as possible, the outcomes of a competitive market where competition is not feasible.¹¹⁵
- The strengths of the current model including:
 - fostering a ‘pro-market’ culture across the three functions;
 - facilitating coordination and depth of analysis across common issues;
 - ensuring small business issues do not fall ‘between the cracks’;
 - providing one source of consistent information, guidance and education to both consumers and businesses about their rights and obligations;
 - administrative savings and skill enhancement through the pooling of information, skills and expertise;
 - in relation to a multi-sector economic regulator, reducing investor uncertainty and the need for regulatory intervention, reducing distortions across industries, and reducing the risk of regulatory capture;
 - providing the consumer protection and outreach expertise needed to support consumer engagement in new infrastructure related markets, and to ensure all interests are represented in economic regulatory processes; and
 - promoting greater accountability as the performance of one regulator is easier to monitor.
- The trend in other countries towards consolidation of functions to deal with problems arising from overlap and gaps in jurisdiction.
- OECD and other international assessments of the current Australian model.
- The ACCC/AER is already a relatively small agency with fewer staff than the ASIC and the Reserve Bank of Australia (RBA). The ACCC is only a little larger than the Australian Prudential Regulation Authority (APRA) and the Australian Communications and Media Authority which are industry specific regulators.

Competition law, consumer protection and economic regulation are **complementary** tools, with the single objective of improving the economic welfare of consumers. The tools need to work together, particularly in rapidly evolving markets. The synergies between, and the complexities of separating, competition, consumer protection and economic regulation are evident when the practical operation of two separate agencies is considered:

- In telecommunications, the ACCC would investigate claims of anti-competitive conduct in the communications sector under Part XIB, deal with consumer protection issues such as broadband advertising under the ACL, and monitor and report on prices and competition in the telecommunications sector under Part XIB of the CCA. The new agency would assess and enforce terms of access to the NBN in the special access undertaking from NBN Co, assess and enforce Telstra’s structural separation undertaking and plan to migrate its customers to the NBN, and set wholesale prices

¹¹⁴ As the Draft Report states (p. 187), competition law is ‘designed to ensure that the behaviour of competitors does not damage the competitive process to the detriment of consumers’.

¹¹⁵ As the Draft Report (p. 294) states: ‘Economic regulation of monopoly or other infrastructure where there is limited competition among providers seeks to protect, strengthen and supplement competitive market processes to improve the efficiency of the economy and increase the welfare of Australians’.

and wholesale terms of access for declared services under Part XIC of the CCA. Under this model, where an issue arises in relation to network access or NBN migration, telecommunications access providers, access seekers and end-user groups would have to engage with both the ACCC and the new agency.

- In energy, the ACCC would enforce the competition and consumer protection provisions, assess energy mergers and authorisations and perform the AER's function of monitoring retail energy markets and enforcing the laws regulating those markets. The new agency would set the prices charged by energy networks (electricity poles/wires and gas pipelines), and monitor wholesale energy markets and enforce the laws regulating those markets. Presumably, either the ACCC or the new agency would take over the AER's current function of publishing information on energy markets. As a consequence, 'gentailers' (combined generators and retailers in the electricity market) would lose the continuity in the current regime which reflects the integrated and changing nature of energy markets.
- In fuel, the ACCC would enforce Part IV of the CCA and the ACL in relation to issues such as discount fuel shopper dockets, price signalling and industry structure. In contrast, the new agency would presumably monitor fuel prices under Part VIIA.¹¹⁶ This means that one agency would have the industry knowledge that the other agency needs to perform its functions.
- In post, the new agency would assess notifications of proposed price increases for Australia Post's reserved services, inquire into disputes about the terms and conditions on which Australia Post provides bulk mail services, and monitor for cross-subsidy between reserved and non-reserved services. However, complaints that Australia Post was using its market power in the reserved services market to reduce competition in related markets would also come within Part IV of the CCA. If the government undertakes any structural reform of postal services, the problems in practice of overlapping post regulators would increase in significance.
- In aviation, the new agency would monitor prices, costs and profits and quality of aeronautical services and car parking at Brisbane, Melbourne, Perth and Sydney airports, assess notifications of proposed price increases from Sydney Airport in relation to regional air services and assess notifications of proposed price increases from Airservices Australia. The ACCC would enforce Part IV and the ACL in relation to issues such as drip feed pricing and airline alliances. As a result, the aviation industry would be dealing with two separate regulators.
- In rail, the new agency would assess and enforce the undertakings submitted by the ARTC under Part IIIA of the CCA in relation to the Hunter Valley coal chain and interstate rail tracks. The ACCC would be responsible for assessing applications for authorisation of coal supply chain capacity management systems, and assessing proposed rail infrastructure access regimes that form part of section 87B undertakings or court enforceable undertakings. As discussed in section 2.16 of this submission (Part IIIA), the development of the Hunter Valley coal chain capacity allocation system was a highly complex process. Adding an additional regulator into the process would increase the burden on market participants and potentially lead to inconsistencies.
- In relation to the waterfront and shipping, the ACCC would investigate complaints in respect of international liner cargo shipping conference agreements under Part X of the CCA (or Part IV if Part X is repealed). The new agency would provide information on the performance of Australia's container stevedoring industry (lifting containers on and off ships). In practice, this would require container stevedores and users of these

¹¹⁶ Monitoring is traditionally regarded as an economic regulatory tool. Part VIIA of the CCA is based on the former *Prices Surveillance Act 1983* which was administered by the Prices Surveillance Authority.

services to deal with two agencies both taking responsibility for competition in this area.

- In relation to wheat export supply chains, the new agency would enforce the Port Terminal Access (Bulk Wheat) Code of Conduct 2014, and perform the roles under that Code in relation to exemptions and capacity allocation systems. The ACCC would be responsible for investigating claims of anti-competitive conduct under Part IV and assessing applications for authorisation including capacity allocation systems. As discussed above in relation to coal supply chains, having two separate regulators involved in capacity allocation systems is unlikely to facilitate the process.
- In the Murray-Darling Basin, the ACCC would enforce the CCA with respect to water brokers, exchanges and irrigation infrastructure operators. The new agency would enforce the water market rules and water charge rules under the *Water Act 2007* (Cth), monitor and report under that regime, determine regulated charges, provide advice to the Commonwealth minister on development of water market rules and water charge rules, and provide advice to the Murray-Darling Basin Authority on the development of water trading rules. However, as discussed in section 3.1 of this submission, the advisory role of the ACCC in respect of issues such as trading rules derives from the ACCC's competition expertise rather than access and pricing. Along with increasing the regulatory burden on Murray-Darling Basin market participants, separating the agencies will make it more difficult for each agency to effectively perform its functions.

The complementarity of competition law, consumer protection and economic regulation tools is illustrated by the following case study in relation to access to Telstra's exchanges.

Case study – Telstra exchange capping

To promote competition, the copper lines that connect customer premises to Telstra's exchanges are regulated under the telecommunications access regime in Part XIC of the CCA. Access seekers rent the copper lines from Telstra to provide broadband services to customers in competition with Telstra. To do this, access seekers require Telstra to provide them with space in Telstra's exchange buildings to install their own equipment.

From late 2007, the ACCC started receiving complaints that Telstra had contravened the telecommunications competition law in Part XIB of the CCA. The complaints related to delays associated with Telstra's queuing system (allocation of space to parties seeking access to Telstra's exchange buildings) and Telstra's internal process for determining when there is no longer space available for access seekers in an exchange building (that is, the exchange is determined by Telstra to be 'capped').

Initially, the issue was investigated by the ACCC under the competition provisions. However, after reviewing the complaints, the investigation transitioned to focus on enforcing Telstra's compliance with the access regime. In 2009, the ACCC instituted proceedings in the Federal Court alleging that Telstra had contravened its standard access obligations for the regulated services, and furthermore that it had breached consumer law. The standard access obligations require Telstra to permit interconnection of facilities, and to ensure that access seekers receive equivalent technical and operational quality and timing of interconnection to that which Telstra provides itself. In 2010, the Federal Court imposed an \$18.55 million penalty for the contravention and found that, in addition to unlawfully rejecting the requests for interconnection from access seekers, Telstra made representations to those access seekers that were false, thereby engaging in conduct that was misleading or deceptive.

Importantly, in all aspects of the investigation, the ACCC's objective was the same – to promote competition where it is in the long-term interest of consumers. If there had been two separate regulators, the businesses involved would have needed to deal with two separate regulators and potentially two separate sets of obligations that were seeking the same objective. Each regulator would have required its own staff with industry knowledge and enforcement expertise, and its own in-house legal and economic services – losing the synergies that currently exist and greatly increasing costs.

Consequently, in the ACCC's view, combining competition, consumer protection and economic regulation is the model that best supports the Review Panel's reform agenda of reinvigorating the incentives provided by competition to deliver benefits to Australians.

One of the key messages from the Draft Report is that the competition policy environment is not static. The reform agenda needs to evolve in response to changing market conditions. The 2010 Blueprint for the Reform of the Australian Public Service similarly noted the challenges posed by more rapid globalisation and technological change. However, contrary to the recommendation in the Draft Report, the Blueprint identified a need for *greater* coordination to 'tackle multi-dimensional and interrelated issues'.¹¹⁷

Compatibility between competition, consumer protection and economic regulation functions

Against the synergies between competition, consumer protection and economic regulation, the Draft Report raises concerns with the compatibility of the functions. The ACCC disagrees with the Draft Report view that, in practice, there is a conflict between competition and economic regulation functions.

The ACCC currently has seven divisions:

- three divisions are focused on competition and consumer work: Enforcement; Merger and Authorisation Review; and Consumer, Small Businesses and Product Safety;
- a fourth division is focused on the regulation of infrastructure other than energy networks;
- a fifth division supports the work of the AER; and
- there are two support divisions: Legal and Economic; and People and Corporate Services.

This internal structure creates specific areas of focus, and fosters areas of expertise and skill development. The Commission decision-making structure (which is discussed in section 3.3 below) then allows consideration of individual matters within the broader competition, consumer and regulatory context.

The suggestion that competition law is adversarial and economic regulation is collaborative is overly simplistic. Such a distinction fails to recognise:

- the extensive educative work done by the ACCC with large and small businesses to promote a culture of compliance with the competition and consumer protection law; and
- that enforcement and ensuring compliance with regulatory obligations are core functions of the ACCC and AER's responsibilities in relation to infrastructure sectors such as telecommunications, energy and the Murray-Darling Basin.

In performing these tasks, both the ACCC and the AER move between points in the regulatory pyramid (discussed in section 3.1 of this submission) with more cooperative

¹¹⁷ Advisory Group on Reform of Australian Government Administration (Terry Moran, Chair), *Ahead of the Game – Blueprint for the Reform of Australian Government Administration* (March 2010) p. 10.

strategies at the base of the pyramid and progressively more punitive approaches utilised if cooperative strategies fail.

The suggestion that the ACCC fails to apply the statutory test when assessing merger decisions or that combining consumer protection with economic regulation results in economic regulation focusing on short-term price reductions rather than the long-term interests of consumers, is an assertion not supported by any evidence. It also fails to recognise the extensive checks and balances (discussed in section 3.3 of this submission) which apply to public administration in Australia, and specifically to the administration of the merger provisions in the CCA.

In the ACCC's experience, combining competition law, consumer protection and economic regulation is a highly efficient model for delivering the key objective of all the functions; namely making markets work for consumers. It also would make it easier to successfully implement the type of microeconomic reform agenda envisaged by the Review Panel. The ACCC would therefore be highly concerned if these synergies were lost due to a false perception of conflict between the functions.

Australia's federal system of government

The Review Panel suggests that, over time, the new agency could assume responsibility for other state functions such as urban and rural water. This raises an issue as to how the funding and appointment process for the new agency will meet the requirements of Australia's federal system of government.

The Constitutional division of responsibility between the Commonwealth and the states is reflected in the current institutional arrangements for the ACCC and AER:

- The ACCC consists of a Chairperson and six members (in practice, referred to as Commissioners) appointed for a five-year term by the Governor-General. The Commonwealth notifies states/territories (provided that they are a party to the Conduct Code Agreement 1995) of a vacancy, and invites suggestions. states/territories must be consulted on a proposed appointment. The Minister must be satisfied that a majority of states and territories support the appointment.
- The AER consists of a Chairperson and two other members (in practice, referred to as Board members):
 - The AER is a separate independent decision-making body. Staff are engaged by the ACCC but are assigned to assist the AER. The AER shares resources with the ACCC, particularly in the legal, economic and corporate areas.
 - Two of the three AER Board members are state/territory members nominated in accordance with the Australian Energy Market Agreement 2006. Decisions of the AER Board must be by unanimous vote of the AER members present and voting.
 - Recognising that there are commonalities between the roles of both bodies, one member of the AER Board is an ACCC Commissioner and one AER Board member sits on the ACCC's Infrastructure Committee (detailed further in section 3.3 below).

The AER structure reflects state government responsibility for energy regulation. The proposal to create a new access and pricing regulator raises issues such as:

- whether the new body should be created by Commonwealth or state legislation;
- whether the process for appointing members should be based on the ACCC or AER model – the new agency would be performing both Commonwealth functions (e.g. telecommunications, aviation and post) and state functions (e.g. energy); and

- whether funding would be provided by the Commonwealth, states or specific industries.

3.3 ACCC governance

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.

Draft Recommendation 48 — Media Code of Conduct

The ACCC should also develop a Code of Conduct for its dealings with the media with the aim of strengthening the perception of its impartiality in enforcing the law.

ACCC view on Draft Recommendations 47 & 48

The ACCC supports the Draft Recommendations in relation to the:

- appearance by the ACCC before a broadly-based Parliamentary Committee such as the House of Representatives Standing Committee on Economics; and
- development by the ACCC of a code of conduct in its dealings with the media.

The ACCC does not support the options for replacing the Commission with a Board or adding an Advisory Board.

The Draft Report states that the ACCC has been a successful agency but that there is a question as to whether enhancements can be made to its governance structure to ensure it continues to perform well into the future.¹¹⁸ In particular, the Draft Report suggests that replacing the ACCC Commission structure with a Board like the RBA would:

- bring business and academic experience to the governance of the ACCC; and
- strengthen the accountability of the ACCC to the broader community as represented by external members of the Board.

However, these features are more likely to be achieved under the current ACCC structure (where external members are appointed for set terms) than a Board structure (which would

¹¹⁸ Draft Report p. 290.

in effect leave staff as decision-makers). In fact, a Board structure, which would require extensive delegation of decision-making to staff, weakens the 'chain of accountability'.

Current ACCC governance structure

The ACCC's current decision-making structure is set out in the ACCC's Annual Report and in the chart at Attachment B to this submission.¹¹⁹ In summary:

- The ACCC consists of a Chairperson and six other full-time members. Commissioners have diverse backgrounds including from business, consumer, academia and the legal and economic professions. Commissioners are appointed by the Commonwealth (but appointments also require the approval of a majority of the states) for a set period not exceeding 5 years (although are eligible for reappointment). Importantly, the appointment period is independent of the political election cycle.
- The full Commission meets weekly (on Wednesdays) or more frequently when required.
- The ACCC has six subject matter committees which help streamline decision-making by the Commission:
 - Enforcement Committee – oversees ACCC actions to ensure compliance with and enforcement of the CCA and refers recommendations to the full Commission for decision; meets weekly.
 - Strategic Compliance Committee – considers emerging compliance issues and the ACCC's response including opportunities for media, industry engagement and outreach; meets fortnightly.
 - Mergers Review Committee – considers merger reviews and refers certain recommendations to the full Commission for decision; meets weekly.
 - Adjudication Committee – considers authorisation applications, notifications and certification trademarks and refers recommendations to the full Commission for decision; meets weekly.
 - Communications Committee – considers telecommunications industry issues and refers recommendations to the full Commission for decision; meets fortnightly.
 - Infrastructure Committee – oversees access, price monitoring, transport and water issues and refers recommendations to the full Commission for decision; meets fortnightly.
- The six subject-matter committees consist of Commissioners, not staff. Decisions are based on detailed papers prepared by ACCC staff. These papers include staff recommendations to the Committees/Commission. There are strict protocols (published on the ACCC's website) applying to the conduct of Commissioners including that Commissioners cannot direct staff recommendations.¹²⁰
- ACCC Commissioners are full-time due to the number of decisions that they are required to make. In 2013-14, Commissioners, through the Committee and Commission structure, considered a total of 1128 staff papers. On average, over 23 decisions are required to be made each week including on:
 - strategic compliance and enforcement – whether to: issue s 155 notices; obtain 'reasonable grounds' advice; accept a proposed s 87B undertaking; issue an infringement notice for an ACL contravention; institute court

¹¹⁹ ACCC & AER, *Annual Report 2013-14* pp 152 (consultative committees) and 200 (corporate governance).

¹²⁰ See the [ACCC website](#) for further information.

proceedings; appeal court decisions; seek leave to intervene in other proceedings; administer a product safety recall; make a recommendation to the Minister in respect of a mandatory product safety standard; provide advice on a code of conduct; and, more broadly, conduct an education or information campaign;

- mergers and adjudication – interim/draft/final authorisation determinations; whether to issue a statement of issues in relation to a proposed acquisition; whether to oppose an acquisition; and whether to accept a proposed s 87B undertaking;
 - communications and infrastructure – draft/final regulatory decisions (e.g. Part IIIA access undertakings; Part VIIA price notifications; Part XIB record-keeping rules; Part XIC declarations, access determinations and special access undertakings; water charges); reporting on monitoring activities (e.g. Part VIIA price monitoring, Part XIB telecommunications reports and water monitoring); and enforcement for non-compliance with regulatory obligations.
- The ACCC has six consultative committees to inform the ACCC on the performance of its functions:
 - Consumer Consultative Committee – which provides a forum through which consumer protection issues can be addressed between the ACCC and consumer representatives; meets three-four times a year.
 - Small Business Consultative Committee – which allows industry and government to discuss competition and consumer law concerns affecting small business; meets two-three times a year.
 - Franchising Consultative Committee – which enables consideration of, and action on, competition and consumer law concerns relating to the franchising sector and other franchising issues; meets two-three times a year.
 - Fuel Consultative Committee – which promotes discussion between the ACCC, the fuel industry and motoring organisations, increases the ACCC's understanding of fuel industry issues and helps the ACCC fulfil its role on issues related to competition and consumer protection in the fuel industry; meets twice a year.
 - Infrastructure Consultative Committee – which is an important means for the ACCC and AER to gain feedback from stakeholders and allows infrastructure representatives to learn about issues affecting the regulation of other areas; meets twice a year.
 - Wholesale Telecommunications Consultative Forum – which focuses on implementation of, and compliance with, Telstra's Structural Separation Undertaking and migration plan. Participation allows the ACCC to identify and assist in resolving current and emerging issues in the forum's area of interest, and facilitates open communication between Telstra, wholesale customers and the ACCC. Meets twice a year.

The ACCC also meets regularly with bodies such as the Law Council, Business Council of Australia and Australian Chamber of Commerce and Industry.

- Like ASIC and APRA, the ACCC, although it is a body corporate, is deemed to be a Commonwealth entity under the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act). Under the PGPA Act, Commonwealth entities are subject to more prescriptive standards of governance, performance and accountability in comparison to Commonwealth companies. Reflecting the Australian approach to

public administration, decisions made by Commissioners are subject to extensive checks and balances:

- The separation of executive and judicial power – in contrast to many overseas regimes, a court, and not the ACCC, determines whether Part IV of the CCA is contravened, and makes the orders.
- Judicial and merits review – ACCC ‘administrative’ decisions (e.g. authorisations, notifications and clearances; access determinations; issuing a s155 notice; freedom of information decisions) may be challenged through judicial review and, in many cases, merits review by a tribunal.
- Legal Services Direction 2005 and review by the Office of Legal Services Coordination – among other things, the Direction sets out a model litigant obligation, and a requirement for agencies to obtain ‘reasonable grounds’ advice from an independent legal advisor before the commencement of proceedings.
- Service Charters – each agency is required to produce a service charter. The ACCC’s Service Charter sets out what to do if a person is dissatisfied with the ACCC’s conduct.
- Commonwealth Ombudsman – which handles complaints about Commonwealth agencies including the ACCC.
- Australian National Audit Office – which audits Commonwealth agencies.
- Australian Public Service Commission – which evaluates the adequacy of Commonwealth agencies’ systems and procedures to ensure compliance with the APS Code of Conduct.
- Ministerial statements of expectation to the heads of Commonwealth regulatory agencies.
- Parliamentary inquiries e.g. Senate Estimates, Committees.
- Inquiries initiated by a Minister e.g. Productivity Commission inquiries, department reviews and reviews by independent bodies.

In addition to this, the ACCC produces guidelines which provide a check on the conduct of a specific matter.¹²¹

Operation of a Board structure in practice

In contrast to the current ACCC structure outlined above, under a Board structure:

- the ACCC would be constituted by staff (executive members) as well as external appointments (non-executive members); and
- the decision-making functions of the ACCC would be delegated to committees consisting of executive members and/or other staff, given the frequency and volume of decisions to be made.

The Draft Report does not discuss the potential role of an ACCC Board. For example, whether it is intended that:

- the Board would make substantive decisions in specific investigations (and, if so, for all matters or just a subset of investigations); or

¹²¹ For example, the guidelines applying to a competition investigation include: compliance and enforcement policy (Feb 2014); dispute management policy (June 2013); accountability framework for investigations (May 2013); immunity & cooperation policy for cartel conduct (September 2014); collection and disclosure of information (June 2014); section 155 (currently under review); section 87B undertakings (April 2014).

- the Board would be limited to setting the broad strategic framework within which specific investigations are conducted, and overseeing the governance of the organisation (such as the internal budget and resourcing, the risk management framework and workforce planning).

However, in practice, the Board model would necessitate extensive delegation of the ACCC's decision-making functions. As outlined above, the work load involved and the fast moving nature of ACCC matters means that it would be impossible for decisions to be made at a monthly meeting by a body that includes part-time members.

Another important difficulty with decisions being made by part-time ACCC Board members is that such members are more likely to have a conflict of interest.

This can be contrasted to the RBA. The RBA is managed by the Governor, and has two boards:

- Reserve Bank Board (responsible for monetary policy and financial stability and the Bank's policy on other matters excluding payments system policy); and
- Payments System Board (responsible for matters relating to payments system policy).

The Reserve Bank Board consists of nine members:

- three ex officio members – the Governor (who is Chair), the Deputy Governor (who is Deputy Chair) and the Secretary to the Treasury; and
- six non-executive members who are appointed by the Treasurer.

The Reserve Bank Board normally meets eleven times each year, with meetings generally taking three to three and a half hours.¹²² The principal function of the Board at each meeting is to set the cash rate to meet an agreed medium-term inflation target. While a cash rate can be set by a Board at monthly meetings, it is not possible to conduct the ACCC's functions on this basis.

Accountability

Extensive delegation of decision-making, as would be necessary under a Board model, would weaken the 'chain of accountability', rather than strengthen it.¹²³

The relationship between statutory authorities and the responsible minister was considered in the Uhrig Review,¹²⁴ and the recent PGPA Act.¹²⁵ In Australia, there are two different governance templates:

- Where the government is able to provide a wide delegation and the authority can operate with 'entrepreneurial' freedom, a board will be the optimal mechanism (with the board setting internal strategy, appointing the CEO and supervising management, and overseeing risk).
- Where the government establishes a discrete set of outputs to be delivered by the statutory authority, a CEO or a collection of office holders (a commission) is better. The role of the Minister is to determine policy and overall strategy for the statutory

¹²² See the [RBA's website](#).

¹²³ Public sector accountability is a linked chain of participants each with unique accountability functions. In Australia, the relationship between the legislative and executive arms of government is governed by the Westminster model of ministerial accountability: a cabinet minister is responsible for the actions of their ministry or department; the minister is responsible to Parliament; and Parliament consists of elected members who are responsible to the community.

¹²⁴ John Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders* (June 2003).

¹²⁵ The 2013 reform recognised that the 'label' of Board or Commission does not provide a guide as to how a statutory body should be categorised. The AER is a good example of this. Although labelled a 'Board', the body meets weekly, and there is relatively limited delegation of decision-making powers.

authority. This type of arrangement, with a clear understanding of what is to be achieved and concise delegation of authority to the CEO or commission is regarded as providing a straightforward basis for accountability.

Changing the current ACCC structure to a governance model that is used for government business enterprises would weaken the chain of accountability, and result in less external expertise through the inclusion of staff on the Board.

Advisory Board

As an alternative, the Draft Report suggests an Advisory Board that could advise the ACCC on 'operational and administrative practices'. However, it is not clear what this would add to the current appointment of external members as ACCC Commissioners, and the ACCC's existing consultative committees.

Prior to the Dawson Review, the ACCC had established a comprehensive consultative committee which met bi-annually and comprised representatives from business, consumers, government departments and the professions. The Dawson Review recommended substantive changes to this model to 'make the ACCC more immediately accountable, to enable useful discussion of problems encountered in the administration of the Act and to provide a source of informed advice to the ACCC where appropriate'.¹²⁶

In response to the Dawson Review, the ACCC put in place more formal arrangements for meetings of its consultative committees which now consist of the six committees described above.¹²⁷ Replacing these six committees with an Advisory Board is likely to reduce the input of external views into the ACCC although the ACCC recognises that the current committee structure could be reviewed (such as whether to formalise existing arrangements by which the ACCC obtains feedback from large businesses) to ensure there are no significant gaps.

3.4 Federal Court of Australia

Draft Report - Federal Court procedural practices for competition law proceedings

The Panel notes that in some countries, notably New Zealand, the court is able to draw on the assistance of an economist who presides over the proceeding with the trial judge. **The Panel invites submissions about that practice, and whether there are procedural practices that might be implemented in Australia that would be beneficial in resolving competition law proceedings in a just and cost-effective manner.**

ACCC view

The proposal for an economist to preside with a trial judge raises constitutional issues in respect of which the Review Panel may wish to obtain advice.

While complex competition law proceedings present significant procedural challenges to the Court (and to parties), Federal Court judges have the tools required to direct procedures.

As the Review Panel has recognised, competition law proceedings in the Federal Court generally require judges to determine complex issues relating to economic concepts such as 'markets', 'market power' and 'substantial lessening of competition'. The ACCC supports, in

¹²⁶ Dawson Report chapter 11.

¹²⁷ See ACCC 2003-04 Annual Report Appendix 5.

principle, the provision of expert economic assistance to judges in competition law proceedings. The question is how to most effectively provide such assistance.

There are limitations arising from Chapter III of the Constitution that would likely prevent the formal appointment of an economist to preside with a Federal Court judge to adjudicate upon competition law proceedings. The taking of proceedings in the Federal Court, where relief is sought under the CCA, involves the exercise of the judicial power of the Commonwealth, which may only be undertaken by a Federal Court judge. The Review Panel may wish to obtain advice on these limitations.

Irrespective of the constitutional issues, the ACCC does not support the concept of an economist presiding with a judge in competition law proceedings. Federal Court judges currently obtain considerable assistance from economists (and other experts) as expert witnesses for the parties. Such experts, although engaged by a party, are required by Division 23.1 of the *Federal Court Rules 2011* (and Practice Note CM7) to maintain their independence. The Federal Court has been innovative in relation to taking evidence from expert economists. In particular, the practice of economic experts giving evidence concurrently (known colloquially as the 'hot tub'), which originated in the Australian Competition Tribunal, is used regularly in competition law proceedings in the Federal Court. This procedure assists judges to focus upon the real economic issues in dispute by allowing the economic experts to question each other and also by allowing the judge to question the experts directly.

Another option is the appointment of an economic expert to assist the Court pursuant to Division 23.2 of the Federal Court Rules. Whilst this procedure has not been utilised to any significant extent in competition law proceedings in the Federal Court (at least to the ACCC's knowledge), a similar procedure is regularly used in state Supreme Courts. For example, specialist accountants are often appointed to work as 'assessors' or 'referees' assisting the court in complex damages cases.

In relation to Federal Court procedures and practices more generally, the ACCC recognises that there has been a particular focus by the Federal Court over recent years on more effective case management. In particular, the Court has introduced reforms relating to early identification and narrowing of the issues in dispute between the parties, and streamlining the process of discovery and the adducing of evidence. The Court now also has at its disposal the case management provisions in Part VB of the *Federal Court of Australia Act 1976*. This more 'hands on' judicial approach to case management is reflected in the recent publication of the *Federal Court Case Management Handbook* (2011, revised 2014), a joint initiative of the Law Council and the Federal Court. In the ACCC's experience, Federal Court judges in competition law proceedings are now sensitive to effective and efficient case management issues and are generally receptive to suggestions as to how the proceedings can be better case managed.

Notwithstanding these initiatives, from the ACCC's perspective, the primary procedural challenge in complex competition proceedings remains that of ensuring that only the issues truly in dispute between the parties are litigated. In the ACCC's experience in competition cases, significant amounts of resources and time have been wasted (by all parties to the litigation) because the real issues in dispute have not been identified until late in the process. A recurring example is the issue of market definition where the market (or markets) pleaded by the ACCC have traditionally been simply denied or not admitted, without any positive pleading by a respondent as to the market for which it contends. In more recent cases, judges have relied upon the case management provisions in the Federal Court Act to require respondents to positively plead the market for which it contends. This is a welcome development and reflects a positive use of the tools presently available to the Court to ensure competition law cases are conducted efficiently and effectively.

3.5 Australian Competition Tribunal

Review Panel view – Australian Competition Tribunal

The Panel considers that the Tribunal performs an important role in the administration of the competition law, especially in access and pricing regulation. While it is important that review processes are conducted within restricted timeframes, the value of the review process would be greatly enhanced if the Tribunal were empowered to hear from relevant business representatives and economists responsible for reports relied upon by original decision-makers.

ACCC view

With the exception of the energy regimes, the Tribunal currently has the power to seek clarification from the relevant business representatives and economists responsible for reports relied upon by original decision makers.

In the case of the energy regimes, a ground of review must be established before the Tribunal considers new information. As this merits review regime was inserted in 2013 (following an extensive Expert Panel and COAG process) and has not yet been tested, the regime should not be amended.

With the limited exception of the electricity and gas regimes, the Tribunal already has the power to seek clarification from the relevant business representatives and economists responsible for reports relied upon by the original decision maker:

- Authorisations (other than merger authorisations) and notifications (CCA Part VII):
The Tribunal re-hears the matter which includes hearing evidence from relevant business people and economic experts (CCA Part IX).
- (Formal) merger clearances (CCA Part VII):
As set out in section 2.11 (mergers) of this submission, to achieve timely formal merger decisions, the Tribunal is required to conduct the review within 30 business days (which may be extended by 60 business days). In order to achieve this timeframe and reduce the risk that parties fail to provide relevant information up-front, the Tribunal is limited to material that the ACCC took into account when making its decision. However, the Tribunal may 'seek such relevant information and consult with such persons, as it considers reasonable and appropriate' to clarify this material. The Tribunal may also require the ACCC to give information, make reports or provide other assistance to the Tribunal (CCA Part IX). This regime was inserted in 2006 following the Dawson review, and has not yet been tested.
- Merger authorisations (CCA Part VII):
Currently, the Tribunal is the first instance decision maker for merger authorisation determinations.
- National access regime (CCA Part IIIA):¹²⁸
As the Tribunal is required to conduct the review within 180 days (which may be extended), the Tribunal is required to consider the information that was before the original decision-maker. However, the Tribunal may also request such information that the Tribunal considers reasonable and appropriate, and may require the

¹²⁸ See section 2.16 of this submission.

NCC/ACCC to provide information or reports. This regime was inserted in 2010 (following a 2001 review by the Productivity Commission, the 2006 COAG Competition and Infrastructure Reform Agreement and a 2010 Senate Committee report) and has not yet been tested.

- Electricity and gas regimes (National Electricity Law and National Gas Law):

As the Tribunal must use its best endeavours to make a determination within three months of granting leave (which may be extended), the Tribunal, in deciding whether a ground of review is established, is limited to the documents before the AER. However, if a ground of review is established, the Tribunal may consider new information.

The energy merits review regime was inserted in 2013 following a 2012 review of the Energy Limited Merits Review Regime by an Expert Panel (Professor George Yarrow, Dr John Tamblyn and the Hon. Michael Egan) and a public consultation process conducted by the COAG Standing Council on Energy and Resources (6 June 2013). As the new regime has not yet been tested, the ACCC supports the AER's submission that the regime should not be amended.

4 Small Business and Retail Markets

4.1 Small business access to remedies

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.

ACCC view on Draft Recommendation 49

The ACCC supports the Review Panel's view that ACCC should refer small businesses to alternative dispute resolution schemes. This is already a key part of the ACCC's operations. The ACCC also places priority on, and responds to, all small business complaints.

The ACCC recommends that the Small Business and Family Enterprise Ombudsman be given the legislative power to mediate all disputes involving small business, including CCA related disputes.

4.1.1 ACCC and small business complainants

The ACCC notes that it actively refers small businesses to appropriate bodies – including alternative dispute resolution (ADR) schemes – where their matters do not fall within its jurisdiction or meet its priorities.

The ACCC has a close working relationship with the Australian Small Business Commissioner (SBC), the state SBCs and the Office of the Franchising Mediation Advisor (OFMA) and regularly refers small businesses to their services. For example, in a random sample of 200 small business complaints received in 2014, the ACCC referred 137 matters to other agencies/organisations – including 55 to SBCs and six to OFMA.¹²⁹

We note that in section 5.1 of the Draft Report (the section containing Draft Recommendation 49) the Review Panel also suggested that the ACCC place some priority upon its response to small business competition related complaints and communicate clearly and promptly its reasons for not acting.

Small business complaints are a priority for the ACCC, and this is reflected in the ACCC *Compliance and Enforcement Policy*.¹³⁰ For example, the ACCC currently prioritises work in relation to credence claims with the potential to adversely impact the competitive process and small businesses. In addition, the ACCC also gives enforcement priority to matters that demonstrate one or more priority factors such as conduct resulting in substantial small business detriment and conduct in concentrated markets which impacts on small business.

Further, while the 8,976 small business related complaints received by the ACCC in the 2013-14 financial year made up only 6 per cent of the total complaints received, more than

¹²⁹ ACCC, internal data.

¹³⁰ Available at the [ACCC website](#).

30 per cent of the matters that were escalated for further consideration by the ACCC's Enforcement area were small business related matters.¹³¹

The ACCC has the capacity to take around 30 matters to court each year. Of the 25 court proceedings commenced by the ACCC in the 2013-14 financial year, 10 (40 per cent) related to conduct that had a clear impact on small businesses.¹³² The two case studies below demonstrate how ACCC action can benefit small businesses.

Case studies – Recent ACCC actions which address issues relevant to small business

*Coles par baked bread*¹³³

In June 2014, the Federal Court found that claims made by Coles that its 'Cuisine Royal' and 'Coles Bakery' bread was 'Baked Today, Sold Today' and 'Freshly Baked In-Store' were false, misleading and deceptive. These bread products were partially baked and frozen off site by a supplier, transported and 'finished' at in-store bakeries within Coles supermarkets.

The ACCC was concerned with this conduct because of the detrimental impact it had on competitors of Coles, including small businesses. Misleading credence claims have the potential to adversely impact the competitive process. If a large business presents its products as having a particular feature when they do not, it can undermine the unique selling point that small businesses who do offer that feature depend on to compete.

*Scoopon*¹³⁴

In December 2013, the Federal Court declared that Scoopon Pty Ltd (Scoopon), an online group buying site, contravened the ACL by making false or misleading representations to:

- businesses that there was no cost or risk involved in running a deal with Scoopon, when this was not the case;
- a business that 30 per cent of vouchers that would be sold would not be redeemed, when there was no reasonable basis for this representation; and
- consumers about their refund rights, and the price of goods advertised in relation to some of its deals.

The Court ordered that Scoopon pay penalties of \$1 million.

The action highlights that businesses have an obligation not to mislead consumers or other businesses.

The ACCC also continues to look for ways to enhance its interaction with small business complainants, but acknowledges that there is always room for improvement.

Existing ACCC protocols involve assessing and responding to all complaints from small businesses, as per the ACCC Service Charter.¹³⁵

The ACCC understands that aspects of the CCA are complex, and has taken steps to ensure that small businesses better understand why the ACCC has or has not taken action. The ACCC Service Charter outlines the ACCC's commitment to communicating with stakeholders, including small businesses, in plain English. As far as possible, responses do not include technical jargon.

¹³¹ ACCC, internal data.

¹³² Ibid.

¹³³ *ACCC v Coles Supermarkets Australia Pty Limited* [2014] FCA 634.

¹³⁴ *ACCC v Scoopon Pty Ltd* [2014] FCA 820.

¹³⁵ Available on the [ACCC website](#).

However, as noted at the outset of this Chapter, the consideration of whether conduct will breach the law – be it a potential misuse of market power, a series of contracts which may substantially lessen competition or exclusive dealing – will always be complex, and will create challenges for the ACCC in its communications with small business complainants.

4.1.2 Dispute resolution scheme for small business

The Review Panel invites views (in Draft Recommendation 49) on whether there should be a specific dispute resolution scheme for small business matters covered by the CCA. The ACCC supports this idea.

Small businesses currently have access to some dispute resolution services, including Small Business Commissioners in Victoria, NSW, SA and WA. However, these services are not set up to explicitly deal with CCA related matters, and not all can compel parties to attend.

Some small businesses also have access to OFMA which provides mediation services for franchising disputes, and complaints relating to the Horticulture Code can be referred to the Horticulture Mediation Advisor.

The federal government has committed to transforming the Australian SBC into the Small Business and Family Enterprise Ombudsman (the Ombudsman). One of the key responsibilities of the Ombudsman will be to act as a concierge for dispute resolution.¹³⁶ In the ACCC's view, the Ombudsman should be the key component of (and entry point to) a small business specific dispute resolution scheme.

The Ombudsman should be given the explicit legislative power to mediate all disputes involving small businesses, including those that include CCA related issues. The Ombudsman should also be given the power to compel parties to attend mediation, with appropriate repercussions if this obligation is not met.

The Ombudsman could also provide small businesses with information and advice on how to resolve their disputes without resorting to mediation (e.g. by providing template letters of demand), and have a protocol in place whereby small businesses cannot access the Ombudsman's mediation service unless they can demonstrate they have first attempted to resolve the dispute themselves.

The ACCC would refer small business complaints that do not fall within its priorities or jurisdiction to the Ombudsman, and it is expected that the Ombudsman would refer serious and systemic CCA related concerns to the ACCC for assessment. This system will require a close working relationship between the ACCC and the Ombudsman. As discussed above, the ACCC has a close relationship with the Australian SBC. The ACCC expects this close relationship to continue with the Ombudsman.

To maximise the effectiveness of the Ombudsman in dealing with potential CCA related disputes, as many small and medium-sized firms as possible should have access to the Ombudsman's services. To this end, the ACCC does not consider that a formal definition of what constitutes a 'small business' should be included in the proposed legislation that will underpin the Ombudsman's role, as this will exclude some firms from its services.

The ACCC considers that the establishment of the Ombudsman should not affect a small business' ability to make complaints directly to the ACCC, the ACCC's ability to take action under the CCA, or any rights of private enforcement.

¹³⁶ The Treasury, *Small Business and Family Enterprise Ombudsman* (30 April 2014) (available at the [Treasury's website](#)).

4.2 Collective bargaining and collective boycott

Draft Recommendation 50 — 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.

ACCC view on Draft Recommendation 50

Collective bargaining arrangements can help to address the bargaining power imbalance that small businesses may face when dealing with larger businesses. However, the ACCC is concerned that the collective bargaining notification process currently contains a number of impediments that limit its use by small businesses. In particular, the ACCC is concerned that it receives very few proposals that involve collective boycotts, even when it could be efficient.

The ACCC supports amending and simplifying the collective bargaining notification process to increase the use of collective bargaining by small business, including for efficiency-enhancing collective boycott activity.

The ACCC recommends that the package of amendments to the collective bargaining notification process identified in the ACCC's Initial Submission be progressed as soon as possible (further outlined at 4.2.1 below).

Broadly, the amendments aim to make it more likely that small businesses lodge notifications involving collective boycott arrangements where it would result in more efficient outcomes and that such notifications would be approved by the ACCC because certain safeguards were available; and to increase the flexibility and attractiveness of the notification process for small business applicants relative to the authorisation process. These changes can bring considerable benefit to small businesses.

The ACCC supports the recommendation that it enhance the awareness of the collective bargaining notification process and its benefits for small business. This will be particularly important if the amendments recommended by the ACCC are adopted and the collective bargaining notification process becomes more flexible and accessible for small business.

Small businesses, including primary producers, often face a bargaining imbalance when dealing with large suppliers or acquirers. The formation of collective bargaining groups can be a way to address the imbalance and can generate public benefits by improving the efficiency of the bargaining process and the negotiated outcome.

In some circumstances, attempts by small businesses to collectively bargain with a large supplier or acquirer without the ability to threaten and/or engage in a collective boycott, may render the bargaining process ineffective. The counterparty business will refuse to negotiate with the collective bargaining group or only agree to similar terms to those that would have been agreed without the collective bargaining process. Whether the ability to collectively

boycott will bring the counterparty to the table to negotiate, and result in better contractual arrangements, will depend on the particular circumstances of the negotiations.

Collective boycott proposals should be able to be considered by the ACCC on a case-by-case basis because in certain circumstances they could significantly improve the outcomes from collective bargaining for small businesses.

There are, however, also circumstances where a collective boycott will be detrimental to efficiency. It is important for the ACCC to be able to balance the potential anti-competitive effects against any efficiency enhancing public benefits and, if appropriate, to impose safeguards and conditions or to object where it is not in the overall public interest.

Currently, however the ACCC receives very few collective bargaining proposals that involve collective boycott activity, even when it could be efficiency-enhancing.

A reason for this may be a decision by the Tribunal in 2006 to overturn the ACCC's determination granting authorisation to allow chicken growers in Victoria to collectively withhold their services where negotiations broke down with chicken meat processors.¹³⁷ The ACCC had imposed a number of conditions designed to limit the circumstances in which boycotts might occur or the damage that might arise.¹³⁸

While the Tribunal agreed that the processors have, and exercise, market power in dealing with chicken growers, it felt that the risk of damage from a collective boycott by chicken growers was too high. This decision sent the message to small businesses, including primary producers, that the bar for allowing collective boycotts under either the authorisation or notification process is high.

Collective boycotts will not always be approved, but the ACCC considers that notifications involving small business collective boycotts would be more likely to be approved by the ACCC if certain safeguards were available in the notification process.

Further, despite the availability of a simpler, quicker small business collective bargaining notification regime, the ACCC continues to receive more applications for authorisation of collective bargaining arrangements than notifications. The ACCC considers that this is largely due to a number of inflexibilities with the collective bargaining notification process.

4.2.1 ACCC proposed amendments to facilitate small business collective bargaining and boycotts

The ACCC has identified a package of amendments to address current deficiencies in the collective bargaining notification process.

First, the ACCC considers safeguards are necessary to make notifications involving collective boycott proposals more likely to be approved by the ACCC. In particular, the ACCC recommends that:

- The ACCC be able to impose conditions on notifications involving collective boycott activity where conditions could address any identified concerns and enable the ACCC to allow the notification to stand. Currently, the ACCC is not able to allow the notification to stand subject to conditions, and so must object to the notification in its totality in those circumstances.
- The timeframe for the ACCC to assess collective boycott notifications be extended from 14 to 60 days. A longer time period before a collective boycott notification would come into force would allow the ACCC adequate time to consult with the counterparty/ies and assess the proposed conduct.

¹³⁷ Re VFF Chicken Meat Growers' Boycott Authorisation [2006] ACompT2.

¹³⁸ ACCC authorisations A40093 and A90931 granted to the Victorian Farmers' Federation, 2 March 2005.

- In exceptional circumstances where a collective boycott is causing imminent serious detriment to the public, the ACCC should have a limited 'stop power' to require collective boycott conduct to cease, subject to Tribunal review.

Second, the ACCC considers it is important to address the current inflexibility with the notification process and the ACCC recommends that greater flexibility should be provided:

- in the nomination of members of the bargaining group such that a notification could be lodged to cover future (unnamed) members of the bargaining group;
- in the nomination of the counterparties with whom the group seeks to negotiate such that a notification could be lodged to cover multiple counterparties; and
- to the ACCC to impose different timeframes for the expiration of collective bargaining notifications. Currently collective bargaining/collective boycott notifications expire automatically after three years. The ACCC should be able to set a timeframe to suit the circumstances, with the current three year period remaining as a default.

Third, the current maximum value thresholds for a party to notify a collective bargaining arrangement should be reviewed to ensure that they are not restricting participation by small businesses.

In conjunction with the proposed legislative changes, the ACCC would amend its collective bargaining notification guidelines and provide information about the range of factors that are relevant to the consideration of whether a collective boycott may be a necessary way to achieve the benefits of collective bargaining. This may help to address the perception that collective boycotts are unlikely to ever be approved.

The ACCC supports the recommendation in the Draft Report that the ACCC should enhance the awareness of the collective bargaining notification process and its benefits for small business. This will be particularly important if the amendments proposed by the ACCC are adopted and the collective bargaining notification process becomes more flexible and accessible for small business.

4.3 Enhanced industry codes

The ACCC recognises the importance of small businesses, and places priority on providing specific resources to ensure that they are aware of their rights and responsibilities under the CCA. The ACCC also places priority on assessing and responding to all small business complaints, and commences numerous court proceedings that benefit small business.

To ensure compliance with the CCA, the ACCC considers that it is important to have effective deterrents in place, and agrees with the Review Panel's view that 'the introduction of civil penalties and infringement notices for breaches of [industry] codes strengthens the CCA enforcement options'.¹³⁹ The introduction of these remedies should provide greater protection for small businesses and when appropriate, should be considered for possible introduction for other mandatory codes over time.

The ACCC is also of the view that a legally enforceable supermarket and grocery code of conduct that provides clear rights and obligations should be implemented, and agrees with the Review Panel's comment that a 'properly designed and effective [supermarket] code' will assist small business suppliers to contract fairly with retailers.¹⁴⁰

¹³⁹ Draft Report p. 220.

¹⁴⁰ Draft Report p. 183.

4.4 Retail markets

Draft Recommendation 51 — 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.

Draft Recommendation 52 — 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.

ACCC view on Draft Recommendations 51 & 52

The issue of regulation and productivity is addressed in sections 3.2.1 and 3.3.2 of the ACCC's Initial Submission.

Attachment A: Glossary

ACCC	Australian Competition and Consumer Commission
ACCC Initial Submission	Reinvigorating Australia's Competition Policy: ACCC Submission to the Competition Policy Review, 25 June 2014
ACCC Supplementary Submission (No. 1)	ACCC Supplementary Submission to the Competition Policy Review: ACCC's role in merger clearances, 8 August 2014
ACCC Supplementary Submission (No. 2)	ACCC Supplementary Submission to the Competition Policy Review: Further matters, 15 August 2014
ACCC Supplementary Submission (No. 3)	Letter from Rod Sims to Professor Ian Harper, 22 August 2014
ACCP	Australian Council of Competition Policy
ACL	Australian Consumer Law
ADR	alternative dispute resolution
AER	Australian Energy Regulator
APRA	Australian Prudential Regulation Authority
ARTC	Australian Rail Track Corporation
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i> (Cth)
CAU	contract, arrangement or understanding
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
CDPP	Office of the Commonwealth Director of Public Prosecutions
CMA	UK Competition and Markets Authority
COAG	Council of Australian Governments
Competition Policy Review	Competition Policy Review (2014)
Copyright Act	<i>Copyright Act 1968</i> (Cth)
Copyright Tribunal	Copyright Tribunal of Australia (established under the Copyright Act)
Corporations Act	<i>Corporations Act 2001</i> (Cth)
CSO	community service obligation
Dawson Report	Report of the Committee, <i>Review of the Competition Provisions of the Trade Practices Act</i> (January 2003)
Dawson Review	Review of the Competition Provisions of the Trade Practices Act (2002 – 2003)
Draft Report	Competition Policy Review Draft Report (September 2014)
EU	European Union
Federal Court	Federal Court of Australia
Federal Court Act	<i>Federal Court of Australia Act 1976</i> (Cth)

FTC	Federal Trade Commission (United States)
Hilmer Review	Independent Committee of Inquiry, National Competition Policy (25 August 1993)
ICN	International Competition Network
IGA	Intergovernmental agreement
Issues Paper	Competition Policy Review, Issues Paper (14 April 2014)
Law Council	Law Council of Australia
NWI	National Water Initiative
NBN	National Broadband Network
NCC	National Competition Council
NCP	National Competition Policy
NZCC	New Zealand Commerce Commission
OECD	Organisation for Economic Co-operation and Development
OFMA	Office of the Franchising Mediation Advisor
Ombudsman	Small Business and Family Enterprise Ombudsman
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i> (Cth)
Prices Surveillance Act	<i>Prices Surveillance Act 1983</i> (Cth)
Privacy Act	<i>Privacy Act 1988</i> (Cth)
RBA	Reserve Bank of Australia
Review Panel	Panel completing the Competition Policy Review
RPM	resale price maintenance
SBC	Australian Small Business Commissioner
SLC	substantially lessening competition or substantially lessen competition
TFEU	Treaty on the Functioning of the European Commission
TISOC	Transport and Infrastructure Council and its associated Officials Group
Trade Practices Act	<i>Trade Practices Act 1974</i> (Cth)
Tribunal	Australian Competition Tribunal
UK	United Kingdom
UK OFT	Office of Fair Trading (UK)
UNCTAD	United Nations Conference on Trade and Development

Attachment B: ACCC/AER Organisational Chart

ACCC/AER STRUCTURE

November 2014

