Law Council
OF AUSTRALIA
Business Law Section

Competition Policy Review Secretariat
The Treasury
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Via email: contact@competitionpolicyreview.gov.au

24 November 2014

Dear Sir or Madam,

Introduction

The Law Council of Australia, is the peak national body representing the legal profession in Australia.

The Small and Medium Enterprise Business Law Committee of the Business Law Section of the Law Council of Australia (SME Committee) makes this submission in response to the Draft Report, dated September 2014 released by the Competition Policy Review (Harper Review).

The SME Committee has as its primary focus the consideration of legal issues affecting small businesses and medium enterprises in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SMEs.

Please also note that our submissions may differ from those made by other Committees of the Law Council because of our Committee members' perspectives and experiences as advisers to SMEs.

Introductory comments

The SME Committee understands the size and complexity of the task set for the Harper Review in the Terms of Reference. Having said that, the SME Committee believes the Harper Review's Draft Report could benefit from further consideration of a number of important issues.

In the SME Committee's view, the Harper Review should carefully investigate and consider the actual policy objectives of the CCA, rather than accept as valid the often-repeated mantra that the overriding policy objective of the CCA is "to protect competition, not competitors". We will discuss this issue in more detail below.

The SME Committee also considers that the Draft Report should include practical ideas aimed at providing support and assistance to the small business sector. The SME Committee does not believe, as the Harper Review suggests in a number of places, that various of its recommendations will actually assist small businesses.

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In the SME Committee's view, many of the proposed recommendations in the Draft Report are more likely to further damage the ability of small businesses to compete with their larger competitors in the market place, rather than assisting small business. For example, the relaxation of trading hours and changes to planning and zoning laws will place small businesses under significantly greater competitive pressure in the marketplace, rather than assisting small business.

The SME Committee also believes that the Harper Review needs to gain a deeper understanding of the various pressures facing many small businesses. For example, one of the primary concerns of small businesses - namely that they are unable to buy goods from their suppliers at wholesale prices which are lower than the retail prices being offered for the same products by their major competitors - does not appear to be well understood by the Review.

Policy objective of the CCA

The Harper Review appears to have accepted the claim that the sole policy objective of the CCA is to "protect competition and not competitors". However, in the SME Committee's view, when one more carefully considers this question it becomes apparent that the policy objectives of the CCA are much broader and more multifaceted.

Section 2 of the CCA states:

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

The CCA is aimed at the promotion of both competition and fair trading. It is implicit in the term "fair trading" that the CCA is aimed at preventing companies from engaging in unfair trading practices towards both consumers and their competitors.

The Second Reading Speech for the *Trade Practices Act* also makes it clear that the policy objective of the CCA involves a wider range of considerations than suggested in the Draft Report. As stated by the Hon. Senator Murphy on 30 July 1974:

> *The purpose of the Bill is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices. The Bill will replace the existing Restrictive Trade Practices Act, which has proved to be one of the most ineffectual pieces of legislation ever passed by this Parliament. The Bill will also provide on a national basis long overdue protection for consumers against a wide range of unfair practices. Restrictive trade practices have long been rife in Australia. Most of them are undesirable and have served the interests of the parties engaged in them, irrespective of whether those interests coincide with the interests of Australians generally. These practices cause prices to be maintained at artificially high levels. They enable particular enterprises or groups of enterprises to attain positions of economic dominance which are then susceptible to abuse; they interfere with the interplay of competitive forces which are the foundation of any market economy; they allow discriminatory action against small businesses, exploitation of consumers and feather-bedding of industries.*

In the view of the SME Committee, the policy objectives of the TPA/CCA are much broader than the promotion of competition, but rather extend to the removal of unfair practices including the prevention of discriminatory action against small businesses.

Similarly, Senator Murphy noted the policy objectives behind section 46 in his Second Reading speech:

> *The clause [46] covers various forms of conduct by a monopolist against his competitors or would-be competitors. A monopolist for this purpose is a person who substantially controls a market. The application of this provision will be a matter for the Court. An arithmetical test such as one third of the market- as in the existing legislation- is unsatisfactory. The certainty which it appears to give is illusory.*
>
> *Clause 46 as now drafted makes it clear that it does not prevent normal competition by enterprises that are big by, for example, their taking advantage of economies of scale or making full use of such skills as they have; the provision will prohibit an enterprise which is in a position to control a market from taking advantage of its market power to eliminate or injure its competitors.*
>
> *The provision will not apply merely because a person who is in a position to control a market engages in conduct within one of the classes set out in the clause. It will be necessary for the application of the clause that, in engaging in such conduct, the person concerned is taking advantage of the power that he has by virtue of being in a position to control the market. For example, a person in a position to control a market might use his power as a dominant purchaser of goods to cause a supplier of those goods to refuse to supply them to a competitor of the first mentioned person- thereby excluding him from competing effectively. In such circumstances the dominant person has improperly taken advantage of his power.*

Again, the policy objective behind section 46 was and is to prevent firms with market power from engaging in conduct which will eliminate or injure their competitors. Implicit in Senator Murphy's speech is a recognition that competition does not occur in a vacuum, but rather manifests itself in a practical sense through rivalrous behaviour between competing firms.

In the SME Committee's view, there is a need for better recognition and acknowledgement by the Harper Review of the multifaceted policy objectives behind the CCA. Of particular importance is recognition and acknowledgement of the clear policy objective of providing competitors, particularly small businesses, with protections from unfair trading and abuses of market power. In the Committee's view, such recognition and acknowledgement is essential for successful outcomes from the Review.

Small business protections

In the SME Committee's view, the debate concerning how to provide small businesses with a greater level of protection should focus less on ways of trying to "fix" section 46 of the CCA. In the Committee's view, section 46 at its best will only ever be a blunt instrument in terms of protecting small businesses from the abusive practices of larger firms.

The SME Committee believes that other proposed changes to the CCA and ACL are likely to provide small businesses with a much greater degree protection than continual tinkering with section 46.

For example, the recent cases taken by the ACCC against a supermarket chain for alleged unconscionable conduct show the ways in which these provisions may be used to provide protections to small and medium sized businesses. In the past, the ACCC was likely to have looked at the conduct described in these cases under section 46, rather than appreciating the potential of using the unconscionable conduct provisions to challenge such conduct.

The proposed extension of the Unfair Contract Terms legislation to business standard form contracts will also provide small businesses with greater protection in their dealings with larger businesses. Indeed, in the SME Committee's view, this particular legislative change is likely to have a profound effect in terms of improving the fairness of contractual relations between large and small businesses in Australia.

Finally, in the SME Committee's view, the introduction of a mandatory Grocery Code, along the lines of the UK Groceries Code, would also have a significant impact in terms of leveling the playing field between small/medium suppliers and the major grocery retailers.

Response to recommendations:

In the following, we will endeavour to respond to each of the recommendations made in your Draft Report:

Draft Recommendation 1— Competition principles

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

- legislative frameworks and government policies binding the public or private sectors should not restrict competition;
- governments should promote consumer choice when funding or providing goods and services and enable informed choices by consumers;
- the model for government provision of goods and services should separate funding, regulation and service provision, and should encourage a diversity of providers;
- governments should separate remaining public monopolies from competitive service elements, and also separate contestable elements into smaller independent business activities;
- government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership;

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

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

- the principle should apply unless the costs outweigh the benefits; and
- any legislation or government policy restricting competition must demonstrate that:
  - it is in the public interest; and
  - the objectives of the legislation or government policy can only be achieved by restricting competition.

The SME Committee agrees with this recommendation.

A simple way in which governments may encourage a diversity of providers is to ensure that contractual arrangements between government and small businesses are not overly complex and onerous. Many small businesses are deterred from seeking government work due to the complexity and one-sided nature of contractual arrangements, including the requirement to obtain excessive and expensive insurance coverage.

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.

The SME Committee supports this recommendation.

The SME Committee would like to reiterate that the simplest way of encouraging a diversity of providers, including small business providers, is to ensure that contractual arrangements between governments and small businesses are not overly complex and onerous.

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.

The SME Committee understands the economic benefits associated with more efficient road pricing.

However, the SME Committee notes that such changes are likely to have a particularly negative effect on road transport operators, the vast majority of which are small and medium sized business. The SME Committee believes that many small and medium sized road transport operators would have considerable difficulty passing on the additional costs associated with "efficient road pricing" to their customers, particularly on to large retail customers.

Furthermore, we believe that this recommendation is likely to have a negative effect on the small business sector, in their capacity as a purchaser of goods, by raising their cost of goods.

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.

The SME Committee agrees with this recommendation.

Part X is an anomaly, particularly as the Part does not require any analysis of the allegedly pro-competitive features of such agreements. In our view, there are few pro-competitive benefits from the day-to-day operation of Part X.

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.

The SME Committee agrees with this recommendation.

Cabotage restrictions are an anomaly. In the Committee's view, the cabotage restrictions are anti-competitive restrictions aimed at preserving employment opportunities for the members of a particular employee organisation.

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.

The SME Committee understands the economic benefits associated with the deregulation of the taxi industry.

However, the SME Committee notes that such changes are likely to have a particularly negative effect on existing taxi operators, the vast majority of which are small businesses.

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.

The SME Committee agrees with this recommendation.

We believe that such a review is particularly timely given overseas developments in relation the use of intellectual property, primarily patents, to achieve anti-competitive outcomes in various industries, particularly in relation to pharmaceuticals and electronic devices.

Draft Recommendation 8— Intellectual property exception

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

The SME Committee agrees with this recommendation.

We believe that such exceptions are not appropriate as they have the potential to exempt conduct which has significant anti-competitive effects.

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.

The SME Committee understands the economic benefits associated with the removal of parallel import restrictions.

However, the SME Committee notes that a major beneficiary of such restrictions are small businesses, for example independent book sellers and music stores. In our view, one of the primary reasons why governments have maintained parallel import prohibitions is due to the concern that the removal of such laws may have a particularly devastating effect on various small business sectors.

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.

Again, the SME Committee understands the economic benefits associated with the removal of planning and zoning restrictions.
However, the SME Committee notes that often the main beneficiaries of such restrictions are small businesses, for example independent grocery stores and specialty food retailers.

The Harper Review should note that one of the primary reasons why governments have preserved restrictions on planning and zoning laws is because of the concern that the removal of such laws may have a particularly devastating effect on various small business sectors.

Draft Recommendation 11— Regulation review

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

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

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

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

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

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

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

The SME Committee agrees with this recommendation.

However, the SME Committee believes that as part of its consideration of the public benefit, any such regulation review should also consider the likely impact of changes on the small business sector. In our view, there is a likelihood that many of these regulations are driven by the broader policy objective of providing support and opportunities for local small and medium sized businesses.

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.

The SME Committee supports this recommendation.

The SME Committee is aware of at least one situation some years ago where two large businesses sought to use their membership of an Australian Standards Committee to introduce an Australian Standard which would have eliminated import competition. In that case, the ACCC were successful in taking steps to prevent the conduct.

However, the SME Committee is concerned that large businesses may be able to use their membership of Australian Standards Committees to introduce Australian Standards which will unduly raise compliance costs for small business or may even have the effect of excluding imports from the market all together.

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).

The SME Committee agrees with this recommendation.

Draft Recommendation 14— Competitive neutrality complaints

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

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

The SME Committee agrees with this recommendation.

A number of members of the SME Committee have been involved in the competitive neutrality complaint processes in the past. We agree that the government bodies responsible for investigating these complaints have generally not investigated such matters in a rigorous and transparent matter. A more transparent process is needed to remove any inference that the government agency investigating the competitive neutrality complaint has a conflict of interest.

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

Draft Recommendation 15— Competitive neutrality reporting

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

The SME Committee agrees with this recommendation.

Greater transparency in competitive neutrality reporting is essential given past failures in this area.

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).

While SME Committee members do not have a great deal of expertise in these particular areas, we support this recommendation.

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.

While the SME Committee supports this recommendation, it reiterates its concerns about the apparent confusion throughout the Draft Report about the actual objects of the CCA. The objects of the CCA are not the promotion of competition to the exclusion of all else. Furthermore, there is no mention of the term "efficiency" in section 2.

We believe that it is unhelpful for groups to be advocating a view of the objects of the CCA which is incomplete and in some respects misleading. While the CCA is directed to promoting competition, it is also directed to the promotion of fair trading between businesses.

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.

While the SME Committee agrees with this recommendation, it sees this change as inconsequential given the infrequent use of any of these provisions.

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.

The SME Committee agrees with this recommendation.

The current tests for determining jurisdiction in relation to government activities are too complex. This recommendation will reduce this complexity.

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.

The SME Committee agrees with this recommendation.

The SME Committee is of the view that this recommendation would be a formalisation of current ACCC practice when it seeks to define the relevant market for the purposes of the CCA.

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.

The SME Committee agrees with the first part of this recommendation.

We also agree that the requirement for a private party to seek ministerial consent before relying on the extra-territorial provisions should be removed.

Draft Recommendation 22— Cartel conduct prohibition

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

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

The SME Committee agrees with this recommendation.

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).

The SME Committee does not agree with this recommendation. A compelling case has not been made for the repeal of these provisions.

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.

The SME Committee agrees that the 'price signalling' provisions of Division 1A of the CCA are inappropriate to the extent that they only apply to the banking sector. However, the SME Committee does not agree with the proposal to exclude public price signalling from the reach of the CCA.

As stated in our initial submission, our preferred approach in relation to price signalling is to introduce a general prohibition in relation to price signalling, which is in line with the law in both the US and the EU.

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.

The SME Committee is somewhat surprised that the Harper Review in its Draft Report has recommended making such significant changes to section 46 without first discussing whether the section is currently operating effectively, particularly given the data provided in our submission and a number of other submissions about the ACCC's success in pursuing section 46 cases. The Harper Review seems to have assumed the section is not working effectively and that, as a result, requires major changes.

The SME Committee believes it is incumbent on the Harper Review to consider and then determine whether there is a particular problem with the operation of particular legislation before recommending significant changes. In our view, there is a crucial difference between, on

the one hand, legislation which is ineffective due to its drafting and, on the other hand, legislation which is effective but which is not being enforced often enough.

The SME Committee does not believe that the Harper Review's proposed changes to section 46 will make it easier for the ACCC to pursue section 46 cases. Rather in our view, the proposed changes will make it harder for the ACCC to be successful in section 46 cases.

First, the introduction of a substantial lessening of competition test is likely to make the provision more difficult for both the ACCC and private litigants to bring successful actions.

Second, the proposal to introduce two defences in section 46 will make the provision all but unworkable.

In the SME Committee's view, the first proposed defence (ie whether the conduct would be a rational business decision by a corporation that did not have a substantial degree of market power) is simply the reintroduction of the taking advantage limb as a defence. In our view, this change will do nothing to improve the Court's ability to interpret and apply this concept.

In our view, the second defence (ie whether the conduct in question would be likely to have the effect of advancing the long-term interests of consumers) is also unworkable because of its scope is too broad and open-ended.

The SME Committee believes that a straightforward prohibition on a firm with a substantial degree of market power using its market power for the purpose or effect of damaging or preventing competition by competitors in a market would be preferable.

If the Harper Review was committed to the idea of introducing a defence, the preferred approach would be to introduce a general business justification defence along the lines of the test which is applied in US monopolization cases.

The SME Committee is also concerned at the Harper Review's apparent cursory treatment of the question of whether a divestiture remedy should be introduced for proven breaches of section 46.

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

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

In our view the Harper Review would benefit from undertaking a more rigorous and in-depth analysis of the arguments for and against the introduction of a divestiture remedy for proven breaches of section 46.

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.

While the SME Committee does not support the reintroduction of a specific price discrimination provision, it considers the Harper Review would benefit from discussing this important issue more rigorously.

As stated above, a major problem which many small businesses face is that they are unable to buy products from their suppliers at a wholesale price which is lower than the retail prices being offered for the same products by their major retail competitors. It is important for the Harper Review to fully investigate and gain an understanding of this problem before dismissing any potential solutions.

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.

The SME Committee does not agree with this recommendation.

The SME Committee understands that the Harper Review has evaluated third line forcing through the lens of competition law. However, in our view, there is an equally valid way of considering the prohibition on third line forcing – namely that it promotes freedom of contract.

In the Committee's view, the prohibitions in subsections 47(6) and (7) are aimed at preventing interference with freedom of contract. In other words, these provisions preserve the freedom of a party not to have to agree to purchase goods or services which they do not want or need from a party, whom they do not want to contract with.

Furthermore, the Committee suggests that the Harper Review should consider the likely effect that this recommendation will have in the marketplace. We believe that if this recommendation were to be implemented there would be a dramatic upsurge of tied sales in a wide range of industries. Furthermore, it is likely that the main group which would end up being subject to such tied arrangements would be small businesses.

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.

The SME Committee agrees with this recommendation. The existing provisions of section 47 are unnecessarily complex.

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.

The SME Committee does not agree with this recommendation for the same reasons it does not agree with the recommendation concerning third line forcing.

The SME Committee understands that the Harper Review has evaluated resale price maintenance (RPM) through the lens of competition law. However, in our view, there is an equally valid way of considering the prohibition on RPM – namely that it promotes freedom of contract.

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

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

Again, the SME Committee considers the Harper Review would benefit from considering the likely effect of the implementation of this recommendation in the marketplace. We believe that if this recommendation were to be implemented there would be a dramatic upsurge of the incidence of RPM. Again, it is likely that the main group which would end up being subject to RPM would be small businesses.

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.

The SME Committee does not agree with this recommendation.

It appears to the Committee that the effect of this recommendation will be to further curtail the timelines available to the ACCC under the formal merger exemption processes. In our view, these timelines, particularly the merger authorization timeframes, are already too short to allow proper consideration of the competitive effects of mergers.

Section 50 of the CCA is aimed at preventing mergers which will or are likely to have the effect of substantially lessening competition. The use of the word “likely” suggests a legislative intention for the ACCC and the Australian Competition Tribunal to err on the side of caution and to block mergers which “may” lessen competition.

In our view, shortening the timelines under the CCA will make it even more difficult for the ACCC to obtain the evidence it requires to prevent anti-competitive mergers.

The SME Committee also believes that the Harper Review would benefit from giving more detailed consideration to the processes which apply overseas, which generally have much longer timelines than exist in Australia.

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.

The SME Committee believes the Harper Review would benefit from a more robust treatment of secondary boycott enforcement. For example, the Harper Review should have undertaken a deeper analysis of the ACCC's record in enforcing secondary boycott provisions. There was considerable information provided to the Harper Review about this issue in submissions, particularly in the Committee's initial submission.

While the SME Committee agrees with this recommendation, the more important issue which the Harper Review Committee should consider is whether jurisdiction over secondary boycotts should remain with the ACCC or be transferred to a specialist body. In our view, this is the issue of primary importance in relation to secondary boycott laws.

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.

The SME Committee understands that the State and Territory Supreme Courts do have jurisdiction in relation to these provisions.

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.**

While the SME Committee agrees with this recommendation, it does not consider that there is a significant practical problem in relation to the perceived overlap between the CCA and the FWA.

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.

The SME Committee agrees with this recommendation.

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.

While the SME Committee is generally supportive of this recommendation, it is keen to see further detail about how this particular recommendation would operate in practice.

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 person 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.

The SME Committee agrees that the ACCC should update its guidelines in relation to section 155 and understands that the ACCC is already in the process of undertaking such an update.

However, the SME Committee does not agree with the proposal to qualify the obligations required under section 155 to require the recipient to undertake a "reasonable search". Section 155 is intended to be a powerful investigatory tool which the ACCC seeks to use to obtain potentially incriminating evidence about serious contraventions of the CCA. In our view, the section 155 power should not be "watered down" be allowing recipients to define what constitutes a reasonable search and rather should continue to require recipients to undertake a thorough and exhaustive search.

The SME Committee believes the Harper Review would benefit from gaining a better understanding of the way in which other leading anti-trust/competition regulators conduct their investigations into cartels and other serious competition law breaches. It is almost standard practices for leading regulators overseas to commence the overt phase of their investigations with the execution of a search warrant (in the US) or by conducting a dawn raid (in the EU). Furthermore, in the USA, the Department of Justice works closely with in the Federal Bureau of Investigation in its cartel investigations, while also making extensive use of the grand jury system.

The SME Committee believes there is a strong case that the ACCC's investigatory powers, particularly in relation to serious cartel conduct, need to be strengthened rather than weakened.

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.

The SME Committee agrees with this recommendation.

However, the Committee believes that much more has to be done to facilitate private actions. In this regard, the Committee believes that the Harper Review should consider other more meaningful ways of seeking to facilitate private actions, such as allowing treble damages awards and making changes to the usual costs rules which apply in litigation.

The SME Committee is of the view that it is important for the Harper Review to carefully consider the implications of section 79B of the CCA which states that the Court is required to give preference to an order of compensation over the award of a pecuniary penalty under section 76. As far as the Committee is aware, a Court has never been called upon to exercise this jurisdiction, primarily because the ACCC does not generally seek both a pecuniary penalty and compensation in its cases under the CCA.

An interesting question is whether Parliament's decision to enact section 79B could be interpreted as a directive to the ACCC that it should be seeking to pursue both pecuniary penalties and compensation as part of its cases under the CCA. If the ACCC were to take this approach, it seems to the SME Committee that the Courts would be required to give preference to the payment of compensation to victims over the imposition of a large pecuniary penalty against the firm/s.

In the SME Committee's view, if the ACCC were to pursue both pecuniary penalties and compensation as part of its proceedings, this would provide a significant benefit to small and medium sized businesses. Small and medium sized businesses are often the victims of

competition law contraventions, particularly cartel conduct and misuses of market power. If the ACCC were to take this more expansive approach to their litigation, it is likely that many small and medium-sized business would be in a much better position to receive compensation as well as being spared the cost and frustration of commencing their own private or class actions.

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.**

While members of the SME Committee do not have a great deal of expertise in this area, we are generally supportive of this recommendation.

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.

The SME Committee supports this recommendation.

An organization such as the ACCP is required as an advocate for competition policy. It is not appropriate for a law enforcement agency such as the ACCC to be called on or expected to provide policy advice to government. Policy advice in relation to competition law should be the exclusive domain of a policy agency, such as the ACCP.

Indeed, there is an argument that the remit of the ACCP should be extended to include consumer protection policy and provide a small business perspective. In this way, the ACCC would not be required or expected to provide government with policy advice on consumer protection or small business issues.

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.

The SME Committee agrees with this recommendation. The proposed role of the ACCP is appropriate.

Draft Recommendation 41— Market studies power

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

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

The SME Committee supports the recommendation to create a market studies function. In the Committee's view, the ACCP is the appropriate body to carry out such reviews. The Committee also believes that the ACCP should have mandatory information gathering powers.

It is also important for the ACCP to be appropriately resourced with adequately trained staff so that it can properly carry out its market studies function.

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.

The SME Committee supports this recommendation.

Draft Recommendation 43— Annual competition analysis

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

The SME Committee agrees with this recommendation, subject to the ACCP being required to seek input from the ACCC about areas which it considers to be of particular importance.

Draft Recommendation 44— Competition payments

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

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

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

The SME Committee agrees with this recommendation.

Draft Recommendation 45— ACCC functions

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

The SME Committee agrees with this recommendation.

In our view, no compelling case has been made for separating the ACCC's competition and consumer functions into two separate agencies. Indeed, over recent years there has been a great deal of evidence which demonstrates the synergies which exist between the ACCC's competition

law and consumer law functions. This is particularly true in terms of the interrelationship between section 46 and the unconscionable conduct provisions.

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.

The SME Committee sees the benefits of this particular recommendation, but believes a great deal more consultation needs to be undertaken before committing to such a change.

The fact that State governments are particularly strong supporters of a structural separation of the ACCC and AER is a compelling reason why the Harper Review should exercise considerable caution. The Committee suspects that State governments may in fact be supportive of this change because they hope or expect that a stand-alone regulator may take a less robust approach to regulation than is occurring currently.

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.

The SME Committee does not support the proposal to replace the current ACCC Commission with a Board comprising executive members. No compelling case has been made for such a change. Indeed, in our view, such a change would seriously weaken the effectiveness and independence of the ACCC. The Committee is concerned that Board appointments would become politicised, which would significantly undermine the independence of the ACCC.

The SME Committee believes that there is some merit in the second proposal – namely, to create an Advisory Board. Currently the ACCC has a number of advisory committees which have a broad membership base. However, in the SME Committee's view it is quite difficult to determine what contributions these existing advisory committees are making to the operations and direction of the ACCC. This is because these advisory committees do not publish reports or issue any minutes of their meetings with the ACCC.

The SME Committee believes that there is merit in establishing an Advisory Board which operates in a more transparent manner. For example, there should be a legislative requirement for the Advisory Board to prepare a separate annual report summarising its interactions with the ACCC. The Advisory Board should also be required to publish the minutes of its meetings with the ACCC, subject to appropriate confidentiality restrictions.

The SME Committee also believes that it is important for representatives of the peak legal bodies, such as the Law Council of Australia, and various State and Territory Law Societies and Bar Associations to have representation on this Advisory Board. The SME Committee thinks it is important for members of the Advisory Board to have both legal and business expertise if they are to make a valuable contribution to the ACCC's operations.

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.

The SME Committee strongly supports this recommendation.

The SME Committee believes it is vitally important for the ACCC to develop a Code of Conduct in relation to its media interactions. This Code should include an absolute prohibition on the ACCC commenting in any way on the merits of the cases which it has before the courts, particularly criminal prosecutions.

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.

The SME Committee believes the Harper Review should be putting forward more substantive recommendations in relation to this issue.

In our view, the Harper Review should initially try to identify ways in which small businesses can assert their legal rights in courts and tribunals in more cost effective ways, and then look to alternative avenues for better access to justice, such as through ADR.

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

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

The SME Committee also believes that it would be feasible for tribunals to be called upon to adjudicate on small business complaints involving other types of exclusive dealing arrangements. In these matters, the small business would be required to demonstrate on the balance of probabilities that the particular conduct was likely to substantially lessen competition.

The primary concern about this proposal would be that most tribunals might not have sufficient expertise to deal with CCA provisions or concepts. However, these issues could be easily overcome by the provision of additional training to tribunal members.

Other options for improving small business access to justice would include encouraging the ACCC to pursue both pecuniary penalties and compensation as part of its CCA cases. Section 79B would then come into play, with the Court being required to give preference to compensation for the victims of the anti-competitive conduct, over the imposition of large pecuniary penalties.

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

Another initiative which could be explored is the creation of a pro-bono law firm panel for the provision of free competition and consumer law advice to small businesses. This would involve particular law firms with expertise in competition and consumer law matters being appointed to a pro-bono panel for the purpose of providing small businesses with initial free advice in relation to competition and consumer law issues. Through this process, many small businesses would be able to understand the reasons why their particular complaint may not raise an actionable breach of competition or consumer laws.

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

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

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

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

In relation to access to justice through mediation, the SME Committee notes that the various Small Business Commissioners already providing a very valuable mediation function to many small businesses. The SME Committee believes that these initiatives should be supported and if possible extended.

The SME Committee does not support the ACCC having a mediation role in relation to small business disputes. Such a role would invariably create conflicts of interests, which would blur the ACCC's role as an enforcement agency.

Having said this, the SME Committee believes that the ACCC could be more deliberate in terms of ensuring that it has exhausted all dispute resolution options before commencing any legal actions against a small business.

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.

The SME Committee agrees with this recommendation.

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.

The SME Committee understands the economic benefits associated with the deregulation of the retail trading hours.

However, the SME Committee notes that such changes are likely to have a particularly negative effect on existing retailers, the vast majority of which are likely to be small and medium sized businesses. Therefore, we think that it is important for the Harper Review to consider the impact of this proposed change on both consumers and small businesses.

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.

The SME Committee understands the economic benefits associated with the deregulation of the pharmacy sector.
However, the SME Committee notes that such changes are likely to have a particularly negative effect the existing pharmacies, the vast majority of which are small businesses. Therefore, we think that it is important for the Harper Review to consider the impact of this proposed change on both consumers and the relevant small businesses

Further discussion

The SME Committee would be happy to discuss any aspect of this submission.

Please contact Coralie Kenny, the Chair of the SME Committee, on 0409 919 082 if you would like to do so.

Yours faithfully

John Keeves, Chairman
Business Law Section