



COMPETITION POLICY REVIEW

Draft Report
September 2014

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MESSAGE FROM THE PANEL

This is our Draft Report on reviewing Australia's competition policy.

In putting it together we consulted widely across the country to hear views on Australia's competition policy, laws and institutions. An Issues Paper released on 14 April 2014 helped focus these discussions.

We met with groups representing consumers and those representing business, both large and small. We also met with a variety of individual business people, academics, current and former regulators, and governments, including a number of state and territory Treasurers. During May and June, Panel members also attended business forums around the country organised by representative business groups. Altogether we have had close to 100 meetings with stakeholders.

We received almost 350 submissions on our Issues Paper, and all non-confidential submissions are published on our website www.competitionpolicyreview.gov.au. Almost 50 per cent of submissions came from peak and advocacy bodies, around 30 per cent from business, 17 per cent from individuals and the remainder from governments. A wide variety of topics were identified, with the top five issues raised most often in submissions being competition law, competitive neutrality, misuse of market power, small business concerns and the operation of the ACCC.

The Panel has drawn heavily on the expertise and experience of stakeholders garnered through submissions and in consultation meetings. We would like to thank all those who have put time into these contributions. They have provided us with crucial insights into the issues we have been asked to consider. Nevertheless, the views expressed in this Draft Report are our own.

We are aware of other reviews currently in train that are likely to cover sector-specific aspects of competition policy, such as the Financial System Inquiry, the Energy White Paper, the Review of the National Broadband Network, the Review of Coastal Trading and the Agricultural Competitiveness White Paper. The Australian Government has also commenced a Federation White Paper and foreshadowed a review of the *Fair Work Act 2009* and a Tax White Paper. While the Panel has not made detailed draft recommendations in these areas, in some cases we have encouraged these reviews to take account of competition issues.

We are keen to test our views with all stakeholders in a variety of ways. Extensive consultation will be held following the release of this Draft Report, including public forums, and through further written submissions and feedback from interested parties. We will also hold a conference in October 2014 where delegates can reflect on international as well as Australian experience of competition policy. Attendance at the conference is limited, but video recordings of the plenary sessions will be available on our website.

Up-to-date advice on the Review and its progress, including consultations, will be posted regularly on our website: www.competitionpolicyreview.gov.au.

This Draft Report provides 'Panel views' as well as 'Draft Recommendations' that you may use to focus your submissions (see [Part 2](#) for the Draft Recommendations). Submissions need not cover all issues.

Formal submissions may be lodged online at www.competitionpolicyreview.gov.au or forwarded to:

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

If you do not wish to make a formal submission, you can use the 'have your say' option on the website www.competitionpolicyreview.gov.au/submissions/.

Submissions are due by Monday 17 November 2014.

The Draft Report will be followed by a Final Report to be provided to the Australian Government by March 2015.

We look forward to hearing further from all interested parties as we progress the work of the Review.



L to R: Peter Anderson, Michael O'Bryan QC, Professor Ian Harper (Chair of the Review), Su McCluskey.

ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ACCP	Australian Council for Competition Policy (proposed body)
ACL	Australian Consumer Law
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
ALRC	Australian Law Reform Commission
BCA	Business Council of Australia
CCA	<i>Competition and Consumer Act 2010</i>
CDPP	Commonwealth Director of Public Prosecutions
COAG	Council of Australian Governments
CPA	Competition Principles Agreement
CSO	community service obligation
EU	European Union
GDP	gross domestic product
IP	intellectual property
IPART	Independent Pricing & Regulatory Tribunal (NSW)
NBN	National Broadband Network
NCC	National Competition Council
NCP	National Competition Policy
NDIS	National Disability Insurance Scheme
NDIA	National Disability Insurance Agency
NEM	National Electricity Market
NSW	New South Wales
NZ	New Zealand
OECD	Organisation for Economic Co-operation and Development
PBS	Pharmaceutical Benefits Scheme
PC	Productivity Commission
PPP	public-private partnership
RPM	resale price maintenance
TPA	<i>Trade Practices Act 1974</i>
Tribunal	Australian Competition Tribunal
UK	United Kingdom
US	United States

EXECUTIVE SUMMARY

Reinvigorating Australia's competition policy is essential to help meet the economic challenges and opportunities we face now and into the future.

Our competition policies, laws and institutions serve the national interest when focused on the long-term interests of consumers.

Change is constant in the economic landscape, bringing opportunities as well as challenges. Exposing the Australian economy to greater competition through the 1980s and 1990s helped us make the most of economic opportunities as they emerged and also to face the challenges that arose.

The Panel has been tasked with examining whether Australia's competition policies, laws and institutions remain 'fit for purpose', especially in light of the changing circumstances of the Australian economy that are expected to unfold over the next decade or so.

This Draft Report identifies three major forces affecting the Australian economy that will influence whether our competition policies, laws and institutions are fit for purpose.

The **rise of Asia and other emerging economies** provides significant opportunities for Australian businesses and consumers, but also poses some challenges. A heightened capacity for agility and innovation will be needed to match changing tastes and preferences in emerging economies with our capacity to deliver commodities, goods, services and capital. We need policies, laws and institutions that enable us to take full advantage of the opportunities offered.

Our **ageing population** will give rise to a wider array of needs and preferences among older Australians and their families. Extending competition in government provision of human services will help people meet their individual health and aged care needs by allowing them to choose among a diversity of providers.

New technologies are 'digitally disrupting' the way many markets operate, the way business is done and the way consumers engage with markets. The challenge for policymakers and regulators is to capture the benefits of digital disruption by ensuring that competition policies, laws and institutions do not unduly obstruct its impact yet still preserve traditional safeguards for consumers.

Competition policy

Competition policy is aimed at improving the economic welfare of Australians. It is about making markets work properly to meet their needs and preferences.

In the Panel's view, competition policy should:

- make markets work in the long-term interests of consumers;
- foster diversity, choice and responsiveness in government services;
- encourage innovation, entrepreneurship and the entry of new players;
- promote efficient investment in and use of infrastructure and natural resources;
- establish competition laws and regulations that are clear, predictable and reliable; and
- secure necessary standards of access and equity.

Important unfinished business remains from the original National Competition Policy (NCP) agenda, and new areas have arisen where competition policy ought to apply.

Ageing of Australia's population will impose greater demands on health and aged care services. Establishing choice and competition principles in government provision of human services can improve services for those who most need them. If managed well, this can both empower consumers and improve productivity at the same time.

In the area of human services, the Panel recommends that:

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

In the area of infrastructure, the Panel recommends introducing cost-reflective road pricing linked to road construction, maintenance and safety to make road investment decisions more responsive to the needs and preferences of road users.

Reforms begun in electricity, gas and water need to be finalised.

Anti-competitive regulations remain in place despite significant progress made under NCP. The Panel recommends that regulations restricting competition be reviewed by each jurisdiction, with particular priority given to regulations covering planning and zoning, retail trading hours, taxis, pharmacy and parallel imports.

Australia's intellectual property regime is also a priority for review. We recommend that the current exception for intellectual property licences in the *Competition and Consumer Act 2010* (CCA) be repealed.

Competitive neutrality remains a matter of concern for many stakeholders, including small businesses. We recommend that competitive neutrality policies be reviewed and updated against best practice, and that complaints-handling processes and monitoring be improved.

Competition laws

In guiding our consideration of whether Australia's competition laws are fit for purpose, the Panel asked a number of questions:

- Does the law focus on enhancing consumer wellbeing over the long term?
- Does the law protect competition rather than protecting competitors?
- Does the law strike the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship?
- Is the law as clear, simple and predictable as it can be?

While the Panel considers that our competition laws have served Australia well, we recommend specific reforms to enhance their effectiveness.

These include changes to section 46 governing the misuse of market power to bring it into line with other prohibitions by focusing on protecting competition and not competitors. While the threshold test of ‘substantial degree of market power’ is well understood, the central element of ‘taking advantage of market power’ is difficult to interpret and apply in practice. We recommend that the provision be reformulated so that it targets anti-competitive conduct that has the purpose, effect or likely effect of substantially lessening competition.

The Panel also recommends a number of changes to simplify and clarify the operation of the law, to bring to the forefront the competition policy objectives of the law and to reduce business compliance costs. The cartel provisions should be simplified, and the price signalling provisions removed and replaced by extending section 45 to concerted practices that have the purpose, effect or likely effect of substantially lessening competition. Merger approval processes should be streamlined.

We recommend changes to other approval processes, both authorisation and notifications, in order to reduce costs for business, particularly small business.

We also recommend that collective bargaining arrangements be made more flexible and easier for small business to use, and we invite views on whether there should be a specific dispute resolution scheme for small business for matters covered by the CCA.

Competition institutions

The Panel has assessed Australia’s competition institutions — their current performance and preparedness for the future — and identified a gap in Australia’s competition framework. Australia needs an institution whose remit encompasses advocating for competition policy reform and overseeing its implementation. This includes reforms agreed following this Review and future reforms.

We recommend replacing the National Competition Council (NCC) with a new national competition body, the Australian Council for Competition Policy (ACCP). This should be an independent entity and truly ‘national’ in scope, established and funded under a co-operative legislative scheme involving the Commonwealth, States and Territories.

Where competition reforms result in disproportionate effects across jurisdictions, competition policy payments should be made to ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform. The ACCP would be responsible for administering payments, based on actual implementation of reforms.

This new body would be an advocate and educator in competition policy. It would have the power to undertake market studies at the request of any government, and could consider requests from market participants, making recommendations to relevant governments on changes to anti-competitive regulations or to the ACCC for investigation of breaches of the law.

The Panel recommends that the ACCC retain both competition and consumer functions. We also recommend a separate access and pricing regulator be established with responsibility for existing regulatory functions undertaken by the NCC and the ACCC, including the Australian Energy Regulator, but with relevant consumer protection and competition matters remaining with the ACCC.

The Panel considers that the ACCC is a well-regarded and effective body but that its governance would be strengthened with input from individuals free of responsibility for its day-to-day operations. This would bring an ‘outsider’s view’ and, in particular, allow business, consumer and academic perspectives to bear directly on ACCC decision-making. Accordingly, we have suggested

enhancing the governance structure of the ACCC by adding a Board. The Draft Report canvasses two options for how this Board might be configured.

Next steps

This is a draft report but still presents specific recommendations for the purpose of stimulating debate. In a number of areas the Panel seeks further input from stakeholders as well as feedback on the Draft Recommendations. We look forward to continuing our engagement with stakeholders on the issues before the Review.

REPORT STRUCTURE

In **Part 1** of this Draft Report the Panel spells out the context for the Review, including the key challenges and opportunities facing Australia.

In **Part 2** the Panel offers its Draft Recommendations for reform of competition policies, laws and institutions. Since this is a draft report, the Panel seeks feedback from stakeholders on its conclusions and proposed reforms. These will inform the Panel's Final Report to the Australian Government. On some questions, the Panel is yet to reach a specific view, and presents options rather than draft proposals. Further stakeholder input is especially welcome on these points.

Part 3 explores the competition policy landscape in more detail, beginning with the principles underpinning the original NCP framework and asking whether revisions or extensions are needed in light of the different forces now bearing on the Australian economy. Discussion then turns to a suite of specific issues related to competition policy, including unfinished business from the original NCP reform agenda and new horizons for competition policy.

Part 4 explores our competition laws in detail, examines areas where some observers claim they are deficient, and considers whether the laws remain fit for purpose in a changing business environment.

Finally, **Part 5** assesses Australia's competition institutions, including the competition regulators, examining their current capabilities and preparedness for the future.

<p>Part 1</p> <p>Overview</p>	<p>Ch 1: Context for the Review</p>
<p>Part 2</p> <p>Findings and Draft Recommendations</p>	<p>Ch 2: Competition policy Ch 3: Competition laws Ch 4: Institutions and governance Ch 5: Small business Ch 6: Retail markets</p>
<p>Part 3</p> <p>Competition policy</p>	<p>Ch 7: Competition principles Ch 8: Regulatory restrictions Ch 9: Infrastructure markets Ch 10: Human services Ch 11: Competitive neutrality Ch 12: Procurement Ch 13: Key retail markets</p>
<p>Part 4</p> <p>Competition laws</p>	<p>Ch 14: Introduction to competition law issues Ch 15: Mergers Ch 16: Unilateral conduct Ch 17: Anti-competitive agreements, arrangements and understandings Ch 18: Employment-related matters Ch 19: Exemption processes Ch 20: Enforcement and remedies Ch 21: National Access Regime</p>
<p>Part 5</p> <p>Competition institutions</p>	<p>Ch 22: Institutional structures for future competition policy Ch 23: Enforcement of competition law Ch 24: Access and pricing regulation Ch 25: Review of competition and regulatory decisions</p>

PART 1 — OVERVIEW

1 CONTEXT FOR THE REVIEW

As a small, open economy Australia is exposed to competitive forces that originate beyond our borders. This is nothing new. Australia's economic development has been propelled by exposure to opportunities elsewhere in the world, with Australian living standards reflecting the beneficial impact of international trade in goods and services — both exports and imports.

Exposure to developments outside Australia widens choice and opportunities, so that Australia remains an attractive place to live, work, raise a family and run a business.

During the 1980s and 1990s successive governments opened the Australian economy to greater competition by lowering import tariffs, deregulating markets for foreign exchange, admitting foreign banks, deregulating domestic aviation, and partially deregulating and reforming the waterfront, coastal shipping and telecommunications. These initiatives widened consumer choices, lowered prices and exposed local producers to more intense competition from abroad.

Deepening Australia's integration with the world

The 1980s heralded a new era for Australia, with reforms aimed at integrating the Australian economy more closely with the world economy. Key components of that agenda included trade liberalisation, capital market liberalisation and deregulation of traded services.

Trade liberalisation — reductions in tariff assistance (that had begun in 1973) and the abolition of quantitative import controls — mainly in the automotive, whitegoods and textile, clothing and footwear industries — gathered pace from the mid-1980s. The effective rate of assistance to manufacturing fell from around 35 per cent in the early 1970s to 5 per cent by 2000.

Capital markets — the Australian dollar was floated in March 1983, foreign exchange controls and capital rationing (through quantitative lending controls) were removed progressively from the early 1980s and foreign-owned banks were allowed to compete — initially for corporate customers and then, in the 1990s, to act as deposit-taking institutions.¹

From the late 1980s other changes also occurred in infrastructure, such as the partial deregulation and restructuring of airlines, coastal shipping, telecommunications and the waterfront.

In the 1990s the competition agenda broadened to include goods and services not typically exposed to foreign competition, like electricity, telecommunications services and rail freight. Many of these were supplied locally by public monopolies or government departments.

In 1995 the Commonwealth, state and territory governments agreed to implement a wide-ranging National Competition Policy (NCP) built on the recommendations of the Hilmer Review. The NCP reflected a desire to build on the momentum of earlier reforms by extending the reach of choice and competition beyond tradeables to encompass non-tradeable goods and services.

1 Banks, G 2005, *Structural Reform Australian-Style: Lessons for Others?*, Presentation to the IMF, World Bank and OECD.

This was not an exercise in driving competition further into the Australian economy for its own sake, but for the longer-term benefits that would flow for Australian living standards.

These expectations were realised. In 2005 the Productivity Commission estimated that productivity improvements and price reductions flowing from the NCP and related reforms in the 1990s raised Australia's GDP by 2.5 per cent.

National Competition Policy

In 1995 Australian governments committed to a set of agreements under the NCP, which:

- extended the *Trade Practices Act 1974* (TPA) to previously excluded businesses (unincorporated businesses and state, territory and local government businesses);
- established independent price oversight of state and territory government businesses;
- corporatised and applied competitive neutrality principles so that government businesses did not enjoy a net competitive advantage as a result of public sector ownership;
- structurally reformed public monopolies to separate out industry regulation and where possible further disaggregated potentially competitive parts of the monopoly;
- established a third-party access regime for significant bottleneck infrastructure;
- reviewed all legislation restricting competition;
- applied the competition agreements to local government;
- established the National Competition Council;
- imposed conditions on governments seeking to exempt conduct from the competition law; and
- provided financial assistance to the States and Territories conditional on progress implementing the NCP.

The impact of the NCP reforms is evident not just in economic statistics but in everyday experience. For example, prior to the NCP reforms:

- consumers had no choice of electricity or gas provider — they paid regulated tariffs and customer service was poor or non-existent;
- there was a monopoly in telecommunications services, which ended only in 1992 when Australia's second telecommunications provider, Optus, entered the market;
- there were price controls and supply restrictions on food products like eggs, poultry, milk, rice and sugar;
- retail trading hours were restricted for most stores, with limited trading on weekends; and
- only lawyers could offer land conveyancing services (conveyancing fees fell by 17 per cent in NSW when this regulation was repealed, leading to an annual saving to consumers of at least \$86 million).²

By contrast, Australians today can choose among competing providers of gas and electricity services, and can complain to their energy ombudsman if they are unhappy with the service rendered.

2 National Competition Council 1999, *National Competition Policy: Some impacts on society and the economy*, page 9.

Retail trading hours have been substantially deregulated in most States and Territories, and online shopping allows consumers access, choice and convenience at any time of the day or night. There are now more mobile phones in Australia than people, and consumers can choose among a vast array of phone plans from a variety of telecommunications providers.

Strengthening competition brings economic benefits, including choice and diversity, as well as lower overall prices. An economy that responds more flexibly to people's changing needs and preferences, with a wider array of products from a greater variety of sources at cheaper prices, improves the everyday lives of Australians.

The changes induced by reforms can involve adjustment costs and can give rise to distributional consequences. For example, businesses can close, assets can lose value and jobs can be lost. Consumers can also find it difficult to navigate increased choice. These costs are transitional but nevertheless can be painful for the individuals involved. They should not stop otherwise beneficial reforms but do need to be considered as an important part of policy implementation.

Changing times

Change is a constant presence in the economic landscape. Change brings opportunities as well as challenges. Exposing the Australian economy to greater competition through the 1980s and 1990s helped us make the most of economic opportunities as they emerged and also to face the challenges that arose.

Australia has enjoyed continuous economic growth since the early 1990s and weathered the global financial crisis of the late 2000s without a recession. Both are markers of resilience and flexibility in the Australian economy and reflect the influence of successful macroeconomic and microeconomic policies, including reforms introduced under the NCP.

Forces for change continue to bear on the Australian economy. Some of these forces were barely envisaged, if at all, at the time of the Hilmer Review. For example, online digital technologies were in their infancy in the early 1990s, and were rapidly and widely adopted, including through the World Wide Web, from the mid-1990s. The rise of China was anticipated, following the economic reforms of Deng Xiaoping, but not really established until well into the 1990s. Ageing of Australia's population was again anticipated but has only begun to bite economically as the 'Baby Boom' generation retires from the workforce.

The Australian Government has established the Competition Policy Review to consider how well Australia's competition policy, laws and institutions are travelling two decades on from the Hilmer Review. In particular, how appropriate are current competition policy settings for the challenges that face us now rather than 20 years ago?

Three major forces for change relevant to this Review stand out as influencing the Australian economy now and into the foreseeable future:

- the industrialisation of developing nations and, in particular, the rise of Asia and the growing Asian middle class;
- ageing of the Australian population and falling workforce participation; and
- diffusion of digital technologies with their potential to disrupt established patterns of economic activity.

Developing nations and the rise of Asia

The re-emergence of China and India as global economic superpowers is driving fundamental structural change in the global economy. The sheer size and pace of growth in these populous economies is shifting the pattern of world economic growth, favouring suppliers of raw materials and energy commodities like Australia.

The global shifts are not confined to the Asian region, however. Many emerging economies in Europe, Africa and Latin America also supply raw materials and energy in direct competition to Australia. As the OECD notes, the global economic balance will continue to shift towards current non-OECD areas, including many emerging economies, whose economic structure and export profile will look increasingly like those of the OECD countries.

The OECD also notes that, to partner these shifts over time:

[F]urther reforms to inject dynamism in labour and product markets, combined with re-designed intellectual property right policies, will be needed to sustain innovation, productivity and employment.³

This message resonates for Australia in many ways, since we cannot assume that the rise of Asia will remain an uncontested opportunity. We will face challenges from other nations in securing the benefits of this shift in global economic activity.

To date, our supply of raw materials and energy has sustained high levels of income growth for Australia. While their contribution to growth will moderate, exports of commodities to Asia will very likely remain strong for years to come. Moreover, the rise of the Asian middle class will present new opportunities for Australia, especially in traded services like education, health and financial services.

The enormous growth in Asian consumption is expected to sustain high levels of infrastructure investment, increase consumer demand, and enhance Asia's economic sophistication and global integration. This represents a substantial and broad export opportunity for Australian suppliers of commodities, goods, services and capital.

The rise of Asia and other emerging economies puts new pressure and expectations on Australia's domestic systems that were built for a particular economic landscape and at a particular time.

Australia will need policies, laws and institutions that help us make the most of the opportunities we face. In particular, we need to build adaptability, flexibility and responsiveness into our systems. A heightened capacity for agility and innovation will be needed to match changing tastes and preferences with our own capacity to deliver commodities, goods and services into Asia and elsewhere in the developing world.

At the same time, the benefits of these economic opportunities should reflect in the living standards of everyday Australians. A wider array of products and services to choose from, supplied from a variety of sources, at prices kept low by competition — domestically and from abroad — will help to diffuse the benefits of Australia's economic opportunities widely within the Australian community.

3 OECD 2014, [Shifting Gear: Policy Challenges for the next 50 Years](#), OECD Economics Department Policy Notes, No. 24, page 1.

Ageing

Australia's population is ageing. The number of Australians aged 75 years and over is projected to increase by around four million between 2012 and 2060 — an increase roughly equivalent to the current population of Sydney.⁴ Population ageing will lower expected income growth. As the Baby Boom generation retires, the number of working age people relative to those over the age of 65 will fall.

Population ageing will substantially increase demands on the health and aged care systems. Today around a quarter of total Australian Government spending is directed to health, age-related pensions and aged care. This is expected to rise to around half by 2049-50.⁵ Improving the efficiency and responsiveness of these sectors will be crucial to meeting the needs and preferences of older Australians with dignity.

While the ageing of Australia's population is well documented, its impact on our competition framework has not received much attention. Allowing people greater choice over their aged care arrangements, where this is feasible, as well as encouraging more diversity among providers will improve the system's capacity to meet a widening array of needs and preferences among ageing Australians and their families. Competitive entry to aged care markets by innovative service providers will also help to place downward pressure on costs.

We will need systems and policies that facilitate more options rather than fewer, and encourage flexibility, adaptability and responsiveness in methods of delivery. Increasing competition in health and aged care is aimed at meeting the needs and preferences of individual users rather than those of providers.

The digital revolution

New technologies are transforming the way many markets operate, the way business is done, and the way consumers engage with markets. The internet has already had a significant impact on the Australian economy. Australians are typically fast adopters of new technologies (such as smart phones), new applications and software tools. This has in turn encouraged internet service providers to extend and develop the infrastructure required to access internet services more fully.

New technologies are also driving changes in sectors such as energy and transport. For example, 'smart meters' allow consumers to access real-time information on pricing and usage of energy, while smart phone applications allow consumers to compare airfares in real time.

Technological innovation is lowering barriers to entry across a range of markets. The company Uber uses a smart phone application to connect users and providers of passenger vehicle services in direct competition with the taxi industry (see Box 1.1). This is an example of digital technology disrupting traditional markets.

Innovative competitive entry of this type can lower cost to consumers and widen their choice of providers. It can also raise concerns about consumer safety. The challenge for policymakers and regulators is to capture the benefits of disruptive entry while preserving traditional safeguards against doubtful or dangerous market practices.

4 Productivity Commission 2013, *An Ageing Australia: Preparing for the Future*, Research paper, page 6.

5 Australian Government 2010, *Intergenerational Report*, page 47.

Changes brought about by digitisation and access to the internet are fostering the growth of networks where information and ideas are routinely shared. This ‘spillover’ of knowledge is a recognised catalyst of innovation, adaptation and invention — the drivers of growth in the ‘knowledge economy’.

Today we see the emergence of new digital technologies with a proliferation of new applications and uses, including emerging trends such as collaborative consumption, or viewed slightly differently, new marketplaces (so-called ‘sharing markets’) developing outside traditional commercial channels.

The use of technology to foster new markets provides more consumers with access to what they want and need, potentially including lower-income consumers.

The pervasive presence of knowledge networks and the power of innovation to lift living standards mean that Australia’s competition policies, laws and institutions must be fit for purpose for the digital age.

Competition policy

Competition policy, like other arms of government policy, is aimed at securing the welfare of Australians. Broadly speaking, it covers government policies, laws and regulatory institutions whose purpose is to make the market economy serve the long-term interests of Australian consumers. Competition policy is about making markets work properly.

Strengthening the competitiveness of enterprises is a necessary national economic challenge. However, competition policy concerns the competitiveness of markets as a whole, not individual enterprises. Nonetheless, the disciplines of a competitive market compel efficiencies in the conduct of business, which in turn contribute to the productivity and competitiveness of enterprises.

The Competition Policy Review has been tasked with examining whether Australia’s competition policies, laws and institutions remain fit for purpose, especially in light of the changing circumstances of the Australian economy that are expected to unfold over the next decade or so.

Competition policy sits well with the values Australians express in their everyday interactions. We expect markets to be fair and we want prices to be as low as they can reasonably be. We also value choice and responsiveness in market transactions — we want markets to offer us variety and novel, innovative products as well as quality, service and reliability.

Access and choice are particularly relevant to vulnerable Australians or those on low incomes, whose day-to-day existence can mean regular interactions with government. They too should enjoy the benefits of choice, where this can reasonably be exercised, and service providers that respond to their needs and preferences. These aspects of competition can be sought even in ‘markets’ where no private sector supplier is present.

Maximising opportunity for choice and diversity, keeping prices competitive, and securing necessary standards of quality, service, access and equity — these are the things Australians expect from properly governed markets. A well-calibrated competition policy aims to secure these outcomes in commercial transactions and, where appropriate, also in the provision of government services.

Fit for purpose

The Panel identifies six attributes of competition policy which we regard as defining its fitness for purpose. These attributes are the criteria against which we have assessed Australia's current competition policy, laws and institutions in this Draft Report. In [Part 2](#) we make draft recommendations on how existing arrangements might be improved.

A competition policy that is 'fit for purpose':

- focuses on making markets work in the long-term interests of consumers;
- fosters diversity, choice and responsiveness in government services;
- encourages innovation, entrepreneurship and the entry of new players;
- promotes efficient investment in and use of infrastructure and natural resources;
- includes competition laws and regulations that are clear, predictable, and reliable; and
- secures necessary standards of access and equity.

Making markets work in the long-term interests of consumers

Our competition policy, laws and institutions serve the national interest best when focused on the long-term interests of consumers.

Consumers in this context are not just retail consumers or households but include businesses transacting with other businesses. In the realm of government services, consumers are patients, welfare recipients, parents of school-age children or users of the national road network.

In 1995 the then TPA incorporated an objects clause,⁶ stating:

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

A focus on the competitive process, rather than competitors, and the interests of consumers is a well-established principle in competition policy across the globe.

In an environment where Australia's economic structure will continue to evolve in response to global forces, and markets become increasingly global through technology and stronger trade channels, fostering competitive processes in the interests of consumers becomes an ever-changing and challenging task.

As it becomes more challenging to ensure that markets operate efficiently in the interests of consumers, adherence to fundamental principles assumes greater importance. In particular, the smooth entry and exit of suppliers in response to changing consumer tastes, needs and preferences must be fostered — which means removing or lowering barriers to entry (and exit) wherever possible.

⁶ Section 2 of the former *Trade Practices Act 1974*. Now section 2 of the *Competition and Consumer Act 2010* (CCA).

We also need flexible regulatory arrangements that can adapt to changing market participants, including those beyond our borders, and to new goods and services that emerge with rapidly evolving technology and innovation. Market regulation should be as ‘light touch’ as possible, recognising that the costs of regulatory burdens and constraints must be offset against the expected benefits to consumers.

We need to allow success to emerge in response to market-driven factors, rather than prescribing rules that support firms of particular sizes at the expense of others. Doing the latter compromises the long-term interests of consumers. Success in the market should be driven by consumer interests, not the special interests of suppliers or providers.

Our competition laws rightly censure anti-competitive trading terms or abuse of market power, but such interventions should be targeted and proportionate. Technology can be a game-changer for businesses of all sizes, and can allow smaller nimble firms to compete on a global scale, without any pre-requisite economies of scale in order to succeed.

Fostering diversity, choice and responsiveness in government services

Choice is a powerful dynamic force for improving our lives. By expressing our individual requirements and preferences, government services can be adapted to better serve our needs.

On the other hand, choice is not about having unlimited options or facing a bewildering array of possibilities. It’s about having our needs and preferences met easily and affordably, in a timely fashion, and at a place and time of our choosing — which may well be outside standard business hours.

Given the size and pervasiveness of government in the Australian economy, as funder, provider and regulator, there is a need to consider new ways to foster diversity, choice and responsiveness in government services.

Australians will demand more government services over time, especially in health and education as our population ages and life-long learning becomes a more important means of securing rewarding employment. These demands are also likely to increase as Australians adjust to a more changeable, less certain economic and social environment.

Designing markets for government services may be a necessary first step as governments contract out or commission new forms of service delivery, drawing on public funds. Over time a broader, more diverse range of providers may emerge, including private for-profit, not-for-profit and government business enterprises, as well as co-operatives and mutuals.

If managed well, moving towards greater diversity, choice and responsiveness in the delivery of government services can both empower consumers and improve productivity at the same time.

Encouraging innovation, entrepreneurship and the entry of new players

Coming decades are likely to see an acceleration of the technological change we have witnessed in the recent past, most especially in the field of information and communications technology (ICT). The explosion in information available to all market participants has better informed those on the buy-side of transactions but also allowed those on the sell-side to target their goods and services more accurately.

The information revolution is just one facet of a rapidly evolving technology landscape. New techniques and applications utilising information are fostering new ideas and ways of doing business

that fundamentally challenge existing laws and policies, founded as they often are on the premise of a stable and predictable marketplace with known participants.

Australians eagerly embrace new ideas when they offer us something of value, and this includes innovations from new players entering markets like never before.

Our existing laws and institutions often struggle to keep pace. Sometimes this is the inevitable consequence of an unanticipated shock, but it can also be because existing laws and policies have rightly or wrongly instituted some form of preferment to incumbent market participants.

New entry is a positive discipline on existing market players, encouraging them to be more innovative and responsive to consumer needs. By contrast, locking in long-term preferment risks Australia falling behind other countries, as potential new approaches and innovations pass us by.

Our competition policy, laws and institutions need to be sufficiently adaptable to allow new entry to make innovative and potentially lower-cost products and services available to Australian consumers.

Uber ridesharing services (see Box 1.1 below) is an example of a new player introducing new technology and a novel concept that challenges existing regulatory frameworks.

A competition policy that is fit for purpose must strike a balance between the long-term benefits to consumers of allowing new entrants to establish themselves in a market and protecting the public interest against dishonest or dangerous practices.

Box 1.1: Regulatory treatment of the ‘sharing economy’ — the example of Uber

Uber is a platform for ridesharing services that connects passengers directly with the drivers of vehicles. Cars are reserved by sending a text message or using a smartphone app.

This type of ‘on-demand ridesharing’ was not envisaged when laws governing the taxi industry were drawn up. The regulatory response to this innovative development has varied across jurisdictions.

Internationally, the response to Uber has been quite different from that in Australia. California was the first jurisdiction to recognise and regulate services such as Uber, creating a new category of regulation for ‘transportation network companies’ (TNCs). The regulation of TNCs covers driver background checks, driver training, drug and alcohol policies, minimum insurance coverage and company licensing.

Australian regulators have yet to demonstrate such flexibility and openness to new modes of business. Transport authorities in NSW have declared UberX (Uber’s ridesharing service) non-compliant with the *Passenger Transport Act 1990*. The Panel understands, however, that the NSW Government is considering its response to ridesharing services, assessing the benefits to consumers alongside the impact on the taxi industry.

The Victorian Taxi Service Commission has fined Uber drivers in that State. Fines of up to \$1,700 per driver have been issued, but Uber has pledged to pay the fines on behalf of its drivers. The South Australian Government has stated that those providing transport services that do not comply with government regulations will face severe financial penalties.

Promoting the efficient investment in and use of infrastructure and natural resources

Australia faces an unprecedented opportunity to thrive over coming decades as the middle class in Asia and beyond burgeons. However, optimising our national interest will require wise and efficient investment in and use of our existing and planned physical and electronic infrastructure, and policies that maximise the return on our natural resources.

To improve our standard of living, quality of life and sustain high income growth, we need to move goods and services rapidly and responsively across the nation and also across our borders. We need to ensure that there is adequate investment in our land, sea and air transport systems, and telecommunications and electronic commerce infrastructure, and that they are used efficiently by those who need them, when they need them.

A competition policy that is fit for purpose facilitates mechanisms to signal the efficient investment in and use of our infrastructure. The original NCP framework introduced price signals to guide investment in and use of electricity and gas, and telecommunications networks. Steps forward were also made in our rail and air infrastructure, but much more remains to be done across all transport modes, including roads, and infrastructure more broadly.

Pricing or other signals that guide the allocation of our natural resources towards their highest value use will optimise their potential to support Australian living standards into the future. In this regard, we need to ensure that planning, zoning and environmental regulations governing the use of our land and other natural resources, including water, are sensibly applied.

Competition laws and regulations that are clear, predictable, and reliable

Australians expect consumers to be dealt with fairly and on reasonable terms, and businesses to refrain from conduct that damages the competitive process (and ultimately consumers). They expect laws to be clear, predictable and reliable and administered by regulators (and applied by the judicial system) without fear or favour. Our competition law must ensure that market participants, big and small, can compete in a way that allows the most efficient and responsive players to thrive.

These principles are particularly important where market participants differ in their capacity or financial means to engage with the legal or regulatory process. Difficulty in accessing justice in matters of competition policy or consumer protection can undermine broader confidence in our regulatory institutions.

There is a natural tension between designing specific laws and regulations to deal with problems that emerge at a point in time and building in flexibility to cope with changing market circumstances as they arise. Laws that are less predictable in their immediate application may nevertheless prove more reliable over time as they are adapted through the judicial process to encompass novel developments.

This is especially relevant when new technologies are rapidly altering market conditions faced by businesses and consumers. The more tightly specified our laws, the more likely they are to lag behind developments in markets and possibly act against the long-term interests of consumers.

A competition policy that is fit for purpose should enshrine competition law that is sufficiently general in its design to accommodate evolving ways of doing business or engaging with consumers, but sufficiently reliable and predictable in its application so as not to discourage innovation and entrepreneurship.

Securing necessary standards of access and equity

Australians expect the benefits and opportunities afforded by a well-functioning market economy to be enjoyed widely, not reserved for the privileged few, or those with the necessary information and resources to exploit the benefits of choice or responsiveness.

Access and equity dictate necessary standards and genuine opportunities that all consumers should be able to enjoy, so that genuine choice, responsiveness and innovation are available to all. This is particularly important for vulnerable consumers, and especially in their dealings with government.

Many government services have not previously been exposed to competition because of concerns about the impact on vulnerable consumers, especially in regard to access (usually around pricing but also quality) and outcomes that may accentuate inequality.

As governments around the world have sought to improve their service delivery, many have explored new forms of contracting or commissioning service provision from providers in the private for-profit or not-for-profit sectors. As experience with improved contract and market design has evolved, important lessons have been learnt and improvements made. There is much of value here from which Australian governments can profitably draw.

A competition policy that is fit for purpose recognises the need for all Australians to share in the benefits of choice, responsiveness and innovation, especially but not exclusively in government services.

PART 2 — FINDINGS AND DRAFT RECOMMENDATIONS

The Review's Terms of Reference require an assessment of Australia's competition policies, laws and institutions to determine whether they remain fit for purpose, especially in light of the opportunities and challenges facing Australia into the foreseeable future.

In this Part we summarise our findings and propose draft recommendations to address the deficiencies we have identified.

The Panel invites stakeholders to respond to our findings and draft recommendations so that we have the opportunity to refine and/or amend them, if necessary, prior to submitting our Final Report to the Australian Government by March 2015.

[Chapter 2](#) presents our draft recommendations for priority areas of reform in competition policy.

These are informed by a revised set of competition principles attuned to the challenges and opportunities likely to face the Australian economy in coming decades. A key lesson from the National Competition Policy (NCP) experience is the importance of an agreed framework which can then be applied by governments in their own jurisdictions, and as necessary adapted to local conditions.

A further lesson from NCP is that all reform initiatives cannot be progressed simultaneously. The Panel recognises the importance of assigning priorities to reform initiatives so that those with the greatest potential benefit to Australians are progressed first. Moreover, priorities will change as technology changes — for instance, the development of the National Broadband Network and mobile infrastructure have meant that access to the unbundled local loop (the copper network) is a less significant issue than it was in 1995.

Competition policy reforms most likely to generate large net benefits are those that: (i) benefit a sizeable part of the economy or have deep links to other sectors; (ii) remove a significant barrier to competition; or (iii) subject activities with significant government involvement to greater contestability and consumer choice.

[Chapter 3](#) outlines our draft recommendations for changes to the *Competition and Consumer Act 2010* (CCA).

The Panel has viewed reform of the CCA through the lens of fitness for purpose. In some areas we conclude there is a need for substantive change to the way the law is drafted. In other areas our recommended changes go to clarification and simplification of the law.

On some issues the Panel finds the law itself fit for purpose but shares concerns expressed by stakeholders, especially small business, about access to remedies under the law.

[Chapter 4](#) outlines our draft recommendations on the institutional structure most likely to sustain enduring reform.

Like the Hilmer Review, we recognise that policy reform will only gain momentum if it is supported by all jurisdictions.

Australia has been well served by its competition policy institutions, yet this is not sufficient reason to retain the framework in its current form. The flagging momentum of competition reform points to the need for reinvigoration through strong institutional frameworks.

The Panel has identified a clear gap in the competition framework — an institution is needed to advocate for competition reform and to oversee the implementation of reforms instituted by governments in the wake of this Review.

[Chapter 5](#) outlines our draft recommendations which relate to the concerns that small businesses have raised with us.

Access to remedies has been a roadblock for many small businesses, and the Panel finds that access should be improved. We find that the collective bargaining framework should be enhanced and made more flexible. We also make draft recommendations on competitive neutrality and regulations that can restrict the way small businesses operate.

[Chapter 6](#) presents our draft recommendations on retail markets, in particular supermarkets and pharmacies. We also discuss restrictions on retail trading hours.

2 COMPETITION POLICY

2.1 A SET OF COMPETITION PRINCIPLES

The National Competition Policy (NCP) as originally crafted reflected the challenges Australia faced more than 20 years ago. The focus of the NCP reforms was on exposing previously sheltered activities to competition and applying a more national approach to competition issues.

The six elements of Competition Policy identified in the Hilmer report⁷ were:

- limiting anti-competitive conduct of firms;
- reforming regulation which unjustifiably restricts competition;
- reforming the structure of public monopolies to facilitate competition;
- providing third-party access to certain facilities that are essential for competition;
- restraining monopoly pricing behaviour; and
- fostering 'competitive neutrality' between government and private businesses when they compete.

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

Legislative frameworks should continue to limit anti-competitive conduct of firms. The Panel considers that the anti-competitive conduct provisions of the CCA should reach beyond unincorporated enterprises and government businesses to cover government activities which have a trading or commercial character including, in particular, procurement.

Beyond the CCA, legislative frameworks and government policies binding the public or private sectors should not restrict competition.

The Panel believes the focus of competition policy should be widened beyond public monopolies and government businesses to encompass the provision of government services more generally.

Promoting user choice and encouraging a diversity of providers plays an important role in improving performance, especially in the provision of human services. It has the potential to improve outcomes for users, including through enhanced diversity, choice and innovation.

Independent regulation can encourage entry in service delivery markets (since it provides a level of certainty about the regulatory environment), while separating provision from funding and regulation encourages accountability, innovation and a level playing field between public and other providers.

The Panel believes that declaration and third-party access to infrastructure should only be mandated when it promotes the public interest. The onus of proof should lie with those seeking access to demonstrate that it would promote the public interest rather than on infrastructure owners to demonstrate it would be contrary to the public interest.

7 Report by the National Competition Policy Review 1993, *National Competition Policy*, page xvii

Acknowledging the diverse circumstances of each jurisdiction, the Panel supports the flexibility built into the NCP for the Commonwealth and state and territory governments to decide how best to implement competition principles in their jurisdictions. Competition policy should continue to apply explicitly to local government.

Agreeing a set of principles would guide the Commonwealth, state, territory and local governments in implementing those aspects of competition policy for which they are responsible. The principles in Draft Recommendation 1 broaden the NCP agenda to include all government services and promote the role of choice.

In applying these principles the Panel endorses the ‘public interest’ test as a central tenet of competition policy, so that the principles should apply unless the costs outweigh the benefits. 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.

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.

2.2 DETERMINING PRIORITY AREAS FOR REFORM

The Panel recognises the importance of assigning priorities to reform initiatives so that those with the greatest potential benefit to Australians are progressed first.

In determining priority areas for competition policy reform, the Panel has asked five questions:

- Will this reform help the Australian economy adjust to the forces for change identified in [Part 1](#) of this Draft Report?
- Will this reform promote choice, diversity and innovation in markets for private and/or government goods and services?
- Will this reform help to raise productivity growth and hence Australian living standards over time?
- Will this reform stimulate competitive entry into markets by lowering barriers to entry or exit?
- Will this reform help to complete unfinished business from the original NCP agenda or address specific issues raised in the Review's Terms of Reference?

If the answer to one or more of these questions is 'yes', then the reform is placed on the Panel's priority list. The remaining sections of this chapter present the Panel's draft recommendations in respect of each of its priority areas for reform.

2.3 HUMAN SERVICES

Access to high-quality human services — including health, education and community services — is vital to the lives of all Australians. Good health makes it easier for people to participate in society; education can help put people on a better life pathway; and quality community services, including aged care and disability care and support, can provide comfort, dignity and increased opportunities to vulnerable Australians.

Given the size of the human services sector (which is set to increase further as Australia's population ages),⁸ even small improvements will have profound impacts on people's standard of living and quality of life.

The Panel notes that governments are making significant changes in sectors such as disability care and support and aged care. These changes focus on greater consumer choice and innovation in service delivery.

As a first step, where governments are involved in human services sectors as a provider, splitting the regulator from the provider can help to ensure that the regulator makes decisions in the best interests of consumers. Regulation that is independent of government provision can encourage a more certain and stable regulatory environment, which can in turn encourage a diversity of new providers.

The Panel considers that a 'presumption of choice' could have significant benefits in many human services sectors. Putting consumers in control of the human services they access — either through direct payments, personal budgets, entitlements or choice — often means that service providers become more responsive to individual requirements.

⁸ See The Treasury 2010, *The 2010 Intergenerational Report*, page 46.

However, the Panel acknowledges that choice is not the only important objective in the area of human services. Equity of access, universal service provision and minimum quality are also important in providing human services to all Australians.

In considering whether it should recommend change in this area, the Panel does not wish to discourage or crowd out the important contribution that not-for-profit providers and volunteers currently make to the wellbeing of Australians.

Where governments retain some control over the delivery of human services, a diversity of service providers and high-quality outcomes for users can be encouraged through commissioning. Governments will need to allow room for providers to innovate in response to changing user demands, and will need to benchmark the performance of providers and issue a credible threat of replacement to those that underperform.

The Panel recognises that in some markets there will not be sufficient depth to support a number of providers — including, for example, certain services in remote and regional areas. Ensuring access to services and maintaining and improving service quality will continue to be important in the absence of competitive pressures.

The Panel is satisfied that deepening and extending competition policy in human services is a priority reform. Removing barriers to entry can stimulate a diversity of providers, which is a prerequisite for expanding user choice. Small gains in productivity (driven by competition) in these large and growing sectors of the Australian economy have the potential to deliver large gains across the community.

Reforms in this area can also exert a powerful demonstration effect. If competition produces conspicuous improvements in users' access to and experience of human services, the case for reform across a wider range of government services is strengthened.

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.

When developing an implementation plan based on these principles, governments can develop various approaches to achieve their goals.

For example, in putting consumer choice at the heart of service delivery, governments can:

- recognise that consumers are best placed to make choices about the human services they need most and design service delivery, wherever possible, to be responsive to those choices;

- recognise that access to quality services will be a prerequisite for effective choice and that accessibility will be particularly important in remote and regional areas;
- ensure that consumers have access to relevant information to help them exercise their choices, including, where appropriate, feedback from previous users of services;
- make intermediaries or purchase advisers available to help consumers make decisions, with policies designed to align the incentives of purchase advisers with the best interests of consumers;
- ensure that a default option is available for consumers unable or unwilling to exercise choice;
- lower financial and non-financial switching costs to enable switching wherever possible — for example, consumers should not ‘lose their place in the queue’ if they switch providers, nor need to undergo further eligibility assessment; and
- offer disadvantaged groups greater assistance in navigating the choices they face through, for example, accessible communication channels that suit their needs.

In separating funding, regulation and provision, governments can:

- vest rule-making and regulation with a body independent of government’s policy role;
- encourage contestability in service delivery, including through careful commissioning;
- allow funding to follow people’s choices; and
- make the funding of community service obligations transparent and contestable.

In encouraging a diversity of service providers, governments can:

- allow a regulator independent of government providers to license any provider that meets and maintains prescribed standards;
- where governments directly commission services, recognise the beneficial impact on innovation and consumer responsiveness that arises from a diversity of providers;
- encourage commissioning decisions that are sensitive and responsive to individual and community needs and recognise the contribution of community organisations and volunteers; and
- ensure that commissioned services are contestable, and that service providers face replacement for poor performance.

In encouraging innovation in service delivery, governments can:

- encourage experimental service delivery trials whose results are disseminated via an intergovernmental process;
- establish targets and benchmarks for service providers based on outcomes, not processes or inputs;
- offer financial rewards for performance above specified targets; and
- encourage jurisdictions to share knowledge and experience in the interests of continuous improvement.

For further detail on human services, see [Chapter 10](#).

2.4 TRANSPORT

Road transport

Road transport is a key input for business-to-business transactions and, with the rapid growth of online purchases, an increasingly important component of end-point sales to consumers. An efficient road system is also essential for urban and regional access and amenity.

Even small changes in productivity in this sector can cascade through the economy, boosting productivity and output in other sectors. Also, given the size of the road transport sector, enhanced productivity in road transport can deliver large gains to the economy.

However, roads are the least reformed of all infrastructure sectors, with institutional arrangements around funding and provision remaining much the same as they were 20 years ago.

More effective institutional arrangements are needed to promote efficient investment and usage of roads, and to put road transport on a similar footing to other infrastructure sectors. Lack of proper road pricing leads to inefficient road investment and distorts choices between transport modes, particularly between road and rail freight.

The advent of new technology presents opportunities to improve the efficiency of road transport in ways that were unattainable two decades ago. Linking road user charges to road construction, maintenance and safety should make road investment decisions more responsive to the needs and preferences of road users. As in other sectors, where pricing is introduced it should be overseen by an independent regulator.

There is currently indirect charging for road use through fuel excise and vehicle registration charges. These could be replaced with direct, cost-reflective prices in a revenue-neutral way.

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.

Marine transport — liner shipping (Part X) and coastal shipping

The Review's Terms of Reference (3.3.5) require it to consider whether existing exemptions from competition law and/or historic sector-specific arrangements are still warranted.

Reform of liner shipping is also unfinished business from the original NCP reforms.

Liner shipping is a key mechanism through which goods cross Australia's borders, both for export and import. These include not only finished goods but also intermediate inputs for Australian businesses. Many items moved by sea cannot be transported by air because of their weight or volume.

The importance of international trade to Australia's economy and the prospects for stronger growth in trade as Asia develops focus attention on the need for efficient and competitive marine transportation.

The Panel considers exemptions provided by Part X of the CCA to be too broad and predicated on anti-competitive agreements in liner shipping being the norm. One possibility would be to subject all liner shipping agreements to individual authorisation by the Australian Competition and Consumer Commission (ACCC) but this might lead to unnecessary compliance costs for some operators.

The Panel believes instead that a 'safe harbour' should be created via a block exemption granted by the ACCC for conference agreements that meet a minimum standard of pro-competitive features. Block exemptions are discussed further in Draft Recommendation 35.

Repeal of Part X will mean that existing liner shipping agreements will no longer be exempt from the competition laws. A transition period will therefore be needed to establish which agreements qualify for the block exemption and for other agreements to either seek authorisation or be modified to comply with the CCA. The Panel considers a transition period of two years should be sufficient.

The Panel notes that the Australian Government is undertaking a separate review of coastal shipping regulations but observes that cabotage restrictions raise the cost and administrative complexity of coastal shipping services. The Panel therefore 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.

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.

Taxis

Reform of taxi regulation in most jurisdictions is long overdue. Regulation limiting the number of taxi licences and preventing other services from competing with taxis has raised costs for consumers, including elderly and disadvantaged consumers, and hindered the emergence of innovative transport services.

Regulation of taxi and hire car services should be focused on ensuring minimum standards for the benefit of consumers rather than restricting competition or supporting a particular business model. This can be delivered through an independent regulator.

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.

For further detail on transport, see [Section 9.2](#).

2.5 INTELLECTUAL PROPERTY

Disruptive technologies, especially digital technologies, are a pervasive force for change in the Australian economy. New technologies foster innovation which in turn drives growth in living standards. Access to and creation of intellectual property (IP) will become increasingly important as Australia moves further into the digital age.

Australians are enthusiastic adopters and adapters of new technology. We stand to benefit greatly by exploiting technology to its full extent in our business production processes and as end-consumers. Our IP policy settings should encourage us to do so.

Nevertheless, there is an appropriate balance to be struck between fostering ideas and innovation on the one hand, and encouraging widespread adoption of new productivity-enhancing techniques, processes and systems on the other. Excessive IP protection can not only reduce the adoption of new technologies but also stifle innovation.

Given the influence that Australia's IP rights can have on facilitating (or inhibiting) innovation, competition and trade, the Panel believes it is crucial that the IP system be designed to operate in the best interests of Australians.

The Panel therefore considers that Australia's IP rights regime is a priority area for review.

Determining the appropriate extent of IP protection is complex. IP rights can help to break down barriers to entry but can also, when applied inappropriately, reduce exposure to competition and erect long-lasting barriers to entry that fail to serve Australia's interests over the longer term. This risk is especially prevalent in commitments entered into as part of international trade agreements.

The Panel is concerned that there is no overarching IP policy framework or objectives guiding changes to IP protection or approaches to IP rights in the context of negotiations for international trade agreements.

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.

IP rights, like all property rights, can potentially be used in a manner that harms competition. It is therefore appropriate that commercial transactions involving IP rights, including the transfer and licensing of such rights, be subject to the CCA.

Accordingly, the Panel considers that the IP licensing exception in subsection 51(3) of the CCA should be repealed.

As is the case with other vertical supply arrangements, however, IP licences should remain exempt from the cartel provisions of the CCA (see Draft Recommendation 22).

Draft Recommendation 8 — Intellectual property exception

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

For further detail on intellectual property, see [Section 8.1](#).

2.6 PARALLEL IMPORTS

Parallel import restrictions are similar to other import restrictions (such as tariffs) in that they benefit local producers by shielding them from international competition. They are an implicit tax on Australian consumers and businesses.

The impact of changing technology and shifting consumer purchasing practices (such as purchasing books online) means that some of these restrictions are easily circumvented. However, the removal of remaining parallel import restrictions would promote competition and potentially deliver lower prices for many consumer goods.

Many of the concerns raised in submissions around relaxing parallel import restrictions, including concerns about consumer safety, counterfeit products and inadequate enforcement, could be addressed directly through regulation and information. The threat of parallel imports may also induce international suppliers to re-think their regional arrangements.

Relaxing parallel import restrictions is expected to deliver net benefits to the community, provided appropriate regulatory and compliance frameworks and consumer education programs are in place. Transitional arrangements should be considered to ensure that affected individuals and businesses are given adequate notice in advance.

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.

For further detail on parallel imports, see [Section 8.2](#).

2.7 PLANNING AND ZONING

Land is a key input to the production of goods and services and a source of amenity for consumers. Even small policy improvements in this area could yield large benefits. The Panel has a range of concerns regarding the planning and zoning rules that govern land use for commercial activities in Australia.

Among these concerns are:

- an overly-localised focus, with little regard to the promotion of competition;
- arrangements that explicitly or implicitly favour incumbent operators and create barriers to new entrants in local markets; and
- complex, time-consuming procedures that differ from one part of the country to another.

Without a clear shift away from a planning and zoning focus on specific residents or existing businesses, all other members of the community are likely to pay higher prices and have fewer choices into the future.

Regulations relating to planning and zoning often restrict competition and impede structural change. Such restrictions can be addressed by including competition principles among the objectives of the various state and territory laws dealing with planning and zoning to ensure that competition issues are always considered.

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.

For further detail on planning and zoning, see [Section 8.3](#).

2.8 REGULATORY RESTRICTIONS

The NCP reforms substantially reduced the amount of anti-competitive regulation. There was a concerted effort by governments to examine and reform regulation that restricted competition where those restrictions were not in the public interest.

However, the regulation review process, begun under the NCP, has flagged and there is a need for reinvigoration.

The Panel has identified the following priority areas for reform that are covered in other Draft Recommendations. Each area was originally identified by the NCP process. Subsequent reviews have also recommended the removal of restrictions in each case:

- taxi licences (Draft Recommendation 6);
- intellectual property (Draft Recommendations 7 and 8);
- parallel import restrictions (Draft Recommendation 9);
- planning and zoning rules (Draft Recommendation 10);
- restrictions on retail trading hours (Draft Recommendation 51); and
- pharmacy ownership and location rules (Draft Recommendation 52).

There are other examples of regulatory restrictions on competition raised in submissions including occupational licensing and/or other professional standards, product standards and licensing, broadcast media rules, liquor and gambling regulation, private health insurance regulation, agricultural marketing rules and air service restrictions.

Cumulatively, such restrictions can have a significant impact on the economy. Many sectors facing regulatory restrictions supply significant inputs to other business activities.

Maintaining a rigorous, transparent and independent assessment of whether regulations are in the public interest, with the onus on the party wishing to retain anti-competitive regulation, is important to ensure regulation serves the long-term interests of consumers.

Opportunities will also arise to examine regulations when reviews are undertaken for other purposes. For example, recently-announced Australian Government reviews in the communications portfolio should consider the impact of the current restrictions on competition in that sector.

Certain activities can be exempted from the operation of the competition laws under Part IV of the CCA (apart from the merger laws) by being authorised in Commonwealth, state or territory legislation (subsection 51(1) of the CCA).

The Panel believes that such jurisdictional exemptions for conduct that would normally contravene the competition laws should be examined 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.

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.

Agreements relating to the implementation of Australian Standards are exempt from the operation of competition laws.⁹ This exemption recognises that harmonisation through standards is generally thought to be a good thing, but that collaboration by industry in relation to standards could be considered anti-competitive.

Given that standards can raise barriers to entry, especially where they are incorporated into legislation and mandate particular technologies or systems rather than performance outcomes, it is appropriate that they too be subject to review.

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.

For further detail on regulatory restrictions, see [Chapter 8](#).

⁹ Paragraph 51(2)(c) of the *Competition and Consumer Act 2010*.

2.9 COMPETITIVE NEUTRALITY

There is overwhelming support from stakeholders for the principle of competitive neutrality and calls for Australian governments to re-commit to competitive neutrality policy. The Organisation for Economic Co-operation and Development (OECD) also recently stated that, among member nations, Australia has the most complete competitive neutrality framework, backed by separate implementation and complaint-handling mechanisms.

But competitive neutrality remains an area of concern for many stakeholders, including small businesses. The Review's Terms of Reference also direct it to consider the proper boundaries for government in economic activity.

The Panel considers that competitive neutrality policies should be reviewed and updated. Clearer guidelines should be provided on the application of competitive neutrality during the start-up stages of government businesses and the period of time over which start-up government businesses should earn a commercial rate of return. The tests used to identify significant business activities should also be reviewed.

There is also scope to improve the transparency of compliance with competitive neutrality policy by requiring government businesses to report publicly on compliance with policy and governments to respond publicly to the findings of complaint investigations.

Since each jurisdiction is able to adopt its own approach to competitive neutrality, there is an opportunity to compare jurisdictions to determine 'best practice' as a basis for updating policies and improving current arrangements.

Competitive neutrality policies benefit consumers in markets where both governments and other providers deliver services. This will be especially important in areas where competition policy has yet to reach, such as human services. In these areas getting the right competitive neutrality policy settings in place will be crucial to securing the benefits of a diverse range of innovative providers.

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.

For further detail on competitive neutrality, see [Chapter 11](#).

2.10 ELECTRICITY, GAS AND WATER

The Panel acknowledges significant progress in the reform of electricity, gas and water in Australia. However, reforms have not been finalised and the benefits are yet to be fully realised.

In electricity and gas, competition reforms have been a success but have slowed. The delay in applying the National Energy Retail Law by Victoria and Queensland without major derogations undermines the benefits of a national law. Continuing regulation of retail energy prices in jurisdictions other than South Australia, New South Wales (NSW) and Victoria perpetuates the distortion of price signals and compromises timely investment in energy infrastructure. The Panel notes that the Queensland Government has recently legislated to deregulate electricity prices in South East Queensland from 1 July 2015.

The Panel strongly supports moves towards the inclusion of the Northern Territory and Western Australia into the National Electricity Market, noting that no physical connection is required to do so.

The Panel notes calls for a more detailed review into competition in the gas market, echoing the proposal within the Eastern Australian Domestic Gas Study. The Panel strongly supports a detailed review of competition in the gas sector and encourages the Australian Government to commit to undertake such a review through the Energy White Paper.

Water reform has been slow. A more national approach to water reform may re-establish its momentum. An intergovernmental agreement founded on the assumption that a national framework is both achievable and desirable may clear some roadblocks. A consistent national framework may also assist in driving competition into the retailing of water and in creating more effective price signals.

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).

For further detail on electricity, gas and water, see [Section 9.1](#).

3 COMPETITION LAWS

3.1 SIMPLIFICATION

The Panel has asked the following questions in guiding its consideration of whether the CCA is fit for purpose:

- Does the law focus on enhancing consumer welfare over the long term?
- Does the law protect competition rather than individual competitors?
- Is the law as simple as it can be consistent with its purpose?
- Does the law strike the right balance between prohibiting anti-competitive conduct and allowing pro-competitive conduct?

The Panel supports the general form and structure of the CCA, that is:

- the law prohibits specific categories of anti-competitive conduct, with economy-wide application;
- only conduct that is anti-competitive in most circumstances is prohibited per se — other conduct is prohibited only if it has the purpose, effect or likely effect of substantially lessening competition;
- enforcement occurs through a public administrator and through private suit, and contraventions are adjudicated by the court; and
- there is a facility to seek exemption from the law in individual cases on public benefit grounds.

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.

However, the Panel considers that the competition law provisions of the CCA, including the provisions regulating the granting of exemptions, are unnecessarily complex.

Law that is complex imposes costs on the economy: direct costs are imposed by reason of the need for legal advice and prolonged legal disputation; and indirect costs are imposed by reason of business and regulatory uncertainty.

The competition law provisions of the CCA would benefit from simplification, while retaining their underlying policy intent.

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.

3.2 APPLICATION TO GOVERNMENT ACTIVITIES IN TRADE OR COMMERCE

As a consequence of the Hilmer Review, the CCA was extended to apply to the Crown, but only insofar as the Crown carried on a business, either directly or by an authority of the Crown.

There are many circumstances in which the Crown (whether as a department or an authority) undertakes commercial transactions but does not carry on a business. This is particularly the case in the area of procurement: whether for the delivery of large infrastructure projects or the regular requirements of the health or education systems.

Through commercial transactions entered into with market participants, the Crown (whether in right of the Commonwealth, state, territory or local governments) has the potential to harm competition. The Panel considers that the Hilmer reforms should be carried a step further and that the Crown should be subject to the competition law insofar as it undertakes activity 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.

3.3 MARKET DEFINITION

The Panel considers that the competition law provisions of the CCA are correctly focused on conduct that damages competition in markets in Australia and that the current definition of 'market' (being a market in Australia) is appropriate.

This reflects the object of the law to protect the welfare of Australians. There is no sound reason for Australian law to regulate conduct affecting competition in overseas markets.

That should not mean, though, that the CCA ignores the forces of competition that arise outside Australia but which affect Australian markets. Today, more than ever, Australian consumers are able to use the internet to browse for and purchase goods and services from overseas suppliers. While the objective of the CCA is to protect and promote competition in Australian markets, frequently the sources of competition in Australian markets are global.

The CCA has been framed to take account of all sources of competition that affect markets in Australia. The definition of the term ‘competition’ in the CCA is important. In the CCA, ‘competition’ is defined to include competition from imported goods and services. Nevertheless, given the importance of ensuring that global sources of competition are considered where relevant, the current definition of ‘competition’ in the CCA could be strengthened so that there can be no doubt that it includes competition from *potential* imports of goods and services, not just *actual* imports.

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.

3.4 EXTRA-TERRITORIAL REACH OF THE LAW

The Panel considers that the competition law provisions of the CCA ought to apply to firms engaging in conduct outside Australia if that conduct damages competition in markets in Australia. The application of the law in those circumstances ought not to depend on whether the firm is incorporated in, or carries on business within, Australia.

Private actions are also an important part of the competition law framework. The requirement for private parties to seek ministerial consent in connection with proceedings involving conduct that occurs outside Australia is an unnecessary roadblock to possible redress for harm suffered as a result of a breach of competition 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.

3.5 CARTELS

Cartel conduct between competitors is anti-competitive in most circumstances and should be prohibited per se. The Panel supports the intent of the cartel conduct prohibitions, including the combined criminal and civil sanctions that are imposed.

However, the Panel considers that there are significant deficiencies in the current framework of the cartel prohibitions, particularly having regard to the criminal sanctions that are imposed. In particular, the Panel considers that:

- the provisions are excessively complex, which undermines compliance and enforcement;
- the cartel provisions, consistent with Australia's competition laws generally, should be directed to cartel conduct that affects goods and services traded in markets in Australia;
- given the potential for criminal sanctions, the provisions ought to be confined to conduct involving firms that are actual competitors and not firms for whom competition is a mere possibility;
- joint ventures and similar forms of business collaboration should not be subject to cartel prohibitions and should only be unlawful if they substantially lessen competition; and
- similarly, trading restrictions that are imposed by one firm on another in connection with the supply or acquisition of goods or services (including IP licensing) should not be subject to cartel prohibitions, and should only be unlawful if they substantially lessen competition.

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 Panel also considers that the per se prohibition of exclusionary provisions, as defined in section 4D, is no longer necessary as, in practice, that conduct is materially the same as cartel conduct in the form of market sharing.

Accordingly, the Panel believes that the prohibition against exclusionary provisions should be removed from the CCA.

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).

For further detail on cartel conduct, see [Section 17.1](#).

3.6 ANTI-COMPETITIVE DISCLOSURE OF INFORMATION

The Panel considers that, in their current form, the prohibitions against ‘price signalling’ in the CCA do not strike the right balance in distinguishing between anti-competitive and pro-competitive conduct. Being confined in their operation to a single industry (banking), the current provisions are also inconsistent with the principle that the CCA should apply to all businesses generally.

The Panel considers that public price disclosure can help consumers make informed choices and is unlikely to raise significant competition concerns. Accordingly, the Panel believes there is no sound basis for prohibiting public price disclosure, either in the banking industry or more generally.¹⁰

Private price disclosure to a competitor will generally have more potential to harm competition as it may be used to facilitate collusion among competitors. However, there are business circumstances in which private disclosure is necessary or in the ordinary course of business, particularly in connection with joint ventures or similar types of business collaboration. For that reason, a per se prohibition has the potential to over-reach.

The Panel considers that anti-competitive price signalling does not need its own separate Division in the CCA; rather, price signalling can be addressed by extending section 45 to cover concerted practices that have the purpose, or would have or be likely to have the effect, of substantially lessening competition. A concerted practice is a regular practice undertaken by two or more firms. It would include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange.

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.

For further detail on anti-competitive disclosure of information, see [Section 17.2](#).

3.7 MISUSE OF MARKET POWER

The Panel believes that an effective unilateral anti-competitive conduct provision is essential to the proper functioning of Australia’s national competition policy framework, but considers that section 46 can be focused more clearly on the long-term interests of consumers and enhanced to restore its policy intent.

The Panel regards the threshold test of ‘substantial degree of power in a market’ as appropriate and well understood. In contrast, the central element of ‘taking advantage of market power’ is difficult to interpret and apply in practice.

¹⁰ The Panel notes that the prohibition on certain public disclosures also applies to disclosures of a corporation’s capacity or commercial strategy. The Draft Report does not deal with these matters separately, since the Panel considers that the same issues arise as in the case of public price disclosure.

Further, the focus of the prohibition on showing a purpose of damaging a competitor is inconsistent with the overriding policy objective of the CCA being to protect competition, not competitors. The Panel also considers that the supplementary prohibitions, which attempt to address concerns about predatory pricing,¹¹ do not advance the policy intent of section 46.

In general, all prohibitions should focus on protecting competition and not individual competitors; that is, business and trading conduct should be prohibited if it has the purpose, or would have or be likely to have the effect, of substantially lessening competition. That gives all firms, big and small, an opportunity to compete on merit (that is, based on the value to consumers of the competing products they offer).

While this is true of unilateral and multilateral conduct alike, the Panel recognises that a business might be deterred from undertaking a business strategy that enhances its competitiveness and creates durable consumer benefit for fear that, if the strategy is successful, it might be assessed as having the effect of substantially lessening competition.

To allay any such concern, the prohibition against unilateral anti-competitive conduct should be made subject to an exception for such business strategies or decisions.

The proposed reform to section 46 is intended to improve its clarity, force and effectiveness, so that it can be used to prevent unilateral conduct that substantially harms competition and that has no economic justification.

¹¹ See subsections 46(1AAA) and (1AA).

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.

For further detail on misuse of market power, see [Section 16.1](#).

3.8 UNCONSCIONABLE CONDUCT

The business community as well as the wider community expects business to be conducted according to a minimum standard of fair dealing. There are sound economic and social reasons for enshrining minimum standards of fair dealing within the law.

The Panel has heard concerns expressed by small businesses and suppliers in respect of behaviours of larger businesses in their supply chains. The business unconscionable conduct provisions were introduced specifically to address these concerns.

The Panel finds there is not a strong case that the current unconscionable conduct provisions are not working as intended to meet their policy goals.

Enforcing business-to-business unconscionable conduct provisions is an important function of the ACCC and the Panel notes the Commission’s current actions in the supermarket sector alleging unconscionable conduct in dealings with suppliers.

Active and ongoing review of these provisions should occur as matters progress through the courts to ensure the provisions meet their policy goals. If deficiencies become evident, they should be promptly remedied.

For further detail on unconscionable conduct, see [Section 16.3](#).

3.9 PRICE DISCRIMINATION

The Panel recognises that some small businesses and consumers have concerns about the impacts of price discrimination. However, the former prohibition on price discrimination (contained in the repealed section 49) was found to be likely to result in price inflexibility, which would negatively affect consumer welfare.

In relation to international price discrimination, the Panel considers there would be significant implementation difficulties associated with any attempt to prohibit international price discrimination. A prohibition on international price discrimination could lead to significant negative consequences, ultimately limiting consumer choice. The Panel favours encouraging the development and use of market-based mechanisms to put downward pressure on prices.

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.

For further detail on price discrimination, see [Section 16.2](#).

3.10 VERTICAL RESTRICTIONS (OTHER THAN RESALE PRICE MAINTENANCE)

As a general principle, the CCA should not interfere with trading conditions agreed between buyers and sellers in connection with the acquisition and supply of goods and services unless those conditions have the purpose, or would have or be likely to have the effect, of substantially lessening competition.

Consistent with that principle, the Panel sees no need for third-line forcing to be singled out from other forms of vertical trading conditions and prohibited per se. As notifications to the ACCC demonstrate, third-line forcing is a common business practice and very infrequently has anti-competitive effects.

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 Panel agrees with the view expressed in many submissions that section 47 is unnecessarily complex and therefore difficult for business to understand and apply. The section focuses attention on particular forms of vertical restraints and directs attention away from the central issue: whether

the restriction is anti-competitive. Vertical restraints that are not included in section 47 are nevertheless subject to assessment under section 45, applying the same competition test.

It may be possible to leave vertical restrictions to be addressed by section 45 alone. However, section 45 does not address conduct consisting of a refusal to supply or acquire goods or services for the reason that a buyer or seller will not agree to a particular anti-competitive trading condition.

Therefore, the Panel sees merit in revising section 47 to simplify its language, while ensuring it continues to address both the imposition of anti-competitive trading conditions and a refusal to trade because a person will not agree to an anti-competitive trading condition.

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.

For further detail on vertical restrictions (other than resale price maintenance), see [Section 17.3](#).

3.11 RESALE PRICE MAINTENANCE

The appropriateness of a per se prohibition of resale price maintenance (RPM) has been debated for many years, both in Australia and overseas. When the per se prohibition was enacted in Australia in the mid-1970s, it reflected the law in many comparable jurisdictions. However, over the last 20 years some countries — particularly the US and Canada — have moved away from the per se prohibition of resale price maintenance. Other countries, including Europe and New Zealand, have retained the per se prohibition.

The Panel considers that there is not a sufficient case at this time for changing the prohibition of RPM from a per se prohibition to a competition-based test. It would be appropriate, though, to allow business to seek exemption from the prohibition more easily. This could be achieved through

allowing RPM to be assessed through the notification process, which is quicker and less expensive for businesses than authorisation. This change would also have the advantage of allowing the ACCC to assess RPM trading strategies more frequently, and thereby provide better evidence as to the competitive effects of RPM in Australia.

A general tenet of competition law is that companies within a corporate group are treated as a single economic entity and are not considered to be competitors. For that reason, the prohibitions in sections 45 and 47 do not apply to trading arrangements entered into between related companies.¹² A similar principle ought to apply to RPM. Currently, there is no exemption for RPM between a manufacturer and a retailer that is a subsidiary of the manufacturer.

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.

For further detail on resale price maintenance, see [Section 17.4](#).

3.12 MERGERS

The Panel considers that the current prohibition of mergers that are likely to substantially lessen competition in Australian markets is appropriate.

Concerns have been raised that Australia's merger law does not give proper consideration to global markets within which many businesses compete. Some submissions argue that the term 'market' in the CCA is defined as a market 'in Australia' and that causes the competition analysis to be narrowly focused. As noted above ([Section 3.3](#)), while the Panel considers that the CCA correctly focuses upon conduct that damages competition in markets in Australia (to protect Australian consumers), the CCA has been framed to take account of all sources of competition that affect Australian markets. Recommendation 20 is intended to strengthen that principle.

Some stakeholders have also questioned whether the ACCC's application of the CCA is constraining the ability of Australian businesses to achieve efficient scale in order to become globally competitive. To compete effectively, businesses must continuously pursue economic efficiency. In many industries efficiency requires scale. Businesses may pursue mergers in order to achieve efficient scale to compete more effectively in global markets.

In many markets in Australia achieving efficient scale will not substantially lessen competition because of the constraining influence of imports. Such mergers are allowed under the CCA. However, in some markets, the opposite will be the case: the influence of imports may be weak and unable to constrain the resulting market power of the merged businesses. When that occurs, there are conflicting interests: the gain to the businesses that wish to merge through achieving greater efficiency against the potential detriment to Australian consumers due to the reduction in competition.

¹² Subsections 45(8) and 47(12) of the *Competition and Consumer Act 2010*.

The Panel considers that the CCA has sufficient flexibility to allow such issues to be adjudicated and determined by the ACCC or the Australian Competition Tribunal. The merger authorisation process applies a public benefit test that covers all potential benefits and detriments, including economies of scale. There may be occasions where 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.

However, the Panel considers that improvements can be made to the administration of the merger law.

There is widespread support for an informal review process. However, strong concerns have been expressed about the timeliness and transparency of the process.

The Panel considers that it is not sensible to attempt to regulate an informal process which, by definition, operates outside any formal legal framework. The flexibility of the informal process is widely recognised as being beneficial and should not be interfered with. However, the public interest is served by timely merger decisions and by transparency in the public administration of the merger law. The Panel considers 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 Panel considers that concerns about the timeliness and transparency of merger review can also be addressed through a more streamlined formal exemption process. There is excessive complexity and prescription associated with the current formal exemption processes, being a formal clearance application to the ACCC and an alternative authorisation application to the Australian Competition Tribunal. The complexity and prescription have deterred the use of these mechanisms and fuelled complaints about the application of the informal process to large mergers that involve contested facts and issues.

The Panel also considers that, if a more streamlined formal exemption process were introduced, it would be preferable for the ACCC to be the first instance decision-maker, rather than the Australian Competition Tribunal. The ACCC, having regard to its composition and powers, is better suited to investigation and first instance decision making in the administration of the competition law, including mergers. In comparison, the Australian Competition Tribunal, having regard to its constitution and powers, is better suited to an appellate or review role.

Creeping acquisitions

A legitimate question arises regarding whether, in assessing the likely effect of a proposed merger, the merger provisions of the CCA should also take account of the aggregate effect of the corporation's previous acquisitions within, for example, the previous three years. The complicating factor is that market conditions may have altered materially over the period chosen. Such a change would impose additional costs associated with merger review. On balance, in the absence of evidence of harmful acquisitions proceeding because of a gap in the law on creeping acquisitions, the Panel does not consider that the case for change has been made.

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.

For further detail on mergers, see [Chapter 15](#).

3.13 EMPLOYMENT-RELATED MATTERS

The negotiation of employment terms and conditions (remuneration, conditions of employment, hours of work or working conditions of employees) has always been excluded from most of the competition law provisions of the CCA by paragraph 51(2)(a). The reason for that exclusion is that the negotiation and determination of employment terms and conditions is governed by a separate regulatory regime, currently contained in the *Fair Work Act 2009*. The policy rationale is that labour markets are not in all respects comparable to other product or service markets. As a general principle, the Panel agrees with that view.

However, there are two categories of employment-related conduct that are not within that general exclusion:

- secondary boycotts, which are prohibited by sections 45D, 45DA and 45DB; and
- trading restrictions in industrial agreements, which are prohibited by sections 45E and 45EA.

Secondary boycotts

Prohibitions on secondary boycotts have been a central feature of the scheme of the CCA since its early years. Secondary boycott prohibitions, with effective enforcement capability, have a significant deterrent effect on behaviour that would otherwise compromise the capacity of businesses to provide goods and services in a competitive market.

The Panel considers that prohibitions on secondary boycotts of the CCA serve the public interest and a sufficient case has not been made for changes to those provisions.

There is a strong perception by organisations representing business, especially in building, construction and mining, that there is insufficient public enforcement of the secondary boycott provisions. Timely and effective public enforcement serves as a deterrent to boycott activity, and needs to exist both in regulatory culture and capability. This deterrent effect contributes to a lower incidence of secondary boycott activity and should be taken into account by the ACCC in exercising its enforcement powers.

Where legislation confers a comparable enforcement jurisdiction on a specialist regulator in respect of secondary boycott laws, such as has occurred in the building and construction industry, it would be appropriate for the ACCC to establish protocols for enforcement and investigation. There would also be value in the ACCC including in its annual report the number of complaints made to it in respect of secondary boycott matters and the number of such matters investigated and resolved each financial year.

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.

Currently, the Federal Court has exclusive jurisdiction in respect of the prohibitions in sections 45D, 45DA, 45DB, 45E and 45EA (subsection 4(4) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth)). A contravention of these sections may arise in connection with other common law disputes between employers and employee organisations. Such common law disputes can be, and often are, determined within State courts. It is not apparent that there is a particular reason for the Federal Court to have exclusive jurisdiction over disputes arising under these sections, particularly when state and territory courts have jurisdiction in respect of common law actions that often raise similar issues.

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.

A number of submissions raised the issue of the environmental and consumer exception to the secondary boycott prohibition. Consumer and environmental organisations argued for retention (or expansion) of the exception, while industry groups and others argued for its removal.

During consultations undertaken by the Panel, it appeared that the primary concern expressed by industry representatives is that environmental groups may damage a supplier in a market through a public campaign targeting the supplier that may be based on false or misleading information.

A question might arise whether a public campaign undertaken by an environmental or consumer organisation against a trading business, advocating that customers ought not purchase products from the business, should be subject to the laws prohibiting false, misleading and deceptive conduct. Presently, those laws only apply insofar as a person is engaged in trade or commerce.

However, expanding the laws concerning false, misleading or deceptive conduct to organisations involved in public advocacy campaigns directed at trading businesses raises complex issues. Many public advocacy campaigns directed at trading businesses concern health issues (e.g. tobacco, alcohol and fast food) or social issues (e.g. gambling). Consideration of the expansion of those laws in that context is beyond the Terms of Reference of the Review.

On the other hand, where an environmental or consumer group takes action that directly impedes the lawful commercial activity of others (as distinct from merely exercising free speech), a question arises whether that activity should be encompassed by the secondary boycott prohibition. **The Panel invites further comment on this issue.**

Trading Restrictions in Industrial Agreements

Section 45E of the CCA prohibits a person (an employer) from making a contract, arrangement or understanding with an organisation of employees that contains a provision restricting the freedom of the employer to supply goods or services to, or acquire goods or services from, another person. Section 45EA prohibits a person from giving effect to such a contract, arrangement or understanding.

The Panel considers that sections 45E and 45EA are important provisions that protect trading freedoms.

It has become apparent that there is a possible conflict between the intended operation of sections 45E and 45EA and the regulation of awards and enterprise agreements under the *Fair Work Act 2009*. This issue has been brought into focus by the 2012 decision of the Full Court of the Federal Court, *Australian Industry Group v Fair Work Australia*. The case considered whether it was lawful for the Fair Work Commission to approve an enterprise agreement under the Fair Work Act which contained a provision requiring the employer to only engage or deal with those contractors who applied wages and conditions no less favourable than those provided for in the agreement for its employees. The Full Court concluded that it was lawful for the Fair Work Commission to approve the agreement, and that the enterprise agreement did not involve any contravention of section 45E because:

- it was not an agreement with an organisation of employees in the sense required by section 45E; and
- as the agreement had statutory force, it was not a contract, arrangement or understanding within the meaning of section 45E.

It appears that there may be a conflict between the purposes of the CCA, as reflected in sections 45E and 45EA, and industrial conduct that is permitted under the Fair Work Act. The apparent purpose of sections 51(2), 45E and 45EA of the CCA is to exempt from the CCA contracts governing the conditions of employment of employees, while prohibiting contracts between employers and employee organisations that otherwise hinder the trading freedom of the employer (in respect of the supply and acquisition of goods and services, which would include contractors). However, it appears to be lawful under the Fair Work Act to make awards and register enterprise agreements that place restrictions on the freedom of employers to engage contractors or source certain goods or non-labour services.

It is desirable that the apparent conflict be resolved. The Panel favours competition over restrictions and believes that businesses should generally be free to supply and acquire goods and services, including contract labour, if they choose.

Further, sections 45E and 45EA are presently framed in narrow terms. The prohibitions only apply to restrictions affecting persons with whom the employer 'has been accustomed, or is under an obligation' to deal. As framed, the prohibitions would not apply to a restriction in relation to any contractor with whom the employer had not previously dealt. The policy rationale for limiting the scope of sections 45E and 45EA in those terms is not apparent to the Panel. The Panel considers that that the limitations in sections 45E and 45EA should be removed.

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.**

3.14 EXEMPTION PROCESSES

The exemption processes in the CCA, authorisation and notification, are important. They recognise that, in certain circumstances, particular conduct may not harm competition or may give rise to public benefits that outweigh any competitive harm.

Like much of the CCA, the authorisation and notification procedures have become overly complex, which imposes costs on business. Wherever possible, it is desirable to remove unnecessary complexity.

Significant steps can be taken to simplify the authorisation and notification procedures. First, in respect of authorisation, it should be permissible to apply for authorisation of a business arrangement through a single application and without regard to the specific provisions of the CCA that might be contravened by the proposed conduct. Second, for both authorisation and notification, the ACCC should be empowered to grant the 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. Each of those changes would assist in focusing the exemption process on the issues of substance and away from technicalities.

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 Panel also considers that the ACCC should be empowered to grant a block exemption in respect of specified conduct in particular market conditions. This would enable the ACCC to create safe harbours for businesses where they engage in conduct that is unlikely to lead to a substantial lessening of competition and avoids the time and resources required to seek an authorisation or notification.

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.

For further detail on authorisation, notification and block exemption, see [Chapter 19](#), and Draft Recommendation 50 in relation to collective bargaining notification.

3.15 ENFORCEMENT AND REMEDIES

The Panel supports the enforcement regime under the CCA, which confers both public and private enforcement rights in respect of the competition laws.

In relation to public enforcement by the ACCC, there appears to be general approval of the severity of the sanctions for contravention of the competition laws. However, the Panel agrees with the view of the ACCC that the current sanction for a corporation failing to comply with section 155 of the CCA is inadequate. **Further comment is invited on whether the current sanctions for contravention of sections 45D, 45DB, 45E and 45EA are adequate.**

Compulsory evidence gathering powers under section 155 of the CCA are important to the ACCC's ability to enforce the CCA, but can impose a regulatory burden on recipients of compulsory notices. The Panel acknowledges concerns raised in submissions about the costs of compliance with section 155 notices issued by the ACCC. This is in part due to the increased use of technology leading to more electronic material being retained by businesses that may need to be searched in order to comply with a notice.

Means are available to reduce the regulatory burden associated with section 155 notices. First, the ACCC should accept a responsibility to frame section 155 notices in the narrowest form possible, consistent with the scope of the matter being investigated. Second, in complying with a section 155 notice, the recipient should be required 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. That requirement could be introduced into the CCA or recognised in a guideline issued by the ACCC.

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.

Private enforcement of competition laws is an important right. However, there are many regulatory and practical impediments to the exercise of those rights. It is important to find ways to reduce those impediments.

Section 83 of the CCA is intended to facilitate private actions by enabling findings of fact made against a corporation in one proceeding (typically a proceeding brought by the ACCC) to be prima facie evidence against the corporation in another proceeding (typically a proceeding brought by a private litigant). Many ACCC proceedings are resolved by a corporation making admissions of

facts that establish the contravention, but it is uncertain whether section 83 applies to admissions. The effectiveness of section 83 as a means of reducing the costs of private actions would be enhanced if the section were amended to apply to admissions of fact made by a corporation in another proceeding, in addition to findings of facts.

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.

In respect of contravening conduct that occurs overseas, a foreign corporation should be subject to Australian competition law regardless of whether it carries on business in Australia. Given that competition laws and policies are now commonplace around the world, there is no reason why private parties should have to seek ministerial consent before launching a proceeding that involves overseas conduct. This is addressed in Draft Recommendation 21.

The Panel considers that small business needs greater assurance that competition complaints can be dealt with. Recommendation 49 deals with small business access to remedies.

For further detail on enforcement and remedies, see [Chapter 20](#).

3.16 NATIONAL ACCESS REGIME

The National Access Regime was originally established to enable third-party access to identified bottleneck infrastructure where it was apparent that economic efficiency would be enhanced by promoting competition in markets that were dependent upon access to that infrastructure.

The bottleneck infrastructure cited by the Hilmer Review is now subject to a range of access regimes. Those regimes appear to be achieving the original policy goals identified by the Hilmer Review. Today, Part IIIA has only a limited role in the regulation of that bottleneck infrastructure.

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

The recent Productivity Commission (PC) inquiry concluded that the Regime is likely to generate net benefits to the community, but that its scope should be confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third-party access. The Panel agrees that, if the Regime is to be retained, the scope of the Regime should be confined because of the potential costs of regulation.

In its report the PC recommended the following changes to the declaration criteria in Part IIIA:

- that criterion (a) will be satisfied if access to an infrastructure service on reasonable terms and conditions through declaration (rather than access per se) would promote a material increase in competition in a dependent market;
- that criterion (b) will be satisfied where total foreseeable market demand for the infrastructure service over the declaration period could be met at least cost by the facility;

- as an alternative recommendation, that criterion (b) will be satisfied where it would be uneconomical for anyone (other than the service provider) to develop another facility to provide the service; and
- that criterion (f) will be satisfied if access on reasonable terms and conditions through declaration would promote the public interest.

The Panel supports the PC's recommendations in relation to criterion (a) and (f) and the alternative recommendation in respect of criterion (b).

The alternative recommendation for criterion (b) essentially maintains it in its current form, while clarifying that duplication of the facility by the owner of the existing facility is not a relevant consideration. As recently interpreted by the High Court in the Pilbara rail access case, the current form of criterion (b) asks a practical question whether it would be profitable for another facility to be developed — if it would, the facility is not a bottleneck. The Panel considers that this test can be more easily applied than the alternative test proposed by the PC, which would require predictions of total market demand over the proposed period of declaration and an assessment of production costs rising from third-party access to the facility.

Decisions to declare a service under Part IIIA, or determine terms and conditions of access, are very significant economic decisions where the costs of getting the decision wrong are likely to be high. The Panel favours empowering the Australian Competition Tribunal to undertake merits review of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, while maintaining suitable statutory time limits for the review process.

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.**

4 INSTITUTIONS AND GOVERNANCE

4.1 A NATIONAL COMPETITION BODY

Several lessons may be drawn from Australia's experience of implementing NCP:

- all jurisdictions need to commit to the policy and its implementation;
- oversight of progress should be independent and transparent to 'hold governments to account'; and
- the benefits of reform need to be argued and where possible measured.

The establishment of governance arrangements to implement reforms must be undertaken in the context of Australia's federal structure. Many of the competition policy reforms outlined in this Draft Report are overseen by state and territory governments.

All Australian governments must have confidence in the governance arrangements for a reinvigorated round of competition policy reform to succeed.

The Panel believes that reinvigorating competition policy requires leadership from an institution specifically constituted for the purpose. Leadership encompasses advocacy for competition policy, driving implementation of the decisions made and conducting independent, transparent reviews of progress.

The National Competition Council (NCC), which oversaw the NCP, now has a considerably diminished role. It has been put to the Panel that the NCC no longer has the capacity to provide leadership in this domain. Draft Recommendation 46 proposes that the remaining functions of the NCC, associated with the National Access Regime, be transferred to a new national access and pricing regulator. The NCC could then be dissolved.

The PC is the only existing body with the necessary credibility and expertise to undertake this function, given its role as an independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. But the PC's work is driven by the Commonwealth and, if it were to have the competition policy function as well, its legislation and governance would need significant change.

The Australian Energy Market Commission (AEMC) is an example of an independent, national organisation, operating in an area of state government responsibility that has a governance structure supported by both the Commonwealth and the States and Territories.

The Panel considers that a new national competition body — the Australian Council for Competition Policy (ACCP) — should be established with a mandate to provide leadership and drive implementation of the evolving competition policy agenda.

The ACCP cannot be accountable to just one jurisdiction but must be accountable to them all. This suggests an intergovernmental agreement and oversight by a specific Ministerial council. Given the economy-wide nature of competition issues, the Panel recommends this responsibility be assigned to Treasurers.

The intergovernmental agreement would set out the functions of the ACCP and the process of appointing its members. While there should be scope for members to be nominated and appointed

by state and territory governments, their role would not be to represent jurisdictional interests, but rather to view competition policy from a national perspective.

The secretariat should be independent of any one government and there may be merit in rotating the right to nominate the Chair.

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.

4.2 FUNCTIONS OF THE NATIONAL BODY

The proposed ACCP should have a broad role. In particular, the ACCP should advise governments on how to adapt competition policy to changing circumstances facing consumers and business. The ACCP should therefore develop an understanding of the state of competition across the Australian economy and report on it regularly.

There needs to be a clear advocate for competition policy in Australia's institutional structure. Too often this has fallen by default to the ACCC, which can be an uneasy role for a regulator to fulfil. The Panel sees advocacy for competition as a central function of the ACCP.

The ACCP should also act as an independent assessor of progress on reform, holding governments at all levels to account. Priority areas for reform identified in this Draft Report could form an initial program of work for the ACCP.

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 effectiveness of the ACCP could be strengthened by assigning it a market studies function which would create a consistent, effective and independent way for governments to seek advice and recommendations on recurrent and emerging competition policy issues.

Given the potential for conflicts between the ACCC's investigation and enforcement responsibilities and the scope of a market studies function, the Panel believes it is appropriate to vest such a power with the ACCP rather than the ACCC.

The market studies function would have a competition policy focus and complement but not duplicate the work of other bodies such as the PC. For example, States and Territories could request the ACCP to undertake market studies of the provision of human services in their jurisdiction as part of implementing the principles of choice and diversity of providers set out in Draft Recommendation 2.

The use of mandatory information-gathering powers can help to ensure that a market study builds an accurate picture of the market but, on the other hand, may create an adversarial environment where participants show reluctance to cooperate and share information with the market studies body. The approach adopted by the PC — inviting interested parties to comment on issues and undertaking independent research — appears to achieve desired outcomes without the need to invoke mandatory legal powers.

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 NCP recognised that there were different circumstances across the jurisdictions that could lead to different approaches to either the scope or timing of reform. The Panel, in agreeing with this approach, considers that the ACCP should be able to receive referrals from jurisdictions collectively as well as individually.

This would ensure that each jurisdiction has the freedom to identify its own concerns, while allowing the ACCP the flexibility to consider whether those concerns have broader or cross-jurisdictional impacts.

In addition, the Panel considers that all market participants, including small business and regulators, should have the opportunity to raise issues they would like to see become the subject of market studies. Funding could be set aside in the ACCP budget to undertake studies in addition to those referred by the Ministerial Council. The decision would rest with the ACCP as to which of these outside requests it might take up, and it would not be obliged to agree to all requests.

The Ministerial Council would need to oversee priorities and resourcing so that the ACCP has the capacity to focus on the priorities of governments and market participants.

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.

For further detail on market studies, see [Section 22.2](#).

The competition policy environment is not static. New technologies can raise new issues and resolve older ones. The Panel considers that governments would benefit from an annual analysis of developments in the competition policy environment.

This would include more detail on the specific priority issues or markets that should receive greater attention, and could include recommending review mechanisms, particularly for more heavily regulated markets, to ensure more burdensome or intrusive regulatory frameworks remain fit for purpose.

Commenting on best practice and international developments would provide opportunities for governments to consider whether the outcomes of different approaches to reform in other jurisdictions apply within their own.

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.

4.3 COMPETITION PAYMENTS

There is widespread support for competition payments that were made by the Commonwealth to state and territory governments to recognise that the Commonwealth received a disproportionate share of the increased revenue flowing from the NCP reforms.

While the quantum of the payments was not large compared to total state and territory revenues, the Panel consistently heard that their existence provided an additional argument that could be used

to support reform. The Panel was also told, however, that their effectiveness was limited by not being applied to the Commonwealth nor consistently to local government.

On the other hand, as noted by the PC, a focus on payments and penalties ‘has from time to time almost certainly misled the community as to the main rationale for reform ...’¹³ This appears to underlie the observation made by many stakeholders that progress with competition policy reform waned once competition payments ceased.

That said, there is a case to be made that the benefits of reform, including any fiscal dividend, should be commensurate with the reform effort made. The differing revenue bases of the Commonwealth and the States and Territories mean that revenue may not flow in proportion to reform effort.

The PC 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. The ACCP could then assess whether reforms had been undertaken to a sufficient standard to warrant compensation payments. That assessment would be based on actual implementation of reforms, not on the basis of undertaking reviews or other processes.

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.

For further detail on competition payments, see [Section 22.2](#).

4.4 COMPETITION AND CONSUMER REGULATOR

The Panel accepts that enforcement of competition policy and consumer protection matters complement each other, and recommends they continue to be administered by one body.

Having a single body:

- fosters a pro-market culture;
- facilitates co-ordination and depth across the functions;
- provides a source of consistent information to business and consumers about their rights; and
- provides administrative savings and skills enhancement through the pooling of information, skills and expertise.

A single body also ensures that the issues of small business are not overlooked, as could be the case if the competition and consumer functions were separated into different bodies.

13 Productivity Commission 2005, *Review of National Competition Policy Reforms*, page 152.

However, the Panel notes that tensions can also arise between the two functions; so it is important that the ACCC continue to maintain an appropriate balance between its competition-related regulatory tasks and its role in protecting consumers.

Draft Recommendation 45 — ACCC functions

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

4.5 ACCESS AND PRICING REGULATOR

The Panel accepts that there are synergies among the functions of competition, consumer protection and economic regulation that can assist the ACCC perform its functions and allow it to develop both wide and deep skills in understanding the operation of markets.

However, on balance, the Panel sees benefit in separating the access and pricing regulatory functions from the other functions of the ACCC. The access and pricing functions include access arbitration functions under the National Access Regime, declaration and access arbitration functions under the telecommunications access regime in Part XIC of the CCA and price monitoring functions under the Water Act 2007. The functions are sufficiently distinct in the type of analysis required and the nature of the relationship with industry, as compared with the competition and consumer functions.

The Panel notes strong support, especially in consultation with state governments, for the functions of the Australian Energy Regulator (AER) to be separated out. The Panel also notes concerns expressed in submissions and consultations that an industry-specific regulator might be susceptible to ‘capture’ by the regulated industry.

The proposed body would also administer the National Access Regime and take on the NCC’s functions under the National Gas Law, which would allow the NCC to be dissolved. This would result in the access and pricing regulator undertaking both the declaration function under the National Access Regime and the current ACCC role in arbitrating the terms and conditions where a facility is declared, but where terms and conditions are not able to be commercially negotiated.

The Panel does not foresee any conflict in a single regulator performing both functions and anticipates that there may be benefits. The Panel notes that, under the current telecommunications access regime (in Part XIC of the CCA), the ACCC currently performs both the declaration and arbitration functions.

The regulator could, over time, assume responsibility for other functions if and when they were elevated into a national framework. One function that could be transferred from States and Territories is national regulation of urban and rural water should a national framework be agreed.

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.

4.6 ACCC GOVERNANCE

The ACCC is established under the CCA as a statutory corporation. It is governed by a chairperson and other persons appointed as members of the Commission (usually called commissioners). Decisions are made by the chairperson and commissioners meeting together (or as a division of the Commission), save where a power has been delegated to a member of the Commission. The Commission is assisted by its staff. In practice, the chairperson and commissioners are appointed on a full-time basis; in other words, they perform an executive role.

The Panel considers that the ACCC is a well-regarded and effective body. Recognising the fundamental role that ‘checks and balances’ play in governance structures, the Panel considers that governance of the ACCC would benefit from input from individuals who do not have responsibility for its day-to-day operations. This would bring an ‘outsider’s view’ of policy and decision-making, and provide an opportunity to bring business, consumer and academic perspectives to bear.

The Panel has contemplated two options to introduce this diversity of views into the decision-making of the ACCC.

The first is to replace the current Commission with a Board, comprising a number of members akin to the current commissioners, who would work full-time in the operations of the ACCC, and a number of independent non-executive members with business, consumer and academic expertise, who would not be involved in the day-to-day functions of the ACCC. This option would strengthen accountability of the ACCC to the broader community as represented by the non-executive members of the Board.

The Panel has no strong view on whether the Board should be chaired by an executive or non-executive member.

An alternative means of adding to the diversity of views may be through retaining the current Commission structure but adding an Advisory Board without decision-making powers. The Advisory Board would comprise independent non-executive directors with business, consumer and academic expertise and would advise the Commission on operational and administrative policies. The Advisory Board would be chaired by the Chair of the Commission, with other commissioners also potentially serving as members.

The Panel considers that, whichever option may be adopted, a fundamental requirement is the appointment of non-executive members who would not have other roles in the ACCC or its committees and who would be independent of the day-to-day operations of the agency.

The ACCC could also report regularly to a broadly-based committee of the Parliament, such as the House of Representatives Standing Committee on Economics, to build profile and credibility for the agency as well as to subject it to additional accountability to the Parliament.

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 ACCC's use of the media has been criticised in submissions to the Panel as undermining the perceived impartiality of the agency in undertaking enforcement action. Advocating for competition policy would become the responsibility of the new ACCP, if established, but the ACCC would continue to communicate with the public through the media, including explaining enforcement priorities, educating business about compliance, and publishing enforcement outcomes.

The Panel believes that the ACCC should establish, publish and report against a Media Code of Conduct. This should counter the perception of partiality on the part of the ACCC, especially in enforcement actions.

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.

5 SMALL BUSINESS

Introduction

Small business makes a vital contribution to Australia's economy. The Panel has been particularly mindful of the concerns and interests of small business in the context of the Review.

During the course of consultations, the Panel met in forums with over 150 small businesses. These meetings supplemented the written submissions made to the Review.

The issues raised in forums and submissions were broad-ranging, including unequal bargaining power in dealing with larger businesses (including concerns about collective bargaining); the compliance burden of regulation; and difficulties in competing with (local) government-run enterprises, particularly where government is also the rule-maker.

This Draft Report contains a number of recommendations that address these and other concerns of small business.

The Panel has proposed changes to the 'misuse of market power' provisions of the CCA at Draft Recommendation 25, and set out its views on the unconscionable conduct provisions in [Section 16.3](#). We have also considered other issues affecting small business, such as standards, licensing, planning and zoning and competitive neutrality elsewhere in this Draft Report.

In this chapter we consider access to remedies, collective bargaining and industry codes.

Concern was also expressed that, for various reasons including resource priorities, the ACCC is unable to enforce the law and that small businesses either lack the time and financial resources to take action themselves or are concerned about the impact this might have on their ongoing business relationships.

5.1 ACCESS TO REMEDIES

The Panel notes the PC's review of Access to Justice Arrangements (which has been provided to the Australian Government but not yet released), the Small Business and Family Enterprise Ombudsman that is in the process of being established, and the current proposal to extend unfair contract terms to small business contracts.

However, the Panel considers that small businesses need greater assurance that competition complaints can be dealt with. There are significant practical difficulties in small business exercising rights of private enforcement. Understandably, the ACCC is not able to take proceedings in respect of all complaints that are brought to it. It is important, though, that the ACCC places some priority upon its response to small business complaints concerning competition laws.

If the ACCC determines that it is unable to pursue a particular complaint on behalf of a small business, it is important that the ACCC communicates clearly and promptly its reasons for not acting and directs the business to available dispute resolution procedures.

Small business would be assisted by an effective dispute resolution system in respect of competition law issues. Such a system would support the operation and effectiveness of competitive markets, which in turn foster a diversity of businesses that provide consumer choice. While some small

business dispute resolution services exist at the state, territory and Commonwealth levels, it is clear small business feels that laws are difficult to enforce.

The ACCC should take a more active role in connecting small business with dispute resolution schemes, where the ACCC considers a complaint has merit but is not a priority for public enforcement. The ACCC should also test the law on a regular basis to assure small business that the law is being enforced.

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

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.

5.2 COLLECTIVE BARGAINING

There is broad support for the exemption process for collective bargaining by small business which is designed to recognise unequal bargaining power between parties to a business transaction. The process of exemption through notification should be capable of addressing a number of the issues raised by small business in their dealings with big business.

However, the provisions are not being used as frequently as they might be. Various improvements could be made, including increasing the flexibility of collective bargaining and improving the framework for collective boycott activities. For example, 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.

Raising awareness of these provisions, including but not limited to raising awareness of co-operatives, will promote their use and potentially strengthen the bargaining position of small businesses in dealing with large businesses.

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.

5.3 INDUSTRY CODES

Codes of conduct play an important role under the CCA by providing for a flexible regulatory framework to set norms of behaviour. The operation of codes of conduct complements the provisions of the CCA and are generally applied to relationships between businesses within a particular industry. Codes also provide a mechanism to implement industry specific dispute resolution frameworks.

For further detail on industry codes, see [Section 16.4](#).

5.4 COMPETITIVE NEUTRALITY

For many small businesses, competitive neutrality is a persistent area of concern. Governments compete with small businesses in a variety of markets and if they have an undue advantage, this can result in them having lower costs and therefore able to charge lower prices than private sector competitors.

The Panel considers that transparency of current competitive neutrality arrangements should be improved and obligations on governments not to breach competitive neutrality principles be strengthened. The Panel has made three draft recommendations in this regard (see Draft Recommendations 13, 14 and 15).

For further detail on competitive neutrality see [Chapter 11](#).

5.5 REGULATORY RESTRICTIONS

The ability of small businesses to compete will also be enhanced by a number of the Panel's draft recommendations to remove regulatory restrictions.

In particular, the Panel notes that draft recommendations concerning planning and zoning and a review of regulatory restrictions (including standards) will assist small business if implemented (see Draft Recommendations 10, 11 and 12).

For further detail on regulatory restrictions, see [Chapter 8](#).

6 RETAIL MARKETS

Introduction

Competition in retail markets has been an important focus for submissions and the Review. This includes issues relating to how competition is operating in grocery and fuel retailing, regulations on planning, zoning and trading hours, and specific regulations like those affecting pharmacy and liquor retailing.

Some of these issues are dealt with elsewhere in this Draft Report; there is a separate recommendation on planning and zoning (Draft Recommendation 10), while retail liquor licensing should be prioritised as part of a new review of regulatory restrictions proposed at Draft Recommendation 11. No specific recommendations have been made in relation to fuel retailing, although a number of recommendations are relevant to submissions made in that context.

6.1 RETAIL TRADING HOURS

Trading hours have been progressively deregulated by state and territory governments over recent years. This has widened choices for consumers. Yet consumers have continued to demand greater diversity in how and when they shop, as is evident in the rapid take-up of online shopping.

The growing use of the internet for retail purchases is undermining the original intent of restrictions on retail trading hours, while at the same time disadvantaging ‘bricks and mortar’ retailers. This provides strong grounds for abandoning remaining limits on retail trading hours.

Deregulation of retail trading hours across the country has varied. The ACT, Northern Territory, Victoria, Tasmania and NSW have largely deregulated trading hours altogether, whereas Western Australia, South Australia and Queensland have retained restrictions.

The Panel believes that full deregulation of retail trading hours is overdue, and that remaining restrictions should be removed as soon as possible. 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 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.

For further detail on retail trading hours, see [Section 8.6](#).

6.2 SUPERMARKETS

A large number of submissions raised issues relating to supermarkets. On further investigation, however, most turned out to be policy and legal issues that apply more broadly than just to supermarkets. Accordingly, many of the recommendations that the Panel has made to deal with these issues have wider application beyond the supermarket context.

Some small supermarkets have alleged that the major supermarkets are misusing their market power, including through ‘predatory capacity’ and targeting particular retailers. Suppliers have raised concerns about misuse of market power and unconscionable conduct by the major supermarket chains.

The Panel cannot adjudicate instances where breaches of the CCA are alleged to have occurred but notes that the CCA generally prohibits conduct that harms the competitive process, not individual competitors.

The Panel recommends changes to the misuse of market power provisions of the CCA at Draft Recommendation 25. The current unconscionable conduct provisions appear to be working as intended to meet the policy goals, but active and ongoing review of these provisions should occur as matters progress before the courts. In this context the Panel notes the present litigation concerning the ACCC’s allegations of unconscionable conduct in the supermarket sector.

The introduction of a properly designed and effective industry code should also assist in ensuring that suppliers are able to contract fairly and efficiently. The Panel notes that Australian Government consultation on a proposed code is currently underway.

The removal of some regulatory barriers would strengthen competition in the supermarket sector. Planning and zoning restrictions are limiting the growth of ALDI, and the ACCC has previously identified that they particularly affect the ability of independent supermarkets to compete. The Panel recommends changes to address concerns about planning and zoning (Draft Recommendation 10).

Trading hours restrictions and restrictions preventing supermarkets from selling liquor impede competition. The Panel recommends that restrictions preventing supermarkets from selling liquor be prioritised as part of the renewed round of regulatory review proposed at Draft Recommendation 11 and that retail trading hours be fully deregulated (Draft Recommendation 51).

There have been a number of structural changes in the operation of supermarkets, such as greater vertical integration and use of ‘home brands’, an increase in the range and categories of goods sold within supermarkets, and greater participation by supermarket operators in other sectors.

Like all structural changes, these can result in dislocation and other costs that affect the wellbeing of other parties. The move of larger supermarket chains into regional areas can also raise concerns about a loss of amenity and changes to the community.

While the Panel is sensitive to these concerns, they do not of themselves raise issues for competition policy or law.

For further detail on supermarkets, see [Section 13.1](#).

6.3 PHARMACY

It is generally accepted that some regulation of pharmacy is justified to recognise patient and community safety, ensuring pharmacists provide consumers with appropriate information and advice about their medication, providing equitable access to medication regardless of the patient’s wealth or location and managing costs to patients and government.

It is not apparent that the current restrictions on location of pharmacies or the requirement that only pharmacists can own a pharmacy ensure the quality of advice provided to a consumer. Such

restrictions limit the ability of consumers to choose where to obtain pharmacy services and limit the ability of suppliers to meet consumers' demands.

A range of alternatives are available to governments to ensure pharmacies meet community expectations of safety, access and standard of care without the need for anti-competitive regulation. These include imposing obligations directly on pharmacies as a condition of their licensing and/or remuneration. The Panel recognises that such a change will have a significant impact on the pharmacy sector and a transition period will be necessary.

The Panel also notes that the current Fifth Community Pharmacy Agreement expires on 1 July 2015, and negotiations for the next agreement are anticipated to commence in the second half of 2014. This provides an opportunity for the Australian Government to remove the location rules, with appropriate transitional arrangements.

The recent National Commission of Audit recommended 'opening up the pharmacy sector to competition, including through the deregulation of ownership and location rules'.¹⁴

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.

For further detail on pharmacy, see [Section 8.9](#).

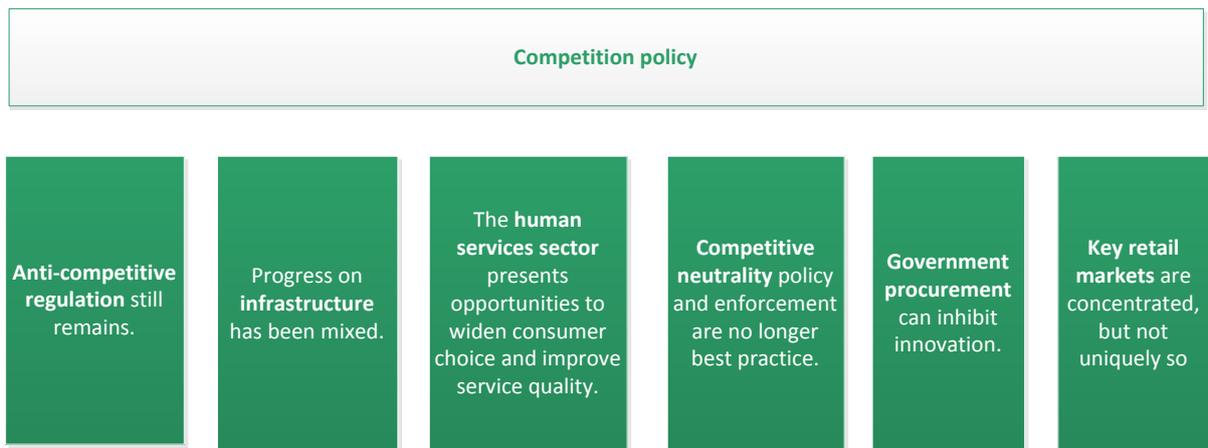
14 National Commission of Audit, *Phase One Report*, page xlii.

PART 3 — COMPETITION POLICY

In this Part we examine the current state of Australia’s competition policy and test its fitness for purpose against the criteria identified in [Part 1](#).

We identify areas where existing competition policy may not serve the long-term interests of consumers, especially in light of the forces for change bearing on the Australian economy.

The discussion is structured to reflect six themes as outlined in the diagram below.



7 COMPETITION PRINCIPLES

The environment that led to the Hilmer Review and then to all Australian governments agreeing to the National Competition Policy (NCP) is reflected in a Prime Ministerial statement from 1991:

The Trade Practices Act is our principal legislative weapon to ensure consumers get the best deal from competition. But there are many areas of the Australian economy today that are **immune from that Act**: some Commonwealth enterprises, State public sector businesses, and significant areas of the private sector, including the professions.

This patchwork coverage reflects historical and constitutional factors, not economic efficiencies; it is another important instance of the way **we operate as six economies**, rather than one. The benefits for the consumer of expanding the scope of the Trade Practices Act could be immense: potentially lower professional fees, cheaper road and rail fares, cheaper electricity.¹⁵ (emphasis added)

The NCP reflected the challenges Australia faced at the time — more than 20 years ago now. The focus of the NCP reforms was exposing previously sheltered activities to competition and applying a more national approach to competition issues.

The NCP was set out in three intergovernmental agreements which reflected the six elements of Competition Policy identified in the Hilmer report:

- limiting anti-competitive conduct of firms;
- reforming regulation which unjustifiably restricts competition;
- reforming the structure of public monopolies to facilitate competition;
- providing third-party access to certain facilities that are essential for competition;
- restraining monopoly pricing behaviour; and
- fostering 'competitive neutrality' between government and private businesses when they compete.

¹⁵ Hawke, B 1991, [Building a Competitive Australia](#), page 9.

Box 7.1: National Competition Policy — Intergovernmental agreements

In 1995 Australian governments committed to three intergovernmental agreements — the Competition Principles Agreement (CPA), the Conduct Code Agreement and the Agreement to Implement the National Competition Policy and Related Reforms.¹⁶ The elements of these agreements were:

- extending the *Trade Practices Act 1974* (TPA) to previously excluded businesses (unincorporated businesses and state, territory and local government businesses);
- establishing independent price oversight of state and territory government businesses;
- corporatising and applying competitive neutrality principles so that government businesses did not enjoy a net competitive advantage as a result of public sector ownership;
- structurally reforming public monopolies to separate out industry regulation and where possible further disaggregating potentially competitive parts of the monopoly;
- establishing a third-party access regime for significant bottleneck infrastructure;
- reviewing all legislation restricting competition;
- applying the agreements to local government;
- establishing the National Competition Council, including funding, appointments and work program;
- imposing conditions on governments seeking to exempt conduct from the competition law; and
- providing financial assistance to the States and Territories conditional on progress in implementing the NCP.

While the NCP agreements provided a framework for agreed policies, the States and Territories had flexibility in implementing what was agreed. The Panel considers that flexibility continues to be important, particularly in the context of a federation where responsibility for reform lies with various levels of government. The importance of local government in implementing aspects of competition policy is sometimes overlooked. The role of local government in competition policy should be explicitly addressed going forward.

The Productivity Commission (PC) in its Review of the NCP noted that flexibility provides the opportunity for governments to learn from different approaches to reform:

[F]lexibility has in turn harnessed the benefits of ‘competitive federalism’ to advance the reform process. That is, the NCP framework has provided opportunities for governments to learn from the outcomes of different approaches to reform in other jurisdictions.¹⁷

That said, flexibility should not compromise the agreed outcomes of particular reforms. Moreover, where different approaches have been adopted by various jurisdictions, ‘best-practice’ approaches to implementing NCP principles should be identified.

¹⁶ National Competition Council 1998, *Compendium of National Competition Policy Agreements, Second Edition*.

¹⁷ Productivity Commission 2005, *Review of National Competition Policy Reforms*, page 130.

The NCP recognised that restrictions on competition can sometimes be desirable. The Panel endorses this approach and considers that the ‘public interest’ test should remain a central component of competition policy in Australia.

However, digital technology and increasing globalisation are changing markets and consumers’ ability to access markets. Australia also confronts long-term economic challenges such as an ageing population.

In light of these developments, the Panel believes that the original elements of competition policy should be revisited.

In particular, there is scope for a set of competition principles that widen the focus beyond public monopolies and government businesses to encompass the provision of government services more generally.

Agreeing a set of principles would guide Commonwealth, state and territory and local governments in implementing those aspects of competition policy for which they are responsible.

The Panel's view

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.

Flexibility should be allowed in the way jurisdictions implement policies based on these principles.

8 REGULATORY RESTRICTIONS

Following the introduction of the NCP in 1995, there was a concerted effort by governments to examine and reform regulation that restricted competition where those restrictions were not in the public interest.

Australian laws at the Commonwealth, state and territory level were subject to review for anti-competitive impact as part of the NCP reforms, as set out in Box 8.1 below.

Box 8.1: NCP Legislative Review Program

In 1995 all Australian governments agreed that legislation (including Acts, enactments, ordinances and regulations) should not restrict competition unless it could be demonstrated that the benefits of the restriction to the community as a whole outweighed the costs, and further that the objectives of the legislation could only be achieved by restricting competition.¹⁸

Governments committed to review and, where appropriate, reform all legislation that restricted competition by the year 2000.

Around 1,800 individual pieces of potentially anti-competitive legislation were identified as part of this process (which was later extended to the year 2005).

Governments reviewed, and where appropriate, reformed, around 85 per cent of their nominated legislation (and around 78 per cent of 'priority' legislation).¹⁹

These assessments were linked to the NCP payments from the Commonwealth to the States and Territories.

The Panel has heard that while much was achieved through the regulatory reform, more remains to be done.

While some restrictions apply to particular industries and appear to support a small number of producers, they may have perverse effects — such as mandated ethanol usage in NSW, which may have pushed motorists towards higher-priced premium fuels. As another example, liquor licensing rules in Queensland that restrict packaged alcohol sales to holders of hotel licences appear to have induced major supermarkets to buy hotel licences, which has made it harder for smaller independent stores to compete.

Regulatory restrictions can limit the ability of consumers to exercise choice and the ability of producers to respond to consumers. They can determine who is in the market, what they can produce, and even the standard of the product or service they can provide.

18 See clause 5 of the [Competition Principles Agreement](#). This was supported in submissions, for example by the Housing Industry Association, page 13.

19 National Competition Council 2005, *Assessment of governments' progress in implementing the National Competition Policy and related reforms*, page xi.

Such regulations are generally not contained in competition law²⁰ but rather in a multitude of Commonwealth, state and territory and local government laws and legislative instruments. These restrictions can take many forms, including the examples contained in Box 8.2 below.

Box 8.2: Examples of regulatory restrictions on competition²¹

Regulation which requires imported cars to be modified to meet Australian-specific car design standards, as these differ from those of the United States and the European Union, restricting the scope for parallel imports and importation of second-hand cars.

Restrictions on the parallel importation of commercial quantities of books by booksellers.

Concessional excise treatment of domestically produced ethanol while imported ethanol pays full excise.

The displaying of discounted fuel prices on fuel retailers' price boards is specifically regulated in New South Wales and South Australia.

A restricted number of taxi licences are issued in all States and Territories, and competition from hire cars is mostly restricted.

Packaged liquor can be sold by hotels in regional Western Australia on Sunday, but not by specialist packaged liquor stores.

Retail pharmacies can only be owned by pharmacists (whereas no such restrictions exist on medical practices in Australia, nor on pharmacies in the United Kingdom, the Netherlands, Norway, Canada and the United States).

Restrictions on pharmacists administering vaccinations and reissuing prescriptions for long-term conditions.

Genetically modified crops cannot be grown in South Australia and Tasmania (but can be grown in all the other mainland States).

The sale of fresh potatoes is restricted in Western Australia (but nowhere else in Australia).

Owner driver and independent contractors are subject to industry-specific regulation in Western Australia, Victoria and New South Wales (but not other States).

Compulsory workers' compensation insurance and third-party personal injury transport insurance are only available from government monopoly providers in some States.

While generally intended to serve other public policy purposes (e.g. health, safety, standards of conduct, consumer protection), regulatory restrictions can nonetheless adversely influence competition — for example, by creating barriers to entry, advantaging some businesses over others, or reducing incentives to compete.²²

The National Competition Council (NCC), which was tasked with assessing the progress of the review process, considers that the legislation review program resulted in a 'material reduction in

20 Although subsection 51(1) of the *Competition and Consumer Act 2010* provides that all jurisdictions can exempt specific conduct from competition laws by way of regulations or legislation. The Acts and Regulations that contain these exemptions are listed on the [ACCC's website](#).

21 Business Council of Australia, Main Report, Exhibit 6, page 21.

22 See for example, OECD 2014, [How Can Competition Contribute to the G-20 Commitment to Raise GDP by at Least 2%?](#), page 2.

unwarranted competition restrictions’, but that government self-assessment as the basis of reform had been ‘limiting’.²³

An independent and transparent process of assessment is more likely to hold all governments to account. It is important that there be an assessment of the outcomes not just the processes undertaken, and this requires a more thorough assessment.

The NCP regulatory review process relied upon a generic, but limited, set of factors to assess public interest. The elements to consider in the public interest will necessarily differ on a case-by-case basis and a generic approach is understandable. Providing governments with industry or regulation-specific guidance, however, can also lead to a narrow approach being taken to the assessment of public interest.

Instead, an independent and transparent process of review can result in a level of public scrutiny that ensures that a thorough examination of the public interest takes place.

The onus of proof in the NCP process was on those wishing to maintain the restriction to demonstrate that it continues to serve the public interest. There is no evidence that this produced poor outcomes.

In addition to national reform agendas like the NCP, and jurisdiction-specific reviews of pieces of regulation, governments can introduce processes to manage the stock and flow of regulation over time.²⁴

Clause 6 of the Competition Principles Agreement (CPA) requires jurisdictions to review legislation that restricts competition, actually or potentially, once every ten years.²⁵ However, as the ACCC submission notes, the impetus for review ‘slowed considerably’ once the competition payments ceased in 2006 (page 21).

While the Commonwealth and state and territory governments were signatories to the CPA, local governments also have power to make rules that can affect competition.

23 National Competition Council 2005, *National Competition Council Assessment of governments’ progress in implementing the National Competition Policy and related reforms: 2005*, page xii.

24 In its report on NCP, the PC recommended that all Australian governments should ensure that they have in place effective and independent arrangements for monitoring new and amended legislation. (Productivity Commission 2005, *Review of National Competition Policy Arrangements*, page x (Recommendation 9.2)).

25 Council of Australian Governments 1995, *Competition Principles Agreement*.

Box 8.3: Local government and regulatory restrictions

The PC 2012 report on Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator²⁶ discussed local government regulation in some detail.

Local governments often have significant delegated power which extends beyond formally making local laws. In many instances, local governments develop quasi-regulations — including rules, local government policies, codes, guidelines, conditions on permits, licences, leases or registrations — that can have a similar effect to local laws.

The PC found that ‘no state government had provided comprehensive training or guidance on how to administer and enforce regulation.’ (page 13)

While exercising its duties, local government may face conflicting roles, which may raise competitive neutrality concerns. The PC noted specific examples including ‘local governments can be the providers of certain facilities, such as waste depots and caravan parks, and regulate similar facilities provided by the private sector.’ (page 15)

The PC noted:

[F]or practical reasons it is frequently difficult to remove such conflicts without significantly affecting the quality of services ... [t]ransparency, conflict resolution and probity requirements are needed to address the potential for these conflicting roles to result in compromised decision-making. (page 15)

And concluded:

Since conditions that are applied through approvals and registrations are given less scrutiny than conditions contained in local laws, there is greater scope for these conditions to impose direct or indirect costs on business and for competition to be restricted without being subject to a public interest test. (page 16)

Since local government rules can affect competition in much the same way as legislation or regulation, they should be made transparently and subject to the same scrutiny and regulatory impact analysis as Commonwealth, state and territory laws.

26 Productivity Commission 2012, *Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator*.

The Panel's view

The National Competition Policy (NCP) reforms substantially reduced the amount of anti-competitive regulation. However, the regulation review process begun under the NCP has flagged and should be reinvigorated.

Regulations with an anti-competitive effect should be subject to a public benefit test and the need to demonstrate that no other way of achieving their purpose exists that is less damaging to competition. Factors to consider in assessing net public benefit should be determined on a case-by-case basis and not narrowed to a specific set of indicators.

Maintaining a rigorous, transparent and independent assessment of whether regulations serve the public interest, with the onus on the party wishing to retain anti-competitive regulation, is important in ensuring that the wellbeing of Australians is improved by changes in regulation.

The assessment should focus on the outcomes achieved and not on the processes undertaken.

All Australian jurisdictions now have in place regulatory impact analysis procedures. Intra-jurisdictional approaches vary in their guidance and application, and there is a specific process for national reforms in the form of the Council of Australian Governments (COAG) best practice regulation guide.²⁷ Principle 4 of the COAG Principles of Best Practice Regulation adopts the CPA legislation review principle that legislation should not restrict competition unless it can be demonstrated that:

- a. the benefits of the restrictions to the community as a whole outweigh the costs; and
- b. the objectives of the regulation can only be achieved by restricting competition.

The Panel recognises that regulatory impact analysis is important for managing the flow of regulation and considers that the impact on competition should be an important element for consideration in any regulation-making process.

The Panel's view

Regulatory impact analysis is an important part of policy development for new and amending regulations. The Competition Principles Agreement test for regulatory restrictions on competition (that legislation should not restrict competition unless it can be demonstrated that the benefits of the restrictions to the community as a whole outweigh the costs, and the objectives of the regulation can only be achieved by restricting competition) should be retained and promoted as an important part of the process, to ensure that competition policy is considered by all governments on an ongoing basis.

Regulatory restrictions can affect: who can supply; what can be supplied; and when and where supply can occur. While it is not practical for the Panel to examine all existing regulatory restrictions on competition, some of the broad categories are detailed below. These are raised in submissions and provide examples of key areas requiring a reinvigorated program of regulatory review.

27 Council of Australian Governments 2007, *COAG best practice regulation guide*. See also: www.dpmc.gov.au/deregulation/obpr/proposal/coag_requirements/index.cfm.

Restricting who can supply	Restricting what can be supplied	Restricting where and when supply can occur
Professional licensing and standards	Product standards and labelling	Air service agreements
Liquor and gambling	Agricultural marketing	Retail trading hours
Pharmacy	Parallel imports	Planning and zoning
Taxis	Intellectual property	
Media and broadcasting services	Private health insurance	

8.1 INTELLECTUAL PROPERTY

As discussed in [Part 1](#), disruptive technologies are changing, and will continue to change, Australia's competitive landscape. Technology is expanding the geographic boundaries of markets, digital delivery of content is becoming more common and there is increasing integration of connected technologies as global communication networks mature.

Disruptive technologies have also put intellectual property (IP) rights in the spotlight. While IP rights can create incentives for innovation and the dissemination of ideas, they also have the potential to restrict market entry by preventing access to technologies.

In light of technological changes and more general changes to the regulatory environment in which investment in creative effort takes place, it is appropriate to re-examine Australia's IP arrangements. As the Chairman of the PC, Peter Harris, recently argued:

[T]he nature of internet-driven change and related global dependence on software-based systems suggests each nation should consider closely how well it is served by current IP systems, as these trends take hold.²⁸

IP rights are a form of intangible property right granted to a creator for something new or original. Like other legal property rights, IP rights exclude others from freely using IP (but the exclusive rights can be traded or licensed to others).

IP rights exist in many forms including:

- patents (inventions and new processes);
- copyright (over literary, musical and artistic works) and registered designs (designs applied to articles such as clothing);

²⁸ Harris, P 2014, *Crawford School of Public Policy, ANU: Competition Policy and Deregulation — challenges and choices*, page 8.

- trademarks (which distinguish the origin of products); and
- plant breeder rights.²⁹

There is no single IP Act; rather IP rights are secured by separate, specific statutory regimes. For example, there is the *Patents Act 1990* for inventions, and the *Copyright Act 1968* for literary and artistic creations.³⁰

The underlying rationale for IP rights is the promotion of new ideas and creations. Competitive markets can fail to support an efficient level of innovation because creations and ideas, once known, can be copied at little cost.

Knowledge has ‘public good’ characteristics — that is, it is difficult to exclude others from using new ideas and use by one person has little or no effect on the extent to which it is available to others. Thomas Jefferson said knowledge is like a candle: when one candle lights another it does not diminish the light of the first candle.³¹

That is, it is more efficient to disseminate knowledge freely than to restrict its use by charging for it. But the public good characteristics of knowledge typically lead to under-investment in research and development — the returns to creators will be insufficient to provide incentives for efficient investment in IP material.

IP regulations attempt to address this ‘free rider’ problem by legally granting exclusive use of the protected right to the creator for a specified period.

By allowing firms to derive financial benefits from their inventions and creations (which provides an incentive to innovate) and allowing other firms and individuals to use disclosed information about new inventions (rather than it remaining secret), IP rights are important for competition and follow-on inventions.

There are benefits to the community from reducing wasteful duplication of research effort and allowing others to build on existing ideas. As the PC notes:

The issuing of patents may improve efficiency and community welfare by increasing the incentives for firms to innovate, which can in turn lead to new, improved or less expensive products. (page 7)

However, IP rights can deter competition and limit choice for consumers. IP rights can be used to facilitate monopolistic or anticompetitive behaviour. This could, for example, manifest in owners of IP rights extracting excessive royalties from IP licences or placing unnecessary restrictions on knowledge dissemination. This would have adverse knock-on effects for innovation. As The Australia Institute says:

While strong IP rights may increase the incentive to put into the [knowledge] pool (thereby generating positive externalities) they hamper the ability to take previously generated knowledge out of the pool (giving rise to negative externalities). The design of the rules is therefore important. (pages 19-20)

29 IP Australia 2014, [What is IP](#).

30 Productivity Commission 2013, *Trade & Assistance Review 2011-12*, Annual Report Series, page 66.

31 Letters from Thomas Jefferson to Isaac McPherson (August 13, 1813) in *The Writings of Thomas Jefferson* 326, 334, (A Lipscomb ed., 1904), cited in Stiglitz, J, 2008, *Economic Foundations of Intellectual Property Rights*, Duke Law Journal, Vol.57, page 1700.

The ACCC claims that in the vast majority of cases the granting of an IP right will not raise significant competition concerns:

[R]ights holders are entitled to legitimately acquire market power by developing a superior product to their rivals, and pursuant to the policy purpose of IP regulation, the temporary market power from an IP right provides the very incentive to invest in the production of new IP. Such innovation is also a key goal of competition law. In this respect, IP and the competition law are for the most part complementary, both being directed towards improving economic welfare. (ACCC Submission 1, page 59)

However, conflicts between the two policies might occur ‘where IP owners are in a position to exert substantial market power or engage in anti-competitive conduct to seek to extend the scope of the right beyond that intended by the IP statute’. (ACCC Submission 1, page 59)

The PC submits that the patent system (where not warranted to encourage innovation) can impose costs on the community by impeding competition, including via:

- the accrual of ‘patent portfolios’ — in some cases, firms that accrue patents conduct no business other than asserting their patents against other firms — effectively ‘taxing’ other firms’ innovations via court cases; and
- ‘cumulative innovation’ — where innovation requires access to multiple patents, there are higher costs to innovate because of the need to purchase those patents. The need to access multiple patents can lead to ‘hold out’, whereby the owner of a patent holds out for a better deal from a potential innovator, which can also discourage innovation. (page 29)

So it is a balancing act. As the ACCC puts it:

The *extent* of any IP rights should balance: (i) on the one hand, the incentives for innovation in the creation of IP; and (ii) on the other, the incentives that access to IP material provides for efficient use of that IP and for innovation from such use. (ACCC Submission 1, page 58)

There is also the challenge of keeping the balance right in light of technology and market changes. For example, the widespread dissemination of material via the internet raises issues around copyright and related rights in the global context. 3D printing — the ability to translate a digital file into a physical object — will also pose challenges.

As noted by the Big Innovation Centre, an important change brought about by 3D printing is the low cost and ease of reproducing physical objects. A single 3D printer will be able to copy different products from existing designs that are easily and quickly shared over the internet. This means that IP is likely to become the main method through which some manufacturing businesses can fund the research, development and design of physical products. The Big Innovation Centre has said:

The disruption caused by 3D printing will put significant strains on government policy. By removing barriers between the internet and the physical world, 3D printing will throw up significant questions for intellectual property laws, for regulators and for competition authorities.³²

32 The Big Innovation Centre 2012, *Three Dimensional Policy, Why Britain needs a policy framework for 3D printing*, page 3.

Is the ‘balance’ right?

CHOICE, like some other submitters, suggests that Australia has not got the ‘balance’ right between the granting of IP rights and the promotion of competition. CHOICE suggests that the balance currently favours rights holders rather than consumers:

[M]onopolies give rise [to] obvious and well-known problems that ultimately end up impacting consumers. For this reason, limitations and exceptions apply to the monopoly of intellectual property. CHOICE believes that currently, Australia has not achieved the right balance in this regard.

Many companies operating in the entertainment industry (which obviously depends very heavily on copyright) have leveraged the considerable advantage of monopoly rights to insulate themselves against the disruptive effects of technological change, in particular from the internet. The persistence of territorial licensing arrangements (limiting the distribution of content based on geographical regions) is testament to the ability of industry to resist change. (page 20)

It is important that IP arrangements are technology-neutral, given the importance of innovation for economic growth. A number of submissions argue that IP arrangements do not support innovation because they are too technology-specific.³³

Mark Summerfield says:

The current provisions in the Patents Act and the CCA, intended to ensure that patents do not unduly deter competition, or limit consumer choice, were not drafted with arrangements such as patent pools, or the evolution of global technology standards, in mind. (page 8)

The Australia Institute recommends a critical examination of patents on items such as software and business methods (page 20). The ACCC also notes that ‘IP regulation can become quickly obsolete as the manner in which IP material is used changes’, citing the abandonment of the Optus TV Now service as a casualty of Australia’s current copyright laws. (ACCC Submission 1, page 65)

However, determining the appropriate ‘extent’ of IP protection is complex (and potentially ever changing). If IP rights provide higher rewards than needed to induce an invention, this will reduce the invention’s net benefit to the community as a whole and result in a higher share of the benefits going to the holder of the IP rights. In the case where there are no substitutes for the idea or invention, the owner of the rights could also engage in monopolistic behaviour.

At issue is how closely tests for allocating IP rights are linked to ‘public benefits’. Innovation could occur without IP protection. There is also the issue of the period over which it is appropriate to reward original creators of innovations.

A recent review of the literature undertaken by the PC found that incentives for innovation from the IP system appeared to apply only in a few sectors.³⁴ One study by Hall and Harhoff, for example, surveyed 210 recent studies and found that patents were effective in encouraging innovation in only a few sectors — pharmaceuticals, biotechnology, medical instruments and specialty chemicals.³⁵

33 Australian Digital Alliance and Australian Libraries Copyright Committee, page 7 and Google Australia, page 18.

34 Productivity Commission 2013, [Trade & Assistance Review 2011-12](#), Annual Report Series, page 90.

35 Hall, B and Harhoff, D 2012, [Recent Research on the Economics of Patents](#), NBER Working Paper Series.

It is important that the extent of IP rights provided by IP regulations are reviewed regularly as part of the legislation review mechanism. The extent of IP protection should be based on what is in the best interest of Australians.

The interaction between IP rights and competition law

Currently, subsection 51(3) of the CCA provides a limited exception from most of the competition law prohibitions for certain types of transactions involving IP. The exception covers certain conditions in licences or assignments of IP rights in patents, registered designs, copyright, trademarks and circuit layouts. The exception does not extend to the prohibitions relating to misuse of market power and resale price maintenance.

Some submitters, including the PC (page 28) and the ACCC, argue that it is hard to justify the IP exception. The ACCC says:

On the *use* of intellectual property rights, the CCA should apply in the ordinary way. The ACCC recommends that section 51(3) of the CCA should be repealed and that, in general, there is no reason to treat intellectual property any differently to other services in relation to access. (ACCC Submission 1, page 58)

In a recent submission to the Australian Law Reform Commission (ALRC) Inquiry into Copyright and Digital Economy, the ACCC also argued that it is important that the rights created through IP laws should be subject to competition laws to ensure they are pro-competitive rather than anti-competitive in effect or purpose.³⁶

The ACCC pointed to the digital environment providing new ways of creating, using and distributing copyright materials with commensurate opportunities to improve efficiency and welfare. However, copyright materials are increasingly used as intermediate inputs and this increases the potential for copyright to have anti-competitive effects. Solutions that are capable of addressing new market failures in digital environments (including potentially new forms of collective licensing or copyright exchanges) may also raise competition concerns.

The ACCC also noted that in other jurisdictions, such as the US, IP rights are subject to the same competition laws as all other property rights. And in these jurisdictions there has not been an erosion of IP rights for creators, nor any apparent impact on the incentives for the production of copyright material.³⁷

The Australian Recording Industry Association Ltd, however, has a contrary view:

The idea that there is no need for the s 51(3) exemption because IP should be treated like any other form of property is simplistic and misleading. The exemptions under s 51(3) serve partly as a safety net where broadly defined prohibitions under the Competition and Consumer Act would otherwise be too far-reaching. The cartel prohibitions, the prohibition against anticompetitive agreements under s 45 and the prohibition against exclusive dealing under s 47 are all broadly defined and can easily catch conduct that is efficiency enhancing (there is no rule of reason defence in Australia). The exemptions under s 51(3) are important because they avoid liability where IP licensing conditions are efficiency enhancing. (page 4)

³⁶ ACCC 2012, [ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper](#), page 12.

³⁷ ACCC 2012, [ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper](#), page 5.

The interaction between IP rights and competition law has been reviewed numerous times, including by Hilmer, the NCC and by the Intellectual Property and Competition Review Committee (known as the Ergas Committee). Each of these reviews recommended amendments to the exception for IP licenses and assignments (Box 8.4).

The Ergas Committee considered that IP rights were sufficiently different from other property rights and assets to warrant special treatment under the (then) *Trade Practices Act 1974* (TPA). However, the existing IP exceptions under subsection 51(3) were ‘seriously flawed, as the extent and breadth of the exemptions are unclear, and may well be over-broad’ (page 11). The Committee was of the view that the:

[E]xemptions do not provide an appropriate balance between the needs of the intellectual property system and the wider goals of competition policy. (page 11)

The then Government accepted the Committee’s recommendation to rewrite subsection 51(3) to allow the application of anti-competitive provisions of the TPA to IP arrangements that result in a substantial lessening of competition.³⁸ However, no change has been made to the legislation.

A recent House of Representatives Standing Committee on Infrastructure and Communications report into pricing of information technology recommended the repeal of subsection 51(3) of the CCA.³⁹ The ALRC’s Copyright and Digital Economy Final Report also stated that the repeal of subsection 51(3) of the CCA should be considered.⁴⁰

38 Productivity Commission 2005, *Review of National Competition Policy Reforms*, page 284.

39 House of Representatives Standing Committee on Infrastructure and Communications, 2013, *At What Cost? IT pricing and the Australia Tax*, page xiii.

40 Australian Law Reform Commission 2014, *Copyright and the Digital Economy Final Report*, pages 74 and 196.

Box 8.4 Reviews of IP and competition law

Hilmer reviewed the exceptions for IP rights under the then *Trade Practices Act 1974*. Hilmer stated that it was not apparent that the exception met the relevant policy goal, nor had the Committee been presented with any persuasive arguments as to why IP licensing and assignments should receive protection beyond the authorisation process. The report concluded that it:

[S]aw force in arguments to reform the current arrangements, including the possible removal of the current exemption and allowing all such matters to be scrutinised through the authorisation process. Nevertheless, it was not in a position to make expert recommendations on the matter and recommends that the current exemption be examined by relevant officials, in consultation with interested groups.⁴¹

In 1999 the NCC reviewed subsection 51(3) of the TPA as part of the Commonwealth's review of legislation that restricted competition under the Competition Principles Agreement.⁴² The NCC concluded that only in rare cases do producers using IP have sufficient market power to enable them to substantially lessen competition in the markets in which they compete. It recommended that:

- the exemption in subsection 51(3) be retained, but amended so that it no longer exempted horizontal arrangements or price and quantity restrictions; and
- the ACCC formulate guidelines on the scope of the exemption, and the application of Part IV to dealings in intellectual property rights.

The interaction between IP rights and competition policy was also reviewed by the Intellectual Property and Competition Review Committee (known as the Ergas Committee) in 2000.⁴³ On subsection 51(3) of the TPA, the Ergas Committee recommended that IP rights continue to be accorded distinctive treatment under the TPA and this should be achieved by:

- amending subparagraph 51(1)(a)(i) of the TPA to *list* all the relevant intellectual property statutes, that is 'an Act relating to patents, trademarks, designs, copyright, circuit layouts and plant breeder's rights'
- repealing subsection 51(3) and related provisions in the TPA;
- inserting an amended subsection 51(3) and related provisions into the TPA to ensure that conditions in a contract, arrangement or understanding related to the subject matter of intellectual property statute did not contravene Part IV or section 4D of the Act — unless those conditions were likely to result in a substantial lessening of competition; and
- the ACCC issue guidelines to provide sufficient direction to IP right owners, clarifying the types of behaviour likely to result in a breach of the then TPA's provisions. Provisions should exist within the guidelines for parties to seek a written clearance from the ACCC.

IP rights, like all property rights, can potentially be used in a manner that harms competition. The Panel considers that it is appropriate that commercial transactions involving IP rights, including the transfer and licensing of such rights, be subject to the CCA, in the same manner as transaction involving other property and assets.

41 Report by the National Competition Policy Review 1993, [National Competition Policy](#), page 151.

42 National Competition Council 1999, [Review of Sections 51\(2\) and 51\(3\) of the Trade Practices Act 1974, Final Report](#).

43 Intellectual Property and Competition Review Committee 2000, [Review of intellectual property legislation under the Competition Principles Agreement, Final Report](#).

Accordingly, the Panel considers that the IP licensing exception in subsection 51(3) of the CCA should be repealed. As is the case with other vertical supply arrangements, however, IP licences should be exempt from the cartel provisions of the CCA. This means that IP licenses and assignments will only contravene the competition law if they have the purpose, or would have or be likely to have the effect, of substantially lessening competition.

As noted by the ACCC, IP licensing or assignment arrangements that are at risk of breaching Part IV of the CCA, but which are likely to produce offsetting public benefits, can be granted an exemption from the CCA through the usual notification or authorisation processes.⁴⁴

IP and international trade agreements

For individual countries, the optimal design and level of IP rights depends on the extent to which they are net importers or exporters of different forms of IP. Australia is a net importer of IP.⁴⁵ With trade and commerce-related aspects of IP crossing national borders, IP has been the subject of international treaties. Frameworks influencing Australian IP law and trade and commerce in IP both within Australia and internationally, include:

- the Agreement on Trade-Related Aspects of Intellectual Property Rights;
- treaties administered by the World Intellectual Property Organization;
- other dedicated IP agreements falling outside the World Intellectual Property Organization's framework; and
- IP provisions included as part of bilateral and regional trade agreements.⁴⁶

As a net importer of IP, and likely to remain so, our ability to access IP protected by rights granted in other countries will be important to ensure that Australia can reap the benefits of the digital economy. That said, it is also important that commitments regarding the extent of IP protection in Australia are based on the best interests of Australians and these should be established through an independent cost-benefit analysis.

The ACCC (ACCC Submission 1, page 65), the PC (page 28) and The Australia Institute (page 20) argue that caution should be exercised when entering international treaties or agreements that include IP provisions. As the PC notes, the proposed Trans-Pacific Partnership Agreement between Australia and various other countries including the US, as well as other proposed international agreements such as the Transatlantic Trade and Investment Partnership are specifically considering intellectual property issues. (page 28)

The PC suggests that Australia has likely incurred net costs from the inclusion of some IP provisions in trade agreements, pointing to analysis of extensions in the duration of copyright protection required by the Australia-United States Free Trade Agreement which imposed net costs on Australia through increased royalty payments.⁴⁷ As Australia is, and will continue to be, a net importer of IP, these costs are potentially significant.

44 ACCC 2012, [ACCC submission to the ALRC Copyright and the Digital Economy Issues Paper](#), page 5.

45 Productivity Commission 2013, [Trade & Assistance Review 2011-12](#), page 77.

46 Productivity Commission 2013, [Trade & Assistance Review 2011-12](#), page 78.

47 Productivity Commission 2010, [Bilateral and Regional Trade Agreements](#).

It is important that trade negotiations be based on an understanding of the costs and benefits to Australia of proposed IP provisions. This should be undertaken in an independent and transparent way and prior to negotiations being concluded.

The Panel's view

Given the influence that Australia's IP rights can have on facilitating (or inhibiting) innovation, competition and trade, the Panel considers that the IP system should be designed to operate in the best interests of Australians.

Determining the appropriate *extent* of IP protection is complex. Given the complexity of the issues, there is a case for conducting an independent framework-style review of IP. The review should look at competition policy issues, new developments in technology and markets and international trade agreements.

In the majority of cases the granting of an IP right is unlikely to raise significant competition concerns. That said, IP rights, like all property rights can be *used* in a manner that harms competition. It is therefore appropriate that the use of IP rights be subject to the CCA.

Independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions in trade negotiations should be undertaken to inform international trade negotiations.

8.2 PARALLEL IMPORTS

An overseas manufacturer of goods can supply goods to different distributors in different countries, license the manufacture of goods to different manufacturers in different countries, or do both. The effect of the supply or licensing arrangements may be that the goods, all of which are genuine, are available for purchase in different countries (including Australia) at different prices.

Parallel importing refers to the importation into Australia of genuine goods by someone other than the licensed or authorised distributor or manufacturer in Australia.⁴⁸

Parallel imports provide an alternative source of supply which promotes competition and can provide consumers with products at lower prices. As such, parallel import restrictions are similar to other import restrictions (such as tariffs) in that they benefit local suppliers by shielding them from international competition.

Parallel imports of goods that are protected by certain forms of IP are currently restricted by legislation. For example, parallel importation of some copyright products, including books, is restricted under the *Copyright Act 1968*.⁴⁹ This can be to the detriment of Australian consumers:

Such restrictions effectively provide an import monopoly to the domestic distributor and protect owners of the local IP rights from competition. The restrictions may also enable copyright owners to practice international price discrimination to the detriment of Australian consumers. (ACCC Submission 1, page 60)

48 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, page 160.

49 ACCC, page 61. The Copyright Act grants copyright holders the right to restrict parallel imports, extending copyright protection into the sphere of distribution.

The ACCC also notes that, under the *Trade Marks Act 1995*, it appears that trade mark owners are able to prevent parallel imports of trade marked goods into Australia by limiting trade mark licences to specific territories.⁵⁰

Australia's parallel import restrictions have been reviewed many times over the past few decades (Box 8.5). Most reviews recommend that parallel import restrictions be removed.⁵¹ General prohibitions regarding parallel imports were removed for sound recordings in 1998 and computer software in 2003. The general prohibition against parallel importing continues to apply to literary works (other than books), dramatic, musical and artistic works, broadcasts and cinematographic films. There is a separate regime for books that allows limited parallel importation.⁵²

The ACCC states that it has 'consistently held the view that parallel importation restrictions (via legislation) extend rights to copyright owners beyond what is necessary to address 'free riding' on the creation of IP' and considers that there is no further economic reason to justify a blanket legislative restriction on parallel imports. (ACCC Submission 1, page 62)

The International Bar Association says:

The dramatic changes to Australian consumers' retail shopping practices over the past few years, especially through their on-line purchases, has called into question, among other things, existing parallel trade policies, both with respect to copyright and trade mark legal regimes. (page 10)

The Australian National Retailers Association argues that the restrictions are another example of 'outdated regulations that distort competition amongst retailers' (page 18), particularly the remaining restrictions on books and some clothing items that feature images. The Co-Op also said parallel importation restrictions 'are effectively an anachronism of a pre digital age'. (page 2)

Using the example of books, the Australian National Retailers Association says that the increased use of technology and shifting book purchase practices mean that the parallel import restriction is easily circumvented by international competitors, making it difficult for domestic bookstores to compete. According to the Australian National Retailers Association e-books are largely imported from overseas distributors (such as Amazon) and not covered by this restriction. Online stores that directly ship books from overseas warehouses to customers, such as Fishpond, can circumvent the restriction because the sale occurs overseas and not in Australia, even though the customer is located here (page 19).

There is some support in submissions for moving to the New Zealand position where all restrictions on parallel imports caused by statute have been abolished.⁵³

50 ACCC Submission 1, page 61 provides details on two recent cases, *Sporte Leisure Pty Ltd v Paul's Warehouse International Pty Ltd* and *Paul's Retail Pty Ltd v Lonsdale Australia Ltd*.

51 For example, the Review of Intellectual Property Legislation under the Competition Principles Agreement 2000 (the Ergas Committee) recommended the repeal of the parallel importation provisions of the *Copyright Act 1968*. In 2009, the PC recommended that Australia's parallel import restrictions on books be repealed.

52 ACCC Submission 1, page 62.

53 Professor Allan Fels, page 14.

Box 8.5: Examples of recent reviews of Australia's parallel import restrictions

A PC inquiry into provisions of the *Copyright Act 1968* that restrict the parallel importation of books found that the restrictions impose a private implicit tax on Australian consumers which is used largely to subsidise foreign copyright holders.⁵⁴

- Price comparisons found that, in 2007-08, a selection of around 350 trade books sold in Australia were on average 35 per cent more expensive than editions sold in the US (after accounting for the effects of GST). In many cases, the price difference was greater than 50 per cent.⁵⁵

The PC also found that parallel import restrictions poorly target cultural externalities and much of the assistance provided by the restrictions does not promote Australian-authored work. PC estimates suggest that the additional income flowing overseas is around 1.5 times that retained by local copyright holders. The PC recommended that Australia's parallel import restrictions on books be repealed and (because of the significant adjustment costs for book producers) that the repeal take effect three years after the announcement of the policy change.

A PC inquiry into the Australian Retail Industry⁵⁶ found that international price discrimination is being practised against some Australian retailers, to the detriment of Australian consumers. The PC stated that some Australian retailers have the option of altering their supply arrangements — either by putting pressure on existing international suppliers and distributors or else changing their supply channels.

The PC recommended a review of the parallel import restrictions which prevent retailers from importing and selling clothing or other goods which embody decorative graphic images sold with the copyright owner's permission in another market.⁵⁷

The House of Representatives Standing Committee on Infrastructure and Communications Inquiry into IT Pricing recommended that the parallel importation restrictions still found in the *Copyright Act 1968* be lifted, and that the parallel importation defence in the *Trade Marks Act 1995* be reviewed and broadened to ensure that it is effective in allowing the importation of genuine goods.⁵⁸

The PC's report on Australia's Automotive Manufacturing Industry recommends progressively relaxing the restrictions on the importation of second-hand passenger and light commercial vehicles (not to commence before 2018) and that the new arrangements be preceded by a regulatory compliance framework that includes measures to provide appropriate levels of community safety, environmental performance and consumer protection.⁵⁹

54 Productivity Commission 2009, *Restrictions on the Parallel Importation of Books, Research Report*, page XXI.

55 Productivity Commission 2009, *Restrictions on the Parallel Importation of Books, Research Report*, page XVIII.

56 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry, Inquiry Report*.

57 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry, Inquiry Report*, page XL.

58 House of Representatives Standing Committee on Infrastructure and Communications, *At what cost? IT pricing and the Australia tax*, pages xii-xiii.

59 Productivity Commission 2014, *Australia's Automotive Manufacturing Industry, Inquiry Report*, page 32.

Other submitters do not support removing the remaining restrictions on parallel importation, noting that business models for copyright industries are generally focused on digital rather than hard copy goods, and there are few remaining restrictions on parallel importation in Australian copyright law. It is argued that, where restrictions remain, they serve sound policy objectives.⁶⁰

Concerns are raised in submissions about parallel imports on health and safety grounds and the impact on the environment. For example:

- the Australian Motor Industry Federation raises concerns about lifting restrictions on the large scale importation of second-hand passenger vehicles into Australia — ‘it is surely acknowledged that the risk to consumers can be much higher through potentially sub-standard machinery entering the country than the likely risk of harm for a book, a DVD, or a computer game’ (page 10);
- the Federal Chamber of Automotive Industries states that ‘the importation of second-hand vehicles is inconsistent with government policy objectives in other areas such as road safety and the environment’. The Federal Chamber of Automotive Industries also has ‘serious reservations about the government’s resourcing capacity to adequately police, at the time of importation and subsequently, the safety of used vehicles including compliance with the standards that applied when the vehicle was built and the continued compliance with such standards following any modifications or repair’. (page 3)

Other concerns include:

- counterfeits being mixed with parallel imports;
- consumer protection concerns where the packaging of the local and imported goods are similar but there is a difference in quality or performance; and
- impacts on local distributors (such as warranty issues and recalled products). For example, consumers of parallel imports may seek a repair or replacement under warranty from the licensed distributor in Australia.⁶¹

Some stakeholders note that they service or repair products they did not sell because they do not want to risk compromising the reputation of their product or brand.

Consumer education and information disclosure are important in ensuring that consumers are aware of the product they are buying, their warranty rights and their ability to seek a refund when purchasing products from overseas traders. Consumers, when they purchase products online from an offshore supplier, are weighing up the risks associated with not being subject to the same warranties and rights to refund their purchase against the higher priced domestic product (with the warranty and servicing features). As argued by the PC:

In effect, by purchasing the lower priced product online from an offshore supplier, consumers have opted to ‘self insure’ against the potential risk of product failure or defects.⁶²

60 Australian Copyright Council, page 5.

61 For example, Australian Food and Grocery Council, page 22, Brewers Association of Australia and New Zealand Inc, pages 4-5, ACCI, page 20, the Federal Chamber of Automotive Industries, page 3.

62 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry*, page 130.

The Panel expects that the market will respond to concerns around parallel imports, including through making consumers aware of what products they are buying (so consumers are not being misled and/or brands damaged if consumers buy goods without realising that they are parallel imports).

The threat of consumers becoming dissatisfied with particular products and/or brands is also likely to motivate international suppliers to rethink their regional arrangements.

Box 8.6 describes a dispute between ALDI and Nestle Australia relating to parallel imports.

Box 8.6: ALDI's imports of Nescafe coffee

In a 2005 notification to the ACCC, Nestle Australia raised the issue of ALDI selling Nescafe branded instant coffee in its stores sourced from overseas suppliers.⁶³ ALDI had previously supplied the locally sourced Nescafe 'Blend 43', which was its highest selling instant coffee, but submitted that it resorted to import sourcing as a result of uncompetitive local prices and supply difficulties.

The imported coffee did not have the same formulation and taste as instant coffee supplied by Nestle Australia. Nestle Australia submitted that consumers may be misled and/or may form negative views about Nestle Australia's products as a result of drinking the imported coffee.

ALDI had taken steps, including in-store posters, shelf labels, and stickers on the coffee jars, to alert customers to the fact that the imported Nestle 'Matinal' or 'Classic' blends were different to the locally sourced Nescafe 'Blend 43' product. ALDI also provided a satisfaction guarantee.

However, Nestle Australia submitted that this disclosure was inadequate to address its concerns and it proposed to cease supply of all of its products to ALDI unless ALDI made further disclosures as prescribed by Nestle Australia and published corrective advertisements.

The ACCC concluded that ALDI's disclosure was adequate, noting that ALDI was selling genuine Nescafe products manufactured by a Nestle subsidiary.

Having regard to internal Nestle Australia documents it obtained, the ACCC concluded that a substantial purpose of Nestle Australia's conduct was to lessen competition generated by ALDI's supply of imported Nescafe products, and lessen the likelihood of other supermarkets importing Nescafe products, both of which would place downward pressure on prices.

A number of submissions suggest there is a need to review the remaining restrictions on parallel imports.

- The BCA lists regulation requiring imported cars to be modified to meet Australian-specific car design standards as well as restrictions on the parallel importation of commercial quantities of books by booksellers as warranting review in any future Legislative Review Program. (BCA Main Report, page 21)
- The Intellectual Property Committee of the Law Council of Australia submits that, in light of several significant decisions by the courts, it has become difficult to advise clients on what is, or is not, a legitimate parallel import. It argues that a comprehensive examination of the parallel importation of trade marked goods should be undertaken to determine the costs and benefits of permitting (or not permitting) parallel imports into Australia. (page 2)

63 Nestle Australia Limited — Notification — N31488

- The Australian Chamber of Commerce and Industry recommends a review of the enforcement requirements associated with parallel importing, noting the relative simplicity of parallel importation of products such as books compared with the nuances in formulation that occur across the global market for processed food and formulated chemical-base products. (pages 20-21)

The Panel's view

Parallel import restrictions are similar to other import restrictions (such as tariffs) in that they benefit local producers by shielding them from international competition. They are effectively an implicit tax on Australian consumers and businesses. The Panel notes that the impact of changing technology means that these restrictions are more easily circumvented.

The removal of parallel importation restrictions would promote competition and potentially lower prices of many consumer goods, while the concerns raised about parallel imports (such as consumer safety, counterfeit products and inadequate enforcement) could be addressed directly through regulatory and compliance frameworks and consumer education campaigns.

8.3 PLANNING AND ZONING

Land can be used for a variety of purposes including residential, industrial, commercial and conservation, which can include national parks. However, the unfettered market may not deliver an outcome across these various uses that is considered optimal for society as a whole, so governments allocate land to particular uses through planning, zoning and development assessment.

While submissions note that planning processes are necessary to ensure that the community is given an opportunity to have input into relevant developments (including the Queensland Law Society at page 3), the operation of planning systems can create barriers to entry, diversification or expansion, including through limiting the number, size, operating model and mix of businesses. This has the effect of reducing the responsiveness of suppliers to the needs of consumers.

Restrictions on competition can arise from:

- excessive and complex zoning;
- taking inappropriate account of impacts on established businesses when considering new competitor proposals; and
- enabling incumbent objectors to delay new developments.

Planning has been reviewed a number of times, as set out in Box 8.7.

Box 8.7: Planning reviews**NCP assessments**

In the 2003 assessment of the NCP the NCC noted that governments are broadly responsible for balancing objectives in developing planning schemes that are in the public interest.⁶⁴

Where legislative restrictions reflect the principles below, the NCC assessed the jurisdiction as having met its CPA obligations:

- planning processes minimise opportunities for existing businesses to prevent or delay participation by new competitors; and
- jurisdictions have considered and, where appropriate, provided for competition between government and private providers in planning approval processes.

All States except New South Wales and Western Australia were assessed as having met their obligations in 2003.

By 2005 Western Australia was the only State that had not completed the reform activity.⁶⁵

ACCC grocery inquiry

The 2008 ACCC inquiry into the competitiveness of retail prices for standard groceries found that planning and zoning laws act as a barrier to the establishment of new supermarkets and little regard is had to competition issues in considering zoning or planning proposals.⁶⁶

The report noted that independent supermarkets were particularly concerned with impediments to new developments given the difficulties they have in obtaining access to existing sites. The ACCC received evidence of incumbent supermarkets using planning consultation and objection processes to 'game' the planning system to delay or prevent potential competitors entering local areas.⁶⁷

PC inquiry into the Australian retail industry

The PC's 2011 inquiry report on the economic structure and performance of the Australian retail industry found that planning and zoning regulations were 'complex, excessively prescriptive and often anti-competitive'.⁶⁸

Included in the PC's recommendations was that:

- state, territory and local governments should (where responsible) broaden business zoning and significantly reduce prescriptive planning requirements to allow the location of all retail formats in existing business zones to ensure that competition is not needlessly restricted... (Recommendation 8.1);
- governments should not consider the viability of existing businesses at any stage of planning, rezoning or development assessment processes. Impacts of possible future retail locations on

64 National Competition Council 2003, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: Volume two — Legislation review and reform*, page 10.2.

65 National Competition Council 2005, *Assessment of governments' progress in implementing the National Competition Policy and related reforms*, page 14.39.

66 ACCC 2008, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, page xix.

67 ACCC 2008, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, page xix and 194.

68 Productivity Commission, 2011 *Inquiry Report: Economic Structure and Performance of the Australian Retail Industry* page XIV and these findings were based on the Productivity Commission's assessment from its 2011 *Research Report into Planning, Zoning and Development Assessments*.

existing activity centre viability (but not specific businesses) should only be considered during strategic plan preparation or major review — not for site specific rezoning or individual development applications (Recommendation 8.2); and

- state, territory and local governments should facilitate more as-of-right development processes to reduce business uncertainty and remove the scope for gaming by competitors (Recommendation 8.3).

PC study on relative costs of doing business in Australia

The PC's 2014 *Relative Costs of Doing Business in Australia: Retail Trade Interim Report* looked at progress since its 2011 report and suggested there are some signs of partial progress on planning and zoning in some jurisdictions, with Victoria leading the way.⁶⁹

Planning and zoning issues are raised in a number of submissions. While the range of issues is broad and cast in different ways, there is clear dissatisfaction with the current arrangements from almost all who raised planning and zoning.

Submissions suggest land use restrictions can pose considerable barriers to effective competition by constraining the supply of urban land, concentrating market power, and creating barriers to entry for new businesses.⁷⁰

Inflexible restrictions placed on retailers in relation to land use restrictions and costly approval procedures are also given as examples of barriers to business entry and expansion.⁷¹ This issue is particularly relevant for emerging providers in the sharing economy.

ALDI suggests its expansion has been considerably slower than planned due to regulatory constraints and says that rigid and overly-prescriptive land use planning and zoning rules have resulted in a chronic shortage of suitably zoned land for small format supermarkets in many built-up areas. It goes on to state:

More so than any other country in which it does business, ALDI has found the challenge of securing appropriate property holdings in Australia the single most significant brake on its expansion. (page 4)

Given planning regulation can restrict the number and use of retail sites, it can confer significant negotiating power on established landlords and restrict commercial opportunities for others. It is

69 The Productivity Commission's *Relative Costs of Doing Business in Australia: Retail Trade Interim Report* (2014) notes, at page 93, that in 2013 the Victorian Government undertook reforms aimed at improving business zones and permissible uses. It was announced that the prevailing five business zones were to be condensed into two broader commercial zones. The reform was to have the effect of increasing permissible uses within the zones, thereby bypassing the need for often lengthy (and costly) rezoning processes. Benefits of the reform included: more mixed uses and diversity within employment precincts; making the property sector more responsive to changes in demand for various business types/models; and removing planning barriers to investment.

70 For example, the Urban Development Institute of Australia, page 2, noted the new residential zones currently being introduced in Melbourne as part of the Victorian Government's Metropolitan Planning Strategy will place a mandatory limit of two dwellings per lot for at least 50 per cent of residential areas in Melbourne. This policy has the potential to lock large quantities of valuable urban land into an extremely limited range of uses, and is characteristic of planning systems throughout Australia.

71 For example, the Australian Retailers Association, page 9.

suggested that removing unnecessary constraints on planning and zoning regulation would help new development and increase competition in the marketplace.⁷²

The lack of an economic objective in relation to planning is another issue raised in submissions. One submission states that ‘planning is not an area of government activity with clear, simple goals (other than motherhood statements about ‘building better communities’ and the like), and this leaves it ripe for capture by special interests’.⁷³

It is important that the competitive impacts of planning and zoning are understood and considered by local planning authorities. It is recommended that competition analysis be incorporated into planning decisions in a manner that considers the benefits to consumers from competition.

Box 8.8: Planning restrictions on child care

In some areas, particularly regional centres, there can be an unmet need for child care. The Australian Bureau of Statistics noted that in 2008:

[P]arents of 89,000 children aged 0-12 indicated that they currently had an unmet need for formal child care ... Of the 89,000 children with an unmet need for formal care, one-third (30,000) had parents who had applied for a child care place. However, for around 55% (17,000) of these children, a place was not available.⁷⁴

As well as necessary requirements in relation to employee training and occupational health and safety, childcare centres are often subject to strict planning and zoning requirements — for example, maximum capacity, building design and appearance, and parking requirements.

The PC also recently found council requirements relating to:

[T]he use of energy efficient appliances; the depth of sandpits; noise levels inside the service’s buildings; the layout and type of plants used ...⁷⁵

While some physical environment restrictions on childcare centres may be necessary for health and safety reasons, planning and zoning requirements prescribed by councils apply in addition to the physical environment requirements prescribed under the Education and Care Services National Regulations which apply to all centres in Australia and cover important requirements such as safety, fencing, facilities and space requirements.⁷⁶

A number of governments have recognised the current problems presented by planning but they tend to be seen through the prism of deregulation, red-tape and economic development more

72 NSW Business Chamber, page 5.

73 Wills-Johnson, N, page 1.

74 Australian Bureau of Statistics 2014, [Cat No. 4102.0](#).

75 Productivity Commission, 2014 *Childcare and Early Childhood Learning Draft Report*, page 318.

76 On 9 December 2011, the former Ministerial Council for Education, Early Childhood Development and Youth Affairs made the Education and Care Services National Regulations under sections 301 and 324 of the Education and Care Services National Law as applied by the law of the states and territories. The current Regulations came into effect on 1 September 2013 in all states and territories except Western Australia, where they commenced on 31 December 2013.

broadly. For a number of incoming governments, reform of planning laws has been a priority,⁷⁷ but none of them appears to have focused on competition as a defined goal.

While governments talk of economic objectives in a broad sense, such as employment and stimulating housing construction, these are still seen from an urban planner's viewpoint and focus on land use, zoning, streamlining of appeals and more standardisation of planning frameworks.

The Panel's view

Effective economic objectives and proper consideration of competition are lacking from planning and zoning legislation and therefore processes. Planning and zoning requirements are a significant source of barriers to entry, particularly in the retail sector. They are also overly complex, geared towards very local issues and can place undue weight on the impact on incumbents. This is producing poor outcomes for consumers.

8.4 SERVICES — PROFESSIONAL LICENSING AND STANDARDS

Licensing can promote important public policy aims such as quality, safety and consumer protection. For example, regulations governing the accreditation of health professionals are a means of assuring service quality does not fall below minimum acceptable standards.

However, licensing can also restrict who can provide services in the marketplace. Such restrictions can prevent new and innovative businesses from entering the market and limit the scope of existing businesses to evolve and innovate. As a result, service providers can become less responsive to consumer demand.

Industry	Issues raised in submissions
Medical profession	<p>Admission requirements of medical colleges, and the unwillingness of the accreditation body to accredit new specialties.⁷⁸</p> <p>If medical specialist colleges unduly restrict entry to their professions, this has the effect of lessening competition.⁷⁹</p> <p>The use of nurse practitioners to perform a range of functions formerly restricted to medical practitioners has enabled the delivery of some health services at lower cost without increased risk to patients.⁸⁰</p>
Building trade	<p>While supporting the need for a degree of licensing, the industry⁸¹ noted that this constrains the market's ability to provide services and should only be used where the benefits outweigh the costs and where the objectives of regulation can only be achieved by restricting competition.</p>

77 For example Victoria's 'Plan for Melbourne', Western Australia's 'Planning Makes it Happen: a blueprint for planning reform', South Australia's 'Planning Reform — a Driver of Economic Growth' and Queensland's *Sustainable Planning and Other Legislation Amendment (SOPLA) Act 2012*.

78 Spier Consulting Submission 1, pages 1-2.

79 National Seniors Australia, page 20.

80 National Seniors Australia, page 20.

81 Housing Industry Association, pages 12-13.

Legal profession	<p>Competition is limited by aspects of the self-regulatory regime.</p> <p>Examples were provided of restrictions on the ability of law schools to offer curricula that don't include 11 core subjects, and State law societies both setting requirements for, and providing, training and professional development.⁸²</p> <p>Concerns regarding transparency, pricing and self-regulation were also raised. It was suggested that either self-regulation by Law Societies and Legal Services Commissioners should be abolished and moved to a completely independent authority or a new super-regulatory function should be assumed by an existing ombudsman. The need for a co-ordinated link between governments, independent regulators, the business community and consumers to encourage the legal profession to become more competitive and affordable was highlighted.⁸³</p>
Dental practitioners	<p>Inconsistencies and anomalies that can result from professional restrictions were highlighted in submissions; for example, registered dental practitioners are required to observe advertising guidelines but private health insurers, where they are the owner/operators of dental clinics, are not bound by the same requirements.⁸⁴</p>

IPART's submission draws the Panel's attention to its new licensing framework⁸⁵ as outlined in Box 8.9

82 For example, Griggs, L and Nielsen, J, pages 1-2.

83 For example, Eqalex Underwriting Pty Ltd, page 6.

84 The Australian Dental Association Inc, page 18.

85 PricewaterhouseCoopers 2012, *A best practice approach to designing and reviewing licensing schemes — Independent Pricing and Regulatory Tribunal*.

Box 8.9: IPART's Licensing Framework

IPART has examined NSW licences and identified those where reform would produce the greatest reduction in regulatory burden for business and the community. As part of this review PricewaterhouseCoopers was engaged by IPART to develop a conceptual framework for licence design.

Application of the licensing framework can ensure that licensing regimes only restrict competition where it can be demonstrated that licencing is the best means of achieving policy objectives.

Where a licence is necessary, the framework also requires an assessment of whether the licence is well-designed, i.e. whether the various aspects of the licensing regime that may restrict competition are the minimum necessary.

The framework requires a regulator to take into account how the objectives of a licence relate to its coverage, duration, reporting requirements, fees and charges and conduct rules.

IPART has suggested this framework could be used by other NSW regulators and in other jurisdictions to limit barriers to competition arising from licensing.

The IPART guidance indicates that, after following the framework:

- the need for licensing will have been established (Stage 1);
- the various aspects of the licensing scheme that may restrict competition will be the minimum necessary (Stage 2);
- the licensing scheme will be efficiently administered (Stage 3); and
- licensing will be the best response to achieve objectives (Stage 4).

Professional standards can impede the ability of service providers to respond to consumer demand. They are often put in place by industry bodies to promote the ethical and quality practices of their profession. This can lead to better consumer outcomes but can also dampen competition and raise barriers to entry into markets.

During the NCP regulation review process, the NCC stated:

It is totally unfounded to assume that a professional, simply by virtue of his/her qualification, is somehow above the profit motive and therefore should not be subject to market competition like all other service providers in our economy.⁸⁶

Some progress has been made in removing unnecessary restrictions on competition, including, for example: removing medical practice ownership restrictions; removal of restrictions preventing lawyers from advertising; and removing lawyers' monopoly on conveyancing services. The removal of conveyancing restrictions is a case in point. Previously, regulations prevented non-lawyers from carrying out conveyancing services, even though this is largely an administrative service.

86 National Competition Council media release, *Public Interest or Self Interest?*, 14 August 2000.

The Panel's view

Services will continue to make a growing contribution to economic activity in Australia. It is therefore important to remove unnecessary restrictions on service provision — particularly barriers to entry and expansion that impede competition.

Licensing requirements can raise barriers to entry in markets that create more costs than benefits to the community. In a range of areas, the competitive impacts of licensing are not adequately considered either in frameworks or during decision-making.

Professional services is an area where there are a range of potential restrictions on competition — both regulatory and non-regulatory. While some restrictions are clearly necessary for health, safety or consumer protection, others unduly impede competition.

8.5 GOODS — PRODUCT STANDARDS AND LABELLING

Restrictions on the sale of goods can come in a range of forms, including through the setting of standards, both Australian and international, and labelling restrictions. Restrictions on the sale of goods have the effect of reducing the ability of producers to respond to consumer demand.

Standards can be put in place in a range of ways, either through regulation or by industry itself.

There are many policy reasons why standards may be in the public interest, including health, safety and consumer protection. Submissions note that standards can provide efficiencies, address information asymmetries, and generate cost savings.⁸⁷

Standards can also promote competition by facilitating interoperability. For example, having no standards for car tyre sizes could limit competition as not all manufacturers would be able to produce for all car wheels — reducing the scope for efficiencies of scale as well. However, there are also instances where standards provide unnecessarily high or differential requirements for goods or services and have the impact of dampening competition or creating barriers to market entry and innovation.

Submissions provide examples where standards can impede growth and innovation, including food safety regulation being directed at specific process requirements rather than the outcomes for food safety.⁸⁸

87 For example, Australian Industry Group, page 15.

88 For example, Australian Food and Grocery Council, page 19 and Attachment 5, provides examples of regulations that impede competition, growth and innovation in the food and grocery sector, including regulation of agricultural and veterinary chemicals residue, industrial chemicals, metrology markings, and 'down schedule' medicines.

Box 8.10: Standards Australia

Standards Australia is a non-government body with a memorandum of understanding with the Australian Government to accredit Australian Standards for goods and services.

There are over 6,800 Australian Standards, the large majority of which are voluntary — others are made mandatory through regulation. Further, some are agreed to be mandatory between parties in private contracts.

Standards Australia requires that all Australian Standards, regardless of who develops them, must demonstrate positive net benefit to the community as a whole. One of the required considerations is the impact on competition.⁸⁹ This mechanism provides the opportunity for Standards Australia to examine the impact on competition and ultimately the outcomes for purchasers of the goods or services, not just the burden on industry.

In 2012, Standards Australia committed to review, revise, reconfirm, or withdraw all standards published more than 10 years ago. It considers that this initiative helped to ensure that the catalogue is current, internationally aligned, and that the standards are not an unnecessary burden on industry.⁹⁰

Standards Australia has a policy of adopting International Standards wherever possible,⁹¹ which should assist in minimising regulatory barriers to import competition.

Given that collaboration by industry in relation to standards could be considered anti-competitive, paragraph 51(2)(c) of the CCA provides that agreements relating to the implementation of Australian Standards are exempt from the operation of competition laws.

The Hilmer Review accepted the continuation of the exemption recognising that, generally speaking, harmonisation through standards is a good thing, enhancing efficiency, making products more substitutable, and facilitating development of service industries for standardised goods. However, Hilmer also noted the risks of standards raising barriers to entry — especially where they are incorporated into legislation and mandate particular technologies or systems rather than performance outcomes.

No submission argued that the exemption from competition laws for collaboration on Australian Standards in paragraph 51(2)(c) of the CCA should be removed. Differing levels of standards can sometimes be required to meet a public policy objective, on account of localised factors such as climatic, geographic or technological issues — a point recognised by the World Trade Organisation.⁹²

Another way standards can create significant barriers to competition is by restricting substitution. If a product or service meets international standards, there would need to be a strong policy case for a different Australian Standard; otherwise it may amount to little more than a barrier to import competition.

89 See www.standards.org.au/StandardsDevelopment/What_is_a_Standard/Pages/Net-Benefit.aspx.

90 Standards Australia, page 4.

91 See www.standards.org.au/InternationalEngagement/Pages/default.aspx.

92 World Trade Organisation, *Agreement on Technical Barriers to Trade*.

Issues raised in submissions

Standards can provide a strong disincentive against new competitors entering an industry, growing their enterprise or diversifying.⁹³

Products which do not conform with regulatory, Australian or industry standards (i.e. non-confirming products) can obtain an unfair cost advantage over the majority of businesses that comply with Australian Standards.⁹⁴

The costs to the community and car buyers of policing regulation of safety and environmental standards, as well as the risks to purchasers of less certain vehicle history, outweigh the benefits of lower purchase prices.⁹⁵

Lack of specificity in requirements of labelling and country of origin-related laws is leading to poor information to consumers and lower competition.⁹⁷

Calls for greater equality and consistency in enforcement of food standards, regarding imports versus domestic products.⁹⁸

Further information

A number of examples are provided:

- a geosynthetic product imported from Germany that meets EU standards, still requires re-testing in Australia by VicRoads;
- vehicle air conditioning refrigerant has strict controls in Australia, including licensing of mechanics that use it, whereas there are no such restrictions in the US; and
- a new conveyor belt lubricant developed in the US where the manufacturer decided against selling it in Australia due to costs and delays in the chemicals approval process (but is available in NZ where there is stronger recognition of other countries' accreditation).

Localised standards should not be assumed to be necessary or desirable per se. If a standard is necessary for other policy reasons such as safety, it should be mandated by governments and effectively enforced.

The PC's inquiry into Australia's Automotive Manufacturing Industry examined import restrictions and standards for used vehicles. It concluded:

The progressive relaxation of restrictions on the importation of used passenger and light commercial vehicles, within a regulatory compliance framework that provides appropriate levels of community safety, environmental performance and consumer protection, would have net benefits for the Australian community. These benefits include lower prices and/or improved vehicle features at a particular price point, and greater choice for vehicle buyers.⁹⁶

Submissions proposed that additional regulation would improve the competitive process for certain food and beverage products.

There was concern that the more rigorous processes being applied to domestic products are affecting competition.

93 Lloyd, J, page 8.

94 Australian Industry Group, page 16 and National Electrical and Communications Association, page 4.

95 Federal Chamber of Automotive Industries, page 3.

96 Productivity Commission 2014, *Australia's Automotive Manufacturing Industry*, page 129. See also Recommendation 5.4.

97 For example, Griffith and District Citrus Growers Association, page 4, and Cider Australia, page 1.

98 KAGOME Australia, page 11.

The Panel's view

There is a range of restrictions on the supply of goods. As in the provision of services, many of them are worthwhile for policy reasons such as health and safety. However, they can also create barriers to entry. Any necessary restrictions on the supply of goods should be implemented in a way that does not unduly restrict competition. There are also clear examples where different international and domestic standards are dampening or distorting import competition.

The Panel notes there was no support in submissions for removing the exemption from the competition laws, contained in paragraph 51(2)(c) of the CCA, for agreements relating to the implementation of Australian Standards. However, non-government standards have the capacity to restrict competition and so should be subject to regular review against the same principles used to assess government regulations.

8.6 RETAIL TRADING HOURS

Restrictions on retail trading hours impede suppliers' ability to meet consumer demand. They can discriminate among retailers on the basis of factors such as products sold, size of retailer or location of retailer. They can also impose costs on consumers by creating inconvenience and congestion. The rules can be complex and confusing and create compliance costs for businesses.

Australian governments agreed to review retail trading hours as part of their NCP commitment to review legislative restrictions on competition, as outlined in Box 8.11.

Box 8.11: Review of retail trading hours under NCP

Since the mid-1990s shop trading hours have been progressively deregulated across Australia; however, experience varies across the country. While the ACT, Victoria and Northern Territory have deregulated trading hours and NSW and Tasmania have done so to a large extent, three States still have some restrictions — Western Australia, Queensland and South Australia.

The NCC's 2005 Assessment of governments' progress in implementing the NCP⁹⁹ noted that all governments except for Western Australia had substantially liberalised retail trading hours. Western Australia was the only jurisdiction to heavily restrict week day trading hours and to prohibit large retailers (outside of tourist precincts) from opening on Sundays.

The Australian Government imposed a deduction of 10 per cent of Western Australia's 2003-04 competition payments and 10 per cent of 2004-05 competition payments.

Retail trading hours in Western Australia have been partially deregulated since then, and Sunday trading was introduced for all shops in the Perth metropolitan area on 26 August 2012. This brought the regulations in Western Australia closer to those in Queensland and South Australia.

The outcomes of more recent reviews of trading hours are outlined in Box 8.12.

99 National Competition Council 2005, *Assessment of governments' progress in implementing the National Competition Policy and related reforms*, page xxix.

Box 8.12: Recent reviews of retail trading hours.

A number of recent reviews have recommended further deregulating retail trading hours.

In 2011, the PC found that restrictions on trading hours applied with varying levels of intensity, with Queensland, Western Australia and South Australia having the most restrictive regulations. The PC recommended retail trading hours should be fully deregulated in all States, including trading on public holidays.¹⁰⁰

In its 2014 *Relative Costs of Doing Business in Australia: Retail Trade Interim Report*, the PC noted (page 90) that trading hours are most restricted in Queensland, Western Australia and South Australia and are inconsistent within these jurisdictions. Participants in the study advised that reform of trading hours remains a priority, and while this is an issue for state and territory governments, the PC noted it is within the scope of the Competition Policy Review.

The Queensland Competition Authority recommended the full deregulation of retail trading hours in 2013. It found that the net potential benefit to Queensland of removing the current restrictions was as much as \$200 million per annum and noted that the ‘potential benefits of reform include an increase in retail productivity, more shopping convenience for the broader community and lower prices’.¹⁰¹

The Western Australian Economic Regulation Authority, in its 2014 report *Inquiry into Microeconomic Reform in Western Australia* found there was no market failure that justifies the current restriction on competition. ‘As such, consumer choice, rather than government regulation should determine which shops open and when. Retailers will respond to consumer demand by opening when it is profitable for them to do so and remaining closed when it is not.’ The Authority recommended deregulating retail trading hours in Western Australia with the exception of Christmas Day, Good Friday and the morning of ANZAC Day.¹⁰²

However, a 2007 review of South Australia’s retail trading hours by Alan Moss recommended that the current shopping hours be retained, with consideration being given to the possibility of a later Sunday closing time. He found that the existing rules strike a satisfactory balance between the competing interests of the various sectors of the retail industry and the larger interests of the community: ‘At the end of the day there are more important human activities than shopping’.¹⁰³

A number of submissions call for further deregulation of trading hours so that in all Australian States and Territories only Christmas Day, Good Friday and ANZAC Day morning are restricted trading days.¹⁰⁴

Comparisons are made in submissions between ‘bricks and mortar’ retailers and online retailers, which are not inhibited by restrictions on trading hours. It was suggested that retail trading hours

100 Productivity Commission 2011, *Economic Structure and Performance of the Australian Retail Industry Inquiry*, Recommendation 10.1, page XLII.

101 Queensland Competition Authority 2013, *Measuring and Reducing the Burden of Regulation*, page 33.

102 Western Australian Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in WA Final Report*, pages 292-293 and recommendation 29.

103 Moss, A 2007, *Report of the 2006–07 Review of the Shop Trading Hours Act 1977* (South Australia), page 26.

104 For example Australian National Retailers Association, page 6, Shopping Centre Council of Australia, page 3 and Woolworths, page 60.

regulation handicaps physical retailers from competing with online retailing which can be conducted at any time of the day or night.¹⁰⁵

Submissions suggest deregulated retail trading hours would enable businesses to compete on a level playing field.¹⁰⁶

However, support for deregulation is not unanimous. The issue gives rise to disparate views within the retail sector, often based around store location and the form of retailing. Small retailers in particular have divided views. Some in high consumer traffic locations and with product or service attributes that attract consumer interest favour change, while others raise the following concerns:

- further investigations should be carried out to determine if deregulation of all trading hours is in the best interests of the consumer;¹⁰⁷ and
- allowing non-exempt stores to trade beyond the existing authorised hours could transfer further market power to an already dominated market and most likely have a detrimental effect on existing smaller retailers.¹⁰⁸

The Panel notes the ability of independent and small businesses to differentiate their offerings to fulfil consumer demands and compete in the face of deregulated trading hours. The Panel also notes that, where restrictions apply to a particular sector or type of business, this can result in consumers having less flexibility and choice.

The relevant policy question is whether the restrictions are in the public interest, not whether they are in the interest of particular competitors. No evidence has been presented that the States and Territories that have deregulated retail trading hours have a less competitive retail trade sector. Indeed, many have claimed that the restrictions inhibit the ability of retailers to meet the needs of consumers. And it is the needs of consumers, not of producers, that should dictate the nature and diversity of the retail sector.

That consumers are demanding more diversity in how and when they shop is clearly demonstrated in the take-up of online shopping. In recent years online retail sales have grown more quickly than spending at traditional 'bricks and mortar' retailers. Online retail sales are estimated to represent around 6 ½ per cent of spending at bricks and mortar retailers, up from around 5 per cent in 2010.¹⁰⁹ National Australia Bank estimates that Australians spent \$15.5 billion on online retail in the 12 months to June 2014.¹¹⁰ Seeking to 'hold back the tide' by limiting the ability of consumers to shop at times of their choosing will act to limit competition between online and 'bricks and mortar' shopping.

105 Shopping Centre Council of Australia, page 7.

106 For example, Chamber of Commerce and Industry WA, page 30.

107 Australian Retailers Association, page 6.

108 White's Grocers, page 8.

109 National Australia Bank 2012, *NAB Online Retail Sales Index In-depth report, January 2010 — January 2012* and *NAB Online Retail Sales Index*, June 2014.

110 National Australia Bank 2014, *NAB Online Retail Sales Index*.

The Panel's view

Shop trading hours have been progressively deregulated across Australia. However, trading hours in Queensland, South Australia and Western Australia remain regulated to some degree.

The remaining restrictions create a regulatory impediment to competition by raising barriers to expansion and distorting market signals. Consumer preferences are the best driver of business offerings, including in relation to trading hours.

The Panel notes that the growing use of the internet for retail purchases is undermining the intent of the retail trading hours restrictions, while disadvantaging 'bricks and mortar' retailers. This provides strong grounds for abandoning remaining limits on trading hours.

Noting the divergence of views, the Panel appreciates the concern of some independent retailers about their ability to compete in a deregulated environment. However, the Panel notes the ability of independent and small businesses to differentiate their offerings to fulfil consumer demands and compete in the face of deregulated trading hours. The Panel also notes that, where restrictions apply to a particular sector or type of business, this can result in consumers having less flexibility and choice.

8.7 MEDIA AND BROADCASTING SERVICES

The media market is highly integrated, incorporating media content delivery platforms (such as television broadcasting) — which will increasingly include new technologies such as multicasting via the internet — and content delivered via media platforms.

Ownership and content issues are intertwined and essential elements in the commercial strategies adopted by media companies and telecommunications partners.

Competition and the diversity of competitors in the media market are affected both by explicit regulatory interventions and by market developments, particularly in relation to content, which require close monitoring to ensure that competition concerns do not emerge.

Regulatory interventions regarding ownership and content exist to achieve other stated policy objectives. These other objectives include media ownership diversity and, in the case of broadcasting rules that impose Australian and local content requirements, media content that reflects a sense of Australian identity, character and cultural diversity.

The media diversity objectives, which underpin many of the ownership and control rules, are given force by the *Broadcasting Services Act 1992* and administered by the Australian Communications and Media Authority. The rules within this Act are relatively simple quantitative constraints, which are generally quite clear to existing and potential market participants.

That said, as hard and fast legislative provisions built around existing market structures and participants at the time legislation is passed, they almost by definition lag developments in a rapidly evolving marketplace. The explicit rules also only cover the most influential services delivered by commercial television broadcasters, commercial radio, and associated print newspapers.

A large number of competition issues in the media sector have been slated for review this year, as part of the Australian Government's deregulation agenda. Many media broadcasting issues, such as

those relating to media control and ownership, have been canvassed in a policy background paper released by the federal Department of Communications in June 2014.¹¹¹

In addition, the Department is also conducting a review of current spectrum policy arrangements to ease the compliance burden on users and improve accessibility of new technologies.¹¹² Spectrum use and access arrangements underpin, among other things, existing television and radio broadcasting markets, as well as other uses for the spectrum such as tablets and smartphones, and importantly, essential public and community services.

These two reviews will likely raise many issues relevant to the competitive environment for media and broadcasting services.

Other related media sector issues, such as the anti-siphoning rules (which prevent pay television broadcasters from buying the rights to events on the anti-siphoning list before free-to-air broadcasters have the opportunity to purchase the rights), are identified as issues for consideration by the Government in 2014, as part of the roadmap for deregulation in the Communications portfolio.

A number of media content issues may raise competition concerns over time, particularly in relation to competition in upstream markets for the provision of content.

As technology evolves, and partnerships between media platform owners, content producers and telecommunication providers strengthen, the capacity to restrict consumer choice or access becomes an issue that competition regulators need to monitor closely.

In Australia, concerns around preferential treatment of content by media owners and telecommunications partners appear less pronounced than in some other jurisdictions. However, the capacity for dominant players in one market to leverage market power into another market, such as media content, is an issue in need of constant monitoring.

The Australian Government's review of the National Broadband Network is expected to map out some of the competition issues in the telecommunications sector that may play into the media sector over time.

111 For further discussion see Australian Government Department of Communications June 2014, [Media Control and Ownership — Background Policy Paper](#).

112 Minister for Communications, Press Release, [Spectrum Reform to Drive Future Innovation and Productivity](#), 23 May 2014.

The Panel's view

Regulatory restrictions on media ownership and broadcasting rules are designed to achieve other public policy objectives, such as media diversity and support for Australian and local content. In a rapidly evolving technology landscape, inflexible regulatory provisions are unlikely to be sustainable or remain relevant over time.

The announced Australian Government reviews as part of the broader deregulation roadmap planned for the Communications portfolio in 2014 should consider the current impact of the regulatory interventions on ownership and control of media and broadcasting services, as well as the impact of rapidly evolving communication technologies on competition over time.

8.8 LIQUOR AND GAMBLING

Liquor retailing and gambling are two heavily regulated sectors of the economy. The risk of harm to individuals, families and communities from problem drinking and gambling provides a clear justification for regulation. This is reflected in a number of submissions expressing concern that changes to the regulation of alcohol sales could increase social harm.

Regulating access to alcohol with the objective of minimising harm can only be achieved by restricting the economic and physical availability of alcohol. This justifies the controls that may otherwise be seen as anti-competitive.¹¹³

However, such regulations also restrict competition and reduce consumer choice.

Under the previous NCP Review, a number of pre-existing competitive barriers for the alcohol industry were removed, but the extent of reform varied by State and the NCC withheld payments from several jurisdictions due to lack of progress in this area. Some stakeholders submit that existing regulations unduly restrict competition. For example, in relation to gambling, the Australian Hotels Association argues that:

[H]otels can only sell wagering acting as an agent for the company holding the exclusive licence. The presence of a monopoly ensures far less productive offerings than would be the case in a competitive environment. (page 5)

The Australasian Association of Convenience Stores submits that regulation preventing its members from obtaining liquor licences inhibits their ability to meet customers' demands and to compete with Coles and Woolworths. (page 5)

Other stakeholders, including the Master Grocers Association and AURL Foodworks, cite the example of Queensland's liquor licensing regime, under which only premises with a hotel licence may operate detached bottle-shops, as an impediment to their ability to respond to consumers and compete with Coles and Woolworths.

The PC's 2010 Gambling report concluded that current gambling regulations have highly questionable effectiveness in reducing harm; Australians lost \$19 billion in gambling activities in 2008-09, and the incidence of problem gambling is significant.¹¹⁴

113 National Alliance for Action on Alcohol, page 1 (this submission is endorsed by the Foundation for Alcohol Research and Education, and the McCusker Centre for Action on Alcohol and Youth).

114 Productivity Commission 2010, *Gambling*, pages 2 and 19.

The PC's report and other evidence suggest there is no simple relationship between restricting competition and mitigating harm. In fact, the PC noted that an important source of consumer detriment from the current regulations is their anti-competitive effects.

Considerable time has elapsed since the NCP reviews of regulation in these areas. Those reviews noted the desirability of revisiting these regulations in future to assess their impact and to compare outcomes in jurisdictions that have implemented competition reforms with those that have not.

For example, state and local liquor licensing regimes could be reviewed to test for any evidence that the more burdensome regimes are producing superior outcomes.

Restrictions on convenience stores selling alcohol and the Queensland licensing regime can prevent small business from competing with large retailers like Woolworths and Coles.

The Panel's view

Liquor retailing and gambling are two heavily regulated sectors of the economy. The risk of harm to individuals, families and communities from problem drinking and gambling is a clear justification for regulation.

However, there is no case to exempt regulations in these areas from ongoing review to ensure that they are meeting their stated objectives at least costs to consumers. The impact of regulatory restrictions on the ability of small businesses to compete should be considered as part of such reviews.

8.9 PHARMACY

Pharmacy¹¹⁵ regulation has been the subject of numerous reports and reviews over the past 20 years, including the 1999 Wilkinson National Review (required under NCP), as well as examination by the PC, NCC, and most recently the National Commission of Audit, which recommended 'opening up the pharmacy sector to competition, including through the deregulation of ownership and location rules'.¹¹⁶

State and territory legislation limits ownership of community pharmacies to pharmacists, with limited exceptions (such as for friendly societies with historical ownership of pharmacies), and there are limits in each State (but not the Territories) on how many pharmacies each pharmacist can own. The limits vary by State. The ownership rules do not prevent pharmacies (owned by different pharmacists) from operating under a common name and brand, e.g. Amcal or Terry White.

Other restrictions arise from the Australian Community Pharmacy Agreement between the Commonwealth and the Pharmacy Guild. This governs dispensing arrangements and pharmacy remuneration for dispensing Pharmaceutical Benefits Scheme (PBS) medications, providing pharmacy programs and services, and for the community service obligation arrangements with pharmacy wholesalers.

In particular, tight restrictions on the location of pharmacies are a component of the agreement. A pharmacist must obtain approval from the Commonwealth to open a new pharmacy or to move or

115 In this Draft Report, 'pharmacy' refers to community pharmacy and does not include hospital pharmacy.

116 National Commission of Audit 2014, *Phase One Report*, page xlii.

expand an existing pharmacy. A pharmacy may not open within a certain distance of an existing community pharmacy (generally either 1.5 or 10 kilometres depending on the location), with some exceptions, including for certain pharmacies located within shopping centres. A pharmacy must also not be located within, or directly accessible from, a supermarket.

It is generally accepted that some regulation of pharmacy is justified to uphold patient and community safety, ensure pharmacists provide consumers with appropriate information and advice about their medication, provide equitable access to medication regardless of the patient's wealth or location, ensure accountability for appropriate standards and behaviour by pharmacists, and manage costs to patients and government.

Stakeholders such as the Pharmacy Guild, Symbion, Australian Friendly Societies Pharmacies Association and the Pharmaceutical Society of Australia support the current arrangements and believe they are achieving better outcomes than could be achieved under a different regulatory regime.

Limiting the controlling interest in the ownership of pharmacy businesses to pharmacists promotes patient safety and competent provision of high quality pharmacy services and helps maintain public confidence in those services; and limiting the number of pharmacy businesses that may be owned by a person helps protect the public from market dominance or inappropriate market conduct (Pharmaceutical Society of Australia, page 7).

The location provisions facilitate access to pharmacies by all segments of the population (Pharmaceutical Society of Australia, page 4).

However, a range of options are available to governments in seeking to secure the community service and other objectives that the present regulation seeks to achieve, including imposing obligations directly on pharmacies as a condition of their licensing and/or remuneration. Moreover, protecting consumers from 'market dominance and inappropriate market conduct' is adequately handled by the CCA and does not need supplementary rules specific to pharmacy.

The current regulations impose costs on consumers; yet it is not clear how restricting the location of pharmacies or requiring that only pharmacists can own a pharmacy ensures the quality of advice provided to consumers. Such restrictions limit the ability of consumers to choose where to obtain pharmacy services and limit the ability of suppliers to meet consumers' demands.

The Consumers Health Forum, National Seniors, Chemist Warehouse, and Professional Pharmacists Australia call for changes to the regulations:

The end result of limiting competition and guaranteeing income has been to create a significant problem in community pharmacy that is leading to poor health outcomes, a stifling of innovation and the taxpayer not receiving value for money (Professional Pharmacists Australia¹¹⁷).

The Pharmacy Guild submits that pharmacy regulations were reviewed in 2000 under NCP and that any further review is unnecessary (page 6), but the Panel notes that considerable time has passed since then and there have been a number of significant developments over that time.

For example, the introduction, and subsequent expansion, of Price Disclosure arrangements for PBS medicines has lowered the prices the Australian Government pays for key medicines closer to those

117 Professional Pharmacists Australia provided a confidential submission to the Review but gave permission for this extract to be quoted in this Draft Report.

actually paid by community pharmacies, with a significant downward impact on the incomes of community pharmacies. Different business models have also emerged including specialist and online pharmacy models and discount groups that operate on a larger scale, such as Chemist Warehouse, which are different in character from the community pharmacies that existed before 2000.

Since 2000 there is a better understanding of how well other primary healthcare sectors operate without such anti-competitive restrictions. For example, ownership of medical practices is not limited to GPs, and nor are GP practices prevented from opening in close proximity to one another.

In light of the changes to the operation of the pharmacy sector and the increased empirical evidence available to inform comparisons in the years since the Wilkinson review, there is renewed reason to question the assumption that protecting pharmacists from competition is in the interests of consumers.

The Panel also notes that the current Fifth Community Pharmacy Agreement expires on 1 July 2015, and negotiations for the next agreement are anticipated to commence in the second half of 2014. This provides an opportunity for the Australian Government to remove the location rules, with appropriate transitional arrangements.

The Panel's view

The Panel accepts that some regulation of pharmacy is justified and needs to remain in place given the key role of pharmacy in primary health care. However, the current regulations preventing pharmacies from choosing their own locations, and limiting ownership to pharmacists and friendly societies only, are more restrictive than those in other health sectors (such as general practice) and many comparable countries.

Further, there have been developments in Australia that strengthen the case for the present arrangements to be repealed and replaced with new regulations that better serve consumers and are less harmful to competition.

Recent developments include the rise of discount pharmacy groups and online prescriptions, as well as the accumulation of evidence about the effects of deregulation in other Australian health sectors, in particular general practice.

Accordingly, the Panel considers that present restrictions on ownership and location are unnecessary to uphold the quality of advice and care provided to patients. However, it is clear that 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 also notes that the current Fifth Community Pharmacy Agreement expires on 1 July 2015, and negotiations for the next agreement are anticipated to commence in the second half of 2014. This provides an opportunity for the Australian Government to remove the location rules, with appropriate transitional arrangements.

8.10 PRIVATE HEALTH INSURANCE

Around 47 per cent of the Australian population has private health insurance with hospital coverage.¹¹⁸ The Australian Government subsidises the cost of insurance through the private health insurance rebate, and a levy is imposed on higher income earners who are not privately insured. However, Medibank states that private health insurance is among the most heavily regulated industries in Australia, with the regulatory framework bearing on the scope of services covered, product design, pricing, discounts and capital requirements. (page 12)

The premiums charged by private health insurers are regulated by the Commonwealth Minister for Health, who has discretion as to whether to allow insurers to increase their premiums. Funds may only apply to increase premiums if their cost structures have increased.

The recent National Commission of Audit examined these pricing arrangements, finding that they remove the incentive for firms to become more efficient, and suggested current arrangements be replaced with a system of price monitoring. It also suggested that insurers be allowed to offer a wider scope of products to consumers, in particular that insurers be allowed to cover care in out-of-hospital (primary care) settings to assist members in managing chronic conditions.¹¹⁹

The prices of some inputs purchased by private health insurers are also regulated. The price of prostheses (medical devices such as cardiac pacemakers and artificial hips) are regulated under the *Private Health Insurance Act 2007*. Applied Medical states:

As a result of regulatory policy settings which restrict optimal competitive outcomes, products listed on the Prostheses List are being sold at prices that are in some cases multiple times more expensive than the prices at which they are sold in the public health system and in other jurisdictions. Given that the value of total expenditure by private health insurers on prostheses was \$1.6 billion in 2012, there is scope for very substantial efficiencies to be created through the introduction and extension of principles of competition to the regulatory structure that underpins the Prostheses List. (page 1)

Preferred provider arrangements involve customers having lower or no out-of-pocket expenses if they see one of the preferred providers offered by their insurer. Some submissions suggest these types of arrangements can be anti-competitive.¹²⁰ However, the Panel notes that the ACCC has examined preferred provider arrangements in sectors including health and motor vehicle smash repair, and finds that they generally raise no competition concerns.¹²¹

118 As at 31 December 2013. Private Health Insurance Administration Council 2014, [Privately Insured People with Hospital Treatment Cover](#), page 5.

119 National Commission of Audit 2014, *Phase One Report*, pages 101-102.

120 For example, Optometry Australia, pages 1-2, Australian Dental Association Inc., pages 7-8 and Australian Physiotherapy Association, pages 3-7.

121 For example, the ACCC found in its [2010-11 Private health insurance report](#) that consumers were, on the whole, satisfied with preferred provider schemes, and the arrangements were unlikely to contravene the third-line forcing provisions of the CCA (page 33). The ACCC has also found that preferred provider schemes for smash repairs have resulted in a number of consumer benefits, including lower insurance premiums, lifetime guarantees and repair work performed to a high standard: www.accc.gov.au/media-release/smash-repairers/insurance-issues-paper-published.

The Panel's view

It is important that consumers have access to products that meet their needs, including in the area of private health insurance.

The National Commission of Audit report suggests there may be scope for 'lighter touch' regulation of the private health insurance sector, which could encourage innovation and wider product availability for consumers. In particular, price regulation of premiums could be replaced with a price monitoring scheme and health funds could be allowed to expand their coverage to primary care settings.

8.11 AGRICULTURAL MARKETING

Agricultural marketing arrangements can create barriers to entry through licensing restrictions and weaken incentives for growers to differentiate their products and to innovate.

The PC's 2005 Review of National Competition Policy Reforms noted that domestic pricing arrangements and import tariffs needed to support the activities of statutory marketing authorities provide assistance to producers, and are effectively paid for by household and business users. Such controls were found often to reduce the scope and incentives for innovation, to the detriment of both consumers and producers.¹²²

Box 8.13 National Competition Policy reforms to agricultural marketing arrangements

Under the NCP, the NCC identified a number of priority legislation review areas in agricultural marketing arrangements including barley/coarse grains, dairy, poultry meat, rice, sugar and wheat.¹²³

There was a progressive removal of price and supply restrictions in the agricultural marketing arrangements under the NCP, and the Australian Bureau of Agricultural and Resource Sciences recently noted that these reforms have resulted in Australian agriculture being strongly market-oriented, with farmers now exposed to competition in domestic and world markets, and governments having largely removed production and trade-distorting support.¹²⁴

However, restrictions still apply in relation to rice in NSW and potatoes in Western Australia.

The NSW Rice Marketing Board¹²⁵ retains powers to vest, process and market all rice produced in NSW, which is around 99 per cent of Australian rice.¹²⁶ A party wanting to participate in the domestic rice market must apply to the Board to become an Authorised Buyer. The NSW Rice Marketing Board has appointed Ricegrowers Limited (trading as SunRice) as the sole and exclusive export licence holder.

122 Productivity Commission 2005 *Review of National Competition Policy Reforms Inquiry Report*, page 81.

123 National Competition Council 2003, *Assessment of governments' progress in implementing the National Competition Policy and related reforms: Volume one — Overview of the National Competition Policy and related reforms*, page 4.6.

124 Australian Bureau of Agricultural and Resource Sciences, 2014 *Australian Agricultural Productivity Growth: Past Reforms and Future Opportunities Research Report*, page 14.

125 See www.rmbnsw.org.au/?page=about.

126 Australian Bureau of Agricultural and Resource Sciences 2014, *Australian Agricultural Productivity Growth: Past Reforms and Future Opportunities Research Report*, page 15.

In Western Australia, licences to grow table potatoes, as well as the price, quantity and varieties grown, are all regulated by the Potato Marketing Corporation,¹²⁷ which is established under the *Marketing of Potatoes Act 1946* (WA), and is a statutory marketing organisation of the government of Western Australia.

The Potato Marketing Corporation, not consumers and producers, determines the quantities, kinds and qualities of potatoes offered to consumers in Western Australia. In fact, it is illegal to sell fresh potatoes grown in Western Australia for human consumption without a licence from the Potato Marketing Corporation.

The Economic Regulation Authority of Western Australia's Final Report, released in July 2014, recommended removing the existing restrictions. Overall, it estimates that the restrictions on the Western Australian ware potato market have a net cost of \$3.8 million per annum. This equates to a present value of \$33.23 million over a 15-year period.¹²⁸

While potato regulation appears to be a hot topic in Western Australia, with submissions calling for deregulation of this State's potato industry,¹²⁹ issues to do with rice marketing in NSW have not been raised at all during public consultations.

The Panel's view

Most price and supply restrictions in agricultural marketing have been removed. However, some unfinished business remains. For example, restrictions still apply in relation to rice in NSW and potatoes in Western Australia. These restrictions raise barriers to entry and impede consumer choice. Governments should resist calls for past reforms to be unwound.

8.12 AIR SERVICE RESTRICTIONS

International air services to and from Australia are regulated by air service agreements. These follow the processes set out under the 1944 Chicago Convention on International Civil Aviation and they restrict airlines to operating within agreements developed by countries on a bilateral basis.¹³⁰

Air service agreements amount to an agreement with another country regarding which airlines can service a particular route. They have the effect of constraining how responsive producers can be to consumer demand.

Complexity is added given other countries' need to negotiate 'beyond rights'. For example, for Qantas to fly to London via Dubai, Australia needs the United Arab Emirates to negotiate 'beyond rights' on behalf of Qantas with the UK. Australia therefore uses air service agreements, as do other countries, as a negotiating chip to obtain 'beyond rights' for Australian flagged carriers in exchange for access to the Australian market.

127 See www.pmc.wa.gov.au.

128 Western Australian Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia: Final report*, page 317.

129 For example, the BCA Main Report, page 21 and CCIWA, page 16.

130 See Department of Infrastructure and Regional Development website: [The Bilateral System — how international air services work](#).

An Australian carrier granted an allocation of capacity must be designated by Australia before it is able to operate an international air service. As a result, air service agreements act to regulate capacity and who can service particular international air routes. This has been thought to raise prices on some routes. As a consequence, some air service agreements may protect Australian carriers from competition or act as barriers to new carriers entering particular markets.

Other parts of the world have moved to a less regulated approach. For example, within Europe international air services effectively operate under an ‘open skies policy’.

Australia has a policy of seeking ‘open skies’ on a bilateral basis, an example being the agreement with New Zealand.¹³¹

Unilaterally allowing open skies to Australia would severely disadvantage Australian airlines, so long as the bilateral system remains entrenched in the rest of the world.¹³²

Sydney Airport Corporation considers that air service agreements may act as a restriction on competition from foreign carriers in the air services market with broader economic implications:

Delays in bilateral capacity negotiations, which are running behind demand in many key growth markets, restrict the level of competition in the market from foreign carriers, preventing travellers from accessing Australia in the most efficient and cost effective manner. These delays also risk economic and tourism growth, which is highly reliant on inbound international visitation. (page 5)

Similarly the Australian Airports Association notes that:

Bilateral Government-to-Government air traffic agreements inhibit large airports from competing with overseas airports. (page 2)

In respect of domestic restrictions, State governments sometimes provide exclusive rights for regional operators to operate on particular routes. Ostensibly, exclusivity is provided in order to guarantee service as it gives the operator confidence that it can run the route profitably. Regional routes are often very lightly patronised, hence supporting only one operator, i.e. they are natural monopolies. While it might be reasonable in these circumstances to restrict competition in order to guarantee a stable service, exclusive rights create the potential for monopoly pricing.

131 See Department of Infrastructure and Regional Development website: [The Bilateral System — how international air services work](#).

132 Productivity Commission 1998, *International Air Services Inquiry Report*, page 220.

The Panel's view

The Panel considers that air service agreements should not be used to protect Australian carriers from competition. Australia's policy on air service agreements should aim to ensure that there is sufficient capacity on all routes to allow for demand growth. This will ensure that agreements do not act as barriers to entry in the provision of services to and from Australia.

Where air service agreements act to restrict capacity, the costs will be borne by travellers through higher prices and fewer options, and by the economy more broadly, for example, through lower tourism growth.

Governments should only create exclusive rights for regional services where it is clear that the air route will only support a single operator. Where exclusive rights are created they should be subject to competitive tender. Alternatively, price oversight may be appropriate.

9 INFRASTRUCTURE MARKETS

The application of competition policy to infrastructure markets significantly affects the choices and prices paid by consumers for almost all of goods and services. The energy, water and transport sectors are key inputs to the Australian economy. The National Competition Policy (NCP) reforms have placed downward pressure on the cost of infrastructure services and increased choice across the economy.

Twenty years ago, infrastructure markets were characterised by vertically integrated, government-owned monopolies that were not responsive to changes in consumer tastes or needs. That has largely changed through competition policy and technology, though progress differs among the sectors.

For example, electricity consumers across Australia were limited to one tariff from one company, whereas consumers can now access sites like energymadeeasy.gov.au to assist them to choose among a range of offers. This degree of consumer choice and empowerment was almost non-existent when Hilmer reported.

The extension of the *Trade Practices Act 1974* (now the CCA) to government businesses, along with the competitive neutrality policy, the structural reform of government businesses including the separation of natural monopoly from contestable elements, privatisation, the move to cost-reflective pricing, and third-party access arrangements for infrastructure services have all left their mark on Australia's infrastructure markets.

While most infrastructure markets have been substantially reformed, the Panel has heard numerous examples that suggest progress has been patchy, the degree of reform differs substantially among sectors and much more needs to be done to provide greater choice and better service levels for consumers and businesses.

Competitive neutrality in infrastructure markets

The introduction of competitive neutrality and the application of the CCA to government businesses encouraged private businesses to invest and compete alongside government-owned businesses. For example, there are now many privately-owned electricity generators competing alongside the remaining government-owned generators. Private operators have also entered the market in rail, with most rail freight services now privately owned and operated.

Competitive neutrality was an important factor in allowing new entrants into the telecommunications market, when the Australian Government owned the dominant carrier, Telstra. While the telecommunications market was once fully privatised, the Commonwealth has recently re-entered the market via constructing the National Broadband Network (NBN). The Government's response to the Review of NBN provides an opportunity for the regulatory framework surrounding the NBN to be assessed against the Panel's recommended competition principles.

In contrast, there has been little private investment in urban water supply, except for desalination plants.¹³³ These plants are reliant on government contracts and are shielded from demand risk. To

133 Productivity Commission 2011, *Australia's Urban Water Sector*, pages 42-45.

the extent that there has been any private provision of roads this has been done through direct government contracting.

Similarly, public transport services are either provided directly by government businesses or through contracting out. Restrictions remain on the private provision of public transport services. For example, in NSW bus operators providing a public transport service less than 40 kilometres in length must have a contract with the NSW Government.¹³⁴

Structural separation

In most sectors, structural reform and separating monopoly from contestable elements has been heavily pursued. In the electricity market, generators have been separated from networks and sold. Competition in retailing has been introduced, and monopoly networks have been subject to prices regulation by independent regulators. Networks have also been privatised in some jurisdictions. Reform in gas markets has followed a similar path to electricity, with competition introduced to wholesale gas markets.

Structural separation was extensively pursued in rail. The main interstate freight network was brought together under the ownership of the Australian Rail Track Corporation, while above-rail freight operations have been privatised. Jurisdictions have access regimes in place for regional freight lines. While competition in above-rail services has emerged on some routes, on many others volumes have been too low to support competitive entry. Much of the rail freight sector faces strong competition from road transport. The major ports have also been reformed with port authorities now typically acting as landlords for competing service providers rather than directly providing services.

While competition was introduced in telecommunications, the dominant fixed-line provider, Telstra, was privatised without being structurally separated. Instead, reliance was placed on providing third-party access to Telstra's fixed-line network. On the face of it, this has seen less fixed-line retail competition in telecommunications than might have been expected. Dissatisfaction with access arrangements also led Optus to build its own hybrid fibre-coaxial network.

Over time, changes in technology have strengthened competition in telecommunications. Data rather than voice is now the dominant form of demand in the market, and wireless technologies compete effectively with fixed-line technologies in many applications.

Privatisation

Government ownership of infrastructure assets has been greatly reduced through privatisation in most infrastructure sectors. In the electricity market, some jurisdictions have already privatised or are in the process of privatising generation and network assets. Gas has followed a similar path. In telecommunications, assets have been fully privatised, although the National Broadband Network is now being built by a Commonwealth-owned company.

All the major airports have been privatised through long-term leases. The Australian Government has also privatised its airline. In rail, above-rail freight operations have been privatised as have many regional freight lines. However, the Australian Rail Track Corporation still remains a Commonwealth-owned corporation. In contrast, in the water sector there has been little

¹³⁴ Independent Pricing and Regulatory Tribunal, page 9.

consideration given to privatising dams and the water reticulation network. Similarly, privatisation has not been pursued in the roads sector to any extent, though there have been some privately built toll roads.

Privatisation has brought considerable public benefit. Governments have been able to redirect resources from asset sales into, for example, human services and retail competition has emerged in many markets. Privatisation has also delivered more efficient management of assets and investments have been more responsive to changes in market demand. For example, airports have been increasing capacity as demand dictates.

The NSW Government's *Electricity Prices and Services: Fact Sheet 11* shows the movement in average annual real electricity network prices being lower in jurisdictions where those assets have been privatised (Victoria and South Australia) compared to those where they have not (New South Wales and Queensland).

EnergyAustralia notes that there are distortions or inefficiencies caused by government ownership:

[A] policy tension is created where Governments continue to own generation and network assets creating the potential to influence policy positions to the detriment of customers and/or taxpayers through unnecessarily high reliability standards or intervention in natural commercial processes. The NEM [National Electricity Market] has developed as a robust market with significant private investment and Government policy has the ability to significantly shape how investment is made. (page 7)

The issue of how to privatise effectively is demonstrated by port infrastructure, where ensuring the regulatory regime can sufficiently influence port authority activities to constrain monopoly power is an issue. While some ports, particularly bulk ports, may have only a few large customers that can exert countervailing power, other ports may have significant market power in the absence of effective regulation.

An example of the former is the Hunter Valley coal chain, which brought together 11 coal miners, four rail haulage providers and three terminals to optimise the coal export chain in the Hunter Valley.¹³⁵ Most city container ports are likely to fall into the latter category, with neither shipping lines, stevedores, nor shippers having the market power and/or the incentive to effectively constrain the port authority or each other.

The ACCC also cites anecdotal evidence suggesting ports are being sold or considered for sale with restrictions on competition in place to enhance sale prices. It notes that:

Privatisation of port assets can raise issues of efficiency where monopoly rights are conferred by state governments, with no consideration to the prospect for competition and/or the need for economic regulation. This has the potential to result in lost efficiencies and/or higher charges which may be hard to remedy after the assets are sold. (page 38)

Sydney Airport serves as another example where the government privatised with a monopoly right in place, namely, a first right of refusal to operate a second Sydney airport.¹³⁶ While the Commonwealth may have achieved a higher sale price, this has come at the longer term cost of a less competitive market structure.

¹³⁵ See www.hvccc.com.au/AboutUs/Pages/History.aspx.

¹³⁶ ACCC Submission 1, page 36.

Pricing reform and access

Pricing reform and the move to cost-reflective pricing has been pursued extensively in most infrastructure markets and has been a key driver of efficiency and allowing markets to offer more consumer choice; for example, through facilitating retail price competition.

Benefits from pricing reform in infrastructure sectors arise through driving better use of existing infrastructure, which can delay the need for infrastructure investment. Where cost-reflective pricing is present, consumer demand will also provide a more accurate guide to infrastructure investment. This increases the likelihood that such investment is efficient and responds to actual changes in demand and consumer preferences. These factors lower the cost and increase the responsiveness across markets to the benefit of consumers. It also means governments can better target assistance to vulnerable consumers in those markets, reducing the burden on taxpayers.

Pricing reform has generally been pursued through deregulating prices where markets are sufficiently competitive, while subjecting the monopoly parts of markets to prices oversight, direct price regulation and access regimes. For example, in the electricity market wholesale prices are deregulated as are retail prices in some jurisdictions, while network prices are subject to pricing determinations.

Similarly in telecommunications markets, prices for mobile and retail services are deregulated, but Telstra's fixed-line network is subject to pricing and access determinations. Airports and ports are subject to prices oversight and a range of other regulatory tools, which can be used to prevent monopoly pricing. Access declarations remain available as a regulatory tool for airports and ports, but for the most part have not needed to be pursued.

In contrast, in water and in roads there has been little progress introducing pricing that reflects the actual cost of use on the network, such as time and location charging. Investment in those sectors 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. Roads in particular have also been subject to investment bottlenecks.

Box 9.1: Electricity as a case study

Reform of the electricity sector is often considered a success, and the lessons are likely to prove instructive for other sectors. The Australian Energy Market Commission (AEMC) notes that:

Energy markets in the Eastern States are generally characterised by competitive wholesale and retail markets. This is due in large part to a history of successful structural and institutional reform that created the framework for competition to develop. (page 1)

Electricity is provided to most of Australia through the National Electricity Market (NEM), which includes all jurisdictions apart from the Northern Territory and Western Australia. The sector is broken into the competitive wholesale and retail markets, on the one hand, and the distribution and transmission networks, on the other.

The AEMC points out in its *National Electricity Market: A Case Study in Successful Microeconomic Reform* that there were a number of factors to that success:

- the material problems were defined and clear reform objectives were set;
- reform took high-level political drive; provision of time, energy and, according to many reform participants, financial incentives;
- strategies were developed to enhance confidence in the reforms;
- strong and appropriate support structures were established with key stakeholder participation;
- the pace of the reform allowed for effective consultation across all stakeholders; and
- getting the industry structures right was key for effective competition.

The way forward

The importance of further reform in infrastructure is clear — the Panel considers that infrastructure reforms are incomplete, even in the sectors where most progress has been made. The Panel recognises that there have been hard-fought gains in the infrastructure sectors, but reform needs to be finalised where it is flagging or stalled.

Furthermore, in some sectors very little progress has been made. Consumers are seeing significantly cheaper air travel as a result of reforms to the aviation sector. In contrast, there has been little progress in attempting to introduce cost-reflective pricing in roads and linking revenue to road provision. As a consequence there is the criticism that new roads are being built in the wrong places for the wrong reasons, while too little attention is paid to getting more efficient use of existing road infrastructure.¹³⁷

The Panel outlines in the remainder of this part where it has identified further reforms that should be undertaken in the infrastructure sectors.

137 See for example, City of Whittlesea, pages 1-2.

The Panel's view

Reform of infrastructure sectors in Australia has generally served consumers well through a greater diversity of choice and price in utilities and transport compared to two decades ago.

However, there are further benefits which could be harnessed through finalising the application of those reforms and through the extension of further reforms.

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.

9.1 ELECTRICITY, GAS AND WATER

Electricity

Electricity is an area that has seen significant reform as part of the NCP agenda. Increases in electricity prices are a key source of concern among consumers and businesses (see Box 9.2). National Seniors Australia notes that:

Firstly, priorities should include the more important unfinished NCP reforms, in particular those that:

- address unprecedented recent growth in household energy and water bills. (page 4)

The Australian Industry Group (Ai Group) submits that:

The Federal and State Governments have already formally recognised the importance of this reform to consumers in the COAG Energy Market Reforms Plan (2012). Ai Group would urge the Federal Government to prioritise the implementation of this, and the other reforms contained in the Plan, as important contributions to enhancing competition in the energy sector. (page 41)

The Council of Australian Governments (COAG) Energy Market Reforms from 2012¹³⁸ referred to by the Ai Group, which encompasses previously agreed reforms, include:

- deregulation of retail prices, to ensure efficient and competitive retail energy markets for the benefit of consumers and the energy sector alike;
- ensuring consistent national frameworks, including the application of the National Energy Retail Law which is designed to harmonise regulation of the sale and supply of energy to consumers; and
- reliability standards, delivering the right balance for consumers between security of supply and costs of delivery through the development of a national regime.

138 For more detail on previously agreed energy reforms, see the COAG Energy Market Reform — Implementation Plan at www.coag.gov.au/node/481.

While reliability standards are not currently set through a national framework, the Panel notes work is underway to move towards one.¹³⁹ Other regulatory provisions may usefully be transferred to the national framework as well. Origin notes that:

[T]here are other examples of cross sector regulation that have a significant bearing on energy market participants, such as the various state regimes for licensing. Multiple frameworks increase the regulatory burden for all market participants and ultimately raise costs for consumers. Therefore, achieving framework consistency should be a policy priority. (page 2)

The Panel sees significant benefit in a national framework for reliability standards and notes that there has been a link between jurisdictional reliability standards and recent price increases.

139 COAG Energy Council Communique, 1 May 2014.

Box 9.2: Electricity prices — a failure of competition policy?

A common concern raised through consultation was the impact of electricity price rises on business and consumers. Often stakeholders felt the price rises were as a result of privatisation; many others felt it was because of the application of competition policy.

The AEMC undertakes annual pricing trend reports, most recently reporting in 2013 on expected price trends over the three years to 2015–16. Nationally the AEMC projected falling pressure on prices coming from stabilising regulated network costs; and upward and downward pressure from the costs of different government environmental policies, including the cost of the carbon price and closed-premium solar feed-in tariff schemes.

The report notes that, in 2012–13:

- regulated network costs, those associated with building and operating transmission and distribution networks, including a return on capital were the main component of the average electricity bill. These costs made up about 50 per cent of the national average electricity price;
- the carbon pricing mechanism, renewable energy target and state and territory feed-in tariff and energy efficiency schemes affect electricity prices and made up around 17 per cent of the national average residential electricity price; and
- competitive market costs include wholesale energy purchase costs and the costs of the retail sale of electricity. They accounted for around 33 per cent of the national average residential electricity price.

The previous report on 2011–12 electricity prices demonstrated that the main driver of upward pressure on retail prices at that point was network prices. The anticipated stabilisation has been borne out in the new report. The increases in network prices largely reflect the costs of replacing and upgrading the network infrastructure.

A number of processes underway are designed to improve the efficiency of regulated network costs. For example, new rules made by the AEMC in November 2012 have given the Australian Energy Regulator greater discretion and more tools to determine efficient costs and revenues when undertaking network regulatory determinations. The AEMC has also commenced a rule change process on the way distribution network businesses set their network tariffs. The AEMC will consider how distribution businesses can be encouraged to set network tariffs in a more cost-reflective manner in undertaking this rule change.

Rather than finding that competition has contributed to price increases, the report notes that competition in retail markets has allowed consumers to access better deals on price. Policies in most National Electricity Market jurisdictions allow for market-based prices and consumers in those States have, for example, been able to save 5-16 per cent in 2012–13 by shopping around for the best deal and switching from regulated offers.¹⁴⁰ The finalisation of competition reforms, such as the full implementation of the National Energy Retail Law, would be expected to further mitigate future price increases.

140 Australian Energy Market Commission 2013, *Final Report: 2013 Residential Electricity Price Trends*, Page iv.

Stakeholders for the most part call for full implementation of the National Energy Retail Law. The Energy Retailers Association of Australia states that:

By standardising consumer protection regulation, the [National Energy Customer Framework] has the capacity to reduce costs for retailers and ensure all customers regardless of location receive the same protections. The failure of all jurisdictions to accept the [National Energy Customer Framework] in full and existence of multiple consumer protection regimes creates barriers to entry, such as increased regulatory, administrative and compliance costs, for retailers wishing to expand their operations across borders. Actions by jurisdictions that inhibit the capacity of retailers to compete across borders is [sic] inconsistent with the intention of the NEM. (page 13)

The Panel also notes concerns raised in submissions, such as EnergyAustralia's, that the benefits from a harmonised National Energy Retail Law (sometimes referred to as the National Energy Customer Framework, or NECF) — reduced costs to business and consumers and improved choice through lowering barriers to energy retailers operating across state and territory borders — are diminished by inconsistent application of the regime.

The Queensland Competition Authority notes that:

So far, the NECF has commenced in all states, except Queensland and Victoria. No state has adopted the NECF without variations. While some variations may have been considered necessary to reflect the particular circumstances in that state, the higher costs of retailers complying with additional obligations and the potentially negative impacts on competition should be carefully considered against the benefits. Nevertheless, in this case partial harmonisation may be better than the status quo. (page 8)

The AEMC, in its *2014 Retail Competition Review*, found that the state of competition for small customers varies across the NEM and recommended that jurisdictions:

- consider options for raising awareness of the tools available for comparing energy offers to improve customer confidence in the market;
- ensure concession schemes are delivering on their intended purpose in an efficient and targeted way;
- continue to harmonise regulatory arrangements across jurisdictions to minimise costs, including implementing the National Energy Customer Framework; and
- remove energy retail price regulation where competition is effective. (page iv)

The Panel believes there is scope to go further than the previously agreed reforms to further develop competition in the sector. For example, the Energy Networks Association writes that:

[Energy Networks Association] strongly supports the transfer of economic regulatory functions under the National Electricity Law and National Gas Law and Rules from the WA Economic Regulation Authority and NT Utilities Commission to the Australian Energy Regulator, and the consistent application of the third-party access pricing rules (in particular, Chapters 6 and 6A of the National Electricity Rules, and the National Gas Rules) to energy networks in WA and NT. (page 7)

While there may be strong arguments — mostly on the basis of geography and high transmission losses — for the Western Australian and Northern Territory markets not to be physically joined to the National Electricity Market, the benefits of those jurisdictions adopting the national legislative and institutional frameworks can be realised without physical connection. The Panel notes there are

already moves underway for this to occur, with the Northern Territory Government moving to transfer responsibility for its electricity regulation to the Australian Energy Regulator (AER).

Gas

Reform in the gas sector has largely mirrored that of the electricity sector. The 2014 Eastern Australian Domestic Gas Study¹⁴¹ examined the market in detail and found that effective competition in wholesale gas markets is linked to access to efficiently priced gas transportation, processing and storage services, which in turn relies on a combination of efficient price signals and regulatory arrangements.

While the report notes that this has worked well to date, with a consistent build and redevelopment of infrastructure to meet growing demand in recent years, it does flag significant changes in the market and that changes in the regulatory and commercial arrangements could be made to address gas supply.

The report summarised options for government consideration including addressing regulatory impediments to supply, improving title administration and management, jointly facilitating priority gas projects and improving access to and cooperation on pre-competitive geoscience.

The report also indicated that a review into competition in the gas market is an option to consider, and this was echoed by EnergyAustralia in its recommendation that:

The Commonwealth Government request that the Productivity Commission conduct a high level coordinated review of market design, gas market competition, the direction and structure of the existing trading and related financial markets, and the suitability of carriage models for pipeline regulation. (page 6)

The Panel notes that the Australian Government will respond to the report through the Energy Green Paper. The Panel considers the Green Paper should, among other things, examine barriers to entry in the gas market, whether access regimes are working effectively to encourage upstream and downstream competition as well as regulatory and policy impediments to the efficient operation of Australia's gas market. The Panel would welcome the Green Paper committing to a more detailed review of competition in the gas sector in response to the Eastern Australian Domestic Gas Study and calls in other reports such as the Victorian Government's Gas Market Taskforce Final Report and Recommendations.¹⁴²

141 Department of Industry and the Bureau of Resource and Energy Economics 2014, [Eastern Australian Domestic Gas Market Study](#), page 47.

142 Victorian Government 2013, [Gas Market Taskforce Final Report and Recommendations](#), Recommendation 15.

The Panel's view

Reform of the energy sector remains important since energy is a key input to other sectors of the economy. Increasing competition in energy will help place downward pressure on energy prices to the benefit of consumers.

Reform of the electricity and gas sectors is well progressed compared to other sectors, but it is unfinished. Reforms committed to by the Council of Australian Governments in December 2012 are still not complete.

Examples of previously agreed reforms which should be finalised are the implementation of the National Energy Retail Law (designed to harmonise regulations for the sale and supply of energy) and retail price deregulation. The Panel notes with concern changes to the template legislation some jurisdictions have made in applying the National Energy Retail Law, and observes that this will detract from the originally intended benefits.

Further benefits may be realised in the electricity and gas sectors from the transfer of more functions to the national regime, such as reliability standards and licensing arrangements.

Competition benefits may also be realised from greater integration of the Western Australian and Northern Territory energy markets with the National Electricity Market.

The Panel notes the findings of the Eastern Australian Domestic Gas Market Study that competition is largely working, but that there may need to be further monitoring of the market as it is currently in a transitional phase. The Panel supports a further, more detailed review of competition in the gas sector as proposed in the Study.

Water

Reform has occurred in the water sector but it is not as progressed as electricity and, perhaps as a result of the absence of a national framework, has been more piecemeal. Each jurisdiction has made progress but none could be said to have fully realised the potential consumer choice and pricing benefits from reforms in the sector.

For example, under the 2004 National Water Initiative, governments committed to best practice water pricing. In 2011 the PC identified economic efficiency as the overarching objective for urban water pricing.¹⁴³ The PC considered that equity issues are best dealt with outside the urban water sector through, for example, taxation and social security systems. Despite these (and other) reports, the National Water Commission¹⁴⁴ found that a failure to implement pricing reforms meant that jurisdictions were not realising the full intended benefits.

There is a diversity of approaches to institutional arrangements across jurisdictions. In addition to pricing, the National Water Initiative encompassed the reform objectives of independent economic regulation and the institutional separation of service providers from the regulatory and policy functions of governments. Both of these reforms are important to delivering efficient pricing where there is a natural monopoly or where markets are not well developed. The National Water Commission notes that it continues to support independent economic regulation and institutional separation as important complements to pricing reforms.¹⁴⁵

143 Productivity Commission 2011, *Australia's Urban Water Sector*, page 69.

144 National Water Commission 2011, *Review of Pricing Reform in the Australian Water Sector*, page xii.

145 Ibid, page xiv.

Much like gas and electricity, there is significant agreement as to the most appropriate means to promote competition in the water sector — promote cost-reflectivity in pricing, create clear objectives in regulation and improve governance arrangements to promote greater transparency and independence in decision-making. However, the reforms in this area are proving slower to implement.

The Independent Pricing and Regulatory Tribunal (IPART) notes that:

[T]here is significant scope to reform the water sector. (page 14)

Postage stamp pricing reflects the average cost of servicing a given area (eg, Sydney Water’s area of operations). The National Water Initiative (NWI) pricing principles allow postage stamp pricing, but state a preference for differentiated prices in specific areas. However, postage stamp pricing remains NSW government policy. (page 17)

IPART further notes that:

[I]t [is] important to develop nationally consistent principles in relation to competition and private sector participation in the water market, similar to the reform of water entitlements from the 2004 National Water Initiative. (page 20)

This view is supported by Infrastructure Australia in its National Infrastructure Plan.¹⁴⁶ The Plan states that Australia’s water industry has a complex regulatory structure, with each State and Territory having its own economic regulator. In comparison, the UK has one water regulator to serve 60 million people.

Infrastructure Australia calls for the creation of a national economic regulator for water on the basis that it will provide stronger incentives to competitive private sector investment through greater stability, efficiency and an improved corporatisation model. The agency further notes that ‘short term political and public pressures can strongly influence the direction of the water industry, and pull states in different directions’, which may be addressed to a certain degree by a national regulator.

The Panel’s view

Progress in the water sector has been slower than reforms in electricity and gas.

While there are clear differences between the sectors, the approach taken in the energy sector may prove instructive in terms of furthering reform, particularly in relation to the creation of national institutions and national agreements in areas of State sovereignty.

In the first instance, there is merit in governments re-committing to a national water agreement, with specific regard to promoting consistent economic regulation in the water sector and the potential for a national regulator. Governments should also recommit to introducing efficient and cost-reflective pricing in water as far as it is practical to do so.

146 Infrastructure Australia 2013, *National Infrastructure Plan*, page 60.

Consumer access to data to improve competition

Markets work best when consumers are engaged and informed, empowering them to make good decisions. This can be assisted by steps to provide clear, easily understood information to consumers about the products and services on offer, including through comparison services such as the AER's energymadeeasy.gov.au, which allows customers to compare electricity and gas offers in a common format.

However, as CHOICE submits, another means of empowering consumers by reducing information asymmetry and complexity is by providing consumers with better access to data about their own usage of products and services (page 24). While such data may benefit consumers in many different markets, some of the most obvious applications are in the utilities sector.

Midata is an initiative in the UK supported by the Government and drawing on insights from behavioural economics. It aims to provide consumers with access to data which businesses collect about their transactions and consumption in an electronic, machine-readable form:

[C]onsumers will be able to make better informed decisions, often with the help of a third party. Being able to base decisions on their previous behaviour will mean individuals can choose products and services which better reflect their needs and offer them the best value. This in turn will reward firms offering the best value products in particular markets, allowing them to win more customers and profits and resources. This will drive competition in the economy.

As a platform for innovation: midata will lead to the creation of new businesses which will help people to interact with their consumption data in many innovative ways.¹⁴⁷

The UK Government has introduced legislation that will mandate data access in the 'core' sectors of energy supply, credit cards, transaction accounts and mobile phones, and set out principles for future interventions in 'non-core' sectors if required.

The US has an electricity-specific program called Green Button, giving customers access to their electricity data in a portable and shareable format.¹⁴⁸

The National Energy Retail Law seeks to address some of the information asymmetry concerns — the legislation requires the AER to maintain the 'energy made easy' price comparator service, as well as legislating certain requirements for the provision of information in standard form by retailers to energy consumers. While these initiatives have gone some way to assisting consumers to better participate in energy markets, access to their usage data may further assist them to engage.

The Panel's view

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.

147 UK Department for Business Innovation & Skills, *Government Response to 2012 consultation*, page 9.

148 See <http://greenbuttondata.org/>.

9.2 TRANSPORT

Aviation

All major Australian airports have been privatised through either outright sale or through 50-year leases.¹⁴⁹ Airports tend to have strong natural monopoly characteristics; consequently the effectiveness of the regulatory framework applying post-privatisation is important to ensure appropriate prices and quality of service.

The PC reported on the regulation of airport services in 2012. The PC concluded that airports' aeronautical charges, revenues, costs, profits and investment look reasonable compared with mostly non-commercial airports overseas and existing safeguards have been little used — including Part IIIA access declarations. There has also been significant investment at airports, which have not suffered bottlenecks compared to other sectors.¹⁵⁰

The PC noted that capital city airports possessed significant market power and found that price monitoring data since 2002-03 showed substantial price increases at most of the monitored airports. However, taken in context, price increases did not indicate systemic misuse of market power.¹⁵¹

The increase in prices has, however, raised concerns with users. The Board of Airline Representatives Australia notes that:

While the industry has achieved large improvements in productivity, international aviation in Australia is facing significant cost pressures from the prices associated with its 'aviation infrastructure' (jet fuel supply, airports, air traffic management and fire services), which will have consequences for air travel affordability and the economic growth the industry generates. (page 3)

While there is substantial regulation in place constraining the market power of airports, an opportunity for promoting competition was lost when Sydney Airport was privatised. When it was sold in 2002, the Australian Government provided the acquirer with the right of first refusal to operate a second Sydney airport. The ACCC notes that the right of first refusal confers a monopoly to Sydney Airport over the supply of aeronautical services for international and most domestic flights in the Sydney basin. While inclusion of this right increased the sale price, it is likely to have had an anti-competitive impact on the aviation sector. (ACCC submission 1, page 36)

The Australian Airports Association (page 5) considers that land use planning and other restrictions limit the ability of smaller airports to compete with larger ones.

Other issues raised in submissions include the lack of competition between jet fuel suppliers at airports and the cost of services provided by Airservices Australia.

The Board of Airline Representatives Australia notes that international airlines operating to Australia pay some of the highest 'jet fuel differentials' globally (page 7).

In relation to services provided by Airservices Australia, the Board of Airline Representatives Australia notes that the existing structure of Airservices' prices encourages the development of an inefficient

149 With a 49-year extension available.

150 Productivity Commission 2011, *Economic Regulation of Airport Services*, Finding 4.1, page XLVI.

151 Ibid, Finding 7.2, page XLVIII.

aviation industry and distorts competition both between regional airports and with other modes of transport (page 4).

The Panel's view

The price monitoring and 'light-handed' regulatory approach in aviation appears to be working well overall. However, if prices continue to increase as fast as they have been that would raise concerns and may warrant a move away from light-handed regulation for individual airports.

While the regulatory framework for airports appears to be working well, airport privatisation could have been handled better. A significant opportunity for greater competition was lost as a result of Sydney Airport being privatised, with the new owner being given first right of refusal to operate the second Sydney Airport.

While privatising in a way that restricts competition may result in a higher sale price, it comes at the long-term cost of a less competitive market structure.

The competition in jet fuel supply and the pricing structure for services provided by Airservices Australia should be a focus of further reform efforts in the sector.

Port reform

Port reform has resulted in the corporatisation of ports in all States and the Northern Territory. Most major ports have moved to a landlord model, where the authority is involved in providing core activities only and more contestable elements such as stevedoring, dredging and towage are provided by private contractors.¹⁵² Some ports have been privatised while others remain in government hands.

Declaration of harbour towage services was repealed in 2002, as the industry was deemed sufficiently competitive.

Stevedoring activities remain declared services and subject to price monitoring by the ACCC. The most recent report by the ACCC, *Container stevedoring monitoring report no. 15*, highlights that competition in the sector is increasing and that past reform focused on improving productivity has been successful, such that users have benefitted through lower real prices and better service levels (page viii).

However, the ACCC notes that returns in the industry remain persistently high, suggesting more investment in capacity and greater competition may be needed (page ix). This raises the question of whether port authorities are sufficiently considering the need to foster greater competition through making land available for new entrants. New terminals are opening in Brisbane and Sydney and one is in prospect for Melbourne. However, as Hutchison Ports Australia notes, for its entry to occur:

[g]overnments had to decide to develop and offer extra land for a new operator and Hutchison needed to submit a winning bid and invest hundreds of millions of dollars establishing new terminals. (page 2)

As with airports, a key issue when privatising ports is ensuring the regulatory regime can sufficiently influence port authority activities to constrain their monopoly power. While some ports, particularly bulk ports, may have only a few large customers that can exert countervailing power, other ports may have significant market power in the absence of effective regulation.

152 Productivity Commission 2005, *Review of National Competition Policy Reforms*, page 15.

An example of the former is the Hunter Valley coal chain, which brought together 11 coal miners, four rail haulage providers and three terminals to optimise the coal export chain in the Hunter Valley.¹⁵³ Most city container ports are likely to fall into the latter category, with neither shipping lines, stevedores nor shippers having the market power and/or the incentive to effectively constrain the port authority or each other.

The ACCC also cites anecdotal evidence suggesting ports were being sold or considered for sale with restrictions on competition in place to enhance sale prices (page 37). The ACCC notes that:

Privatisation of port assets can raise issues of efficiency where monopoly rights are conferred by state governments, with no consideration to the prospect for competition and/or the need for economic regulation. This has the potential to result in lost efficiencies and/or higher charges which may be hard to remedy after the assets are sold. (ACCC Submission 1, page 38)

The recent policy focus has largely been around infrastructure provision both at the ports and in the port surrounds rather than the regulatory framework. For a port to operate effectively, road and rail links also need to be optimised. Better use of ports is linked to improvements in land use planning as well as pricing for other transport modes.¹⁵⁴

The Panel's view

Significant reform of ports has been achieved, which has benefited users. Nonetheless, various participants in many of the port services chains have significant market power. Regulators and regulatory frameworks need to recognise this, including through the application of pricing oversight and, if necessary, price regulation.

Leasing costs at ports subject to price regulation should aim to reflect the opportunity cost of the land and not the ability to extract monopoly rents. The latter represents an inefficient tax on consumers and business.

Cabotage (coastal shipping and aviation)

Australia has a policy of reserving coastal shipping for locally flagged vessels, though foreign-flagged ships may carry cargo and passengers between Australian ports after being licensed to do so.

Significant changes were made to the process of licensing foreign vessels under the *Coastal Trading (Revitalising Australian Shipping) Act 2012*.

The licensing process is intended to allow Australian ships the opportunity to argue that they are in a position to undertake voyages proposed to be undertaken by foreign vessels. This represents a form of protection of Australian-registered ships.

The Government announced separate departmental-led consultations on coastal shipping regulation on 8 April 2014.¹⁵⁵ In view of the separate Government process to consider possible reforms to coastal shipping, the Panel has not examined this issue in detail.

153 See www.hvccc.com.au/AboutUs/Pages/History.aspx.

154 For further discussion see ACCC 2013, *Container stevedoring monitoring report no. 15*, page 18 and www.infrastructureaustralia.gov.au/publications/files/COAG_National_Ports_Strategy.pdf.

155 See Australian Government 2014, *Options Paper: Approaches to regulating coastal shipping in Australia*.

However, the Panel has received many submissions arguing that changes made under *Coastal Trading (Revitalising Australian Shipping) Act 2012* have raised the cost and administrative complexity of coastal shipping regulation without improving its service or provision.

This is highlighted by the Tasmanian Farmers and Graziers Association that notes:

[o]ne of the key regulatory impediments in Tasmania is the lack of competition and demarcations surrounding coastal shipping.

These onerous regulations result in the 420 km distance across Bass Strait being the most expensive sea transport route in the world. (page 8)

Similar to coastal shipping, Australia also prevents international airlines from picking up domestic passengers on a domestic leg of an international flight. While not raised in submissions, the Panel did receive representations in its visit to Darwin that aviation cabotage prevented domestic passengers from being able to be embarked on international flights transiting through Darwin. For example, a flight originating in Malaysia and travelling to Darwin and then on to Sydney cannot embark passengers for the Darwin to Sydney leg.

The Panel considers there is likely to be considerable benefits flowing from the removal of air cabotage restrictions on remote and poorly served domestic routes and the current blanket air cabotage restrictions are inefficient.

The Panel's view

The Panel considers that reform of coastal shipping regulation should be a priority.

Consistent with the approach the Panel recommends for other regulatory reviews, the Panel considers that restrictions on cabotage for shipping and aviation should be removed unless they can be shown to produce outcomes that are in the public interest and those outcomes can only be achieved by restricting competition.

This approach should guide the current Government consultation process in relation to coastal shipping.

Rail freight

In the rail sector, the NCP reforms focused on the structural separation of the interstate track network from above-rail operations, with the formation of the Australian Rail Track Corporation, along with the development of access regimes and regulatory bodies. Networks have been declared under the National Access Regime or equivalent State-based regimes. Open access was also applied sporadically to related rail assets such as bulk handling assets, intermodal terminals, coal ports and grain export facilities.

At a national level, the objectives set by the original NCP have been largely met. The application of price controls and the oversight of regulators appear to have addressed concerns about possible monopoly pricing. Regulatory regimes have generally promoted competition and entry has occurred in some access-dependent markets.

With the removal of regulation reserving certain freight tasks for rail under NCP, rail freight on the majority of routes now has to compete with road transport. Aurizon notes:

The fundamental economic problem for the interstate rail network is a lack of scale, which manifests as an inability to compete effectively with road transport. (page 39)

While rail track may be considered a natural monopoly, intermodal competition can act as an effective constraint. This has reduced the need for heavy-handed regulation in the rail sector.

Issues raised in submissions include the complexity of access issues, with some above-track operators having to contend with multiple access regimes to provide a single rail service, and that structural separation has been imposed in areas where above-rail competition has not and is unlikely to emerge.

The Panel's view

Rail reform has been relatively successful and proceeded at a reasonable pace. Many rail freight tasks face significant competition from road freight, which has made efficiency-enhancing reforms relatively palatable. Regulators and policymakers should be pragmatic about structural separation of railways, recognising that on some low-volume rail routes vertical integration may be preferable.

Road transport

Australia is highly reliant on its road network for the efficient movement of goods and people both in cities and the regions. More than 70 per cent of domestic freight is transported by road.¹⁵⁶

Australia's road transport industry has historically operated in a diffuse regulatory and funding framework, which has imposed significant costs on some road users. Government involvement in the road transport sector covers licensing, access rules, safety regulation and road provision.

The pace of road reform in Australia has been slow compared to other transport and utilities reforms. This is partly due to roads and road transport being traditionally administered through government departments, while airlines, airports, and rail have been operated by public companies. Roads have also been seen as public goods, administered by a large number of authorities at the local, state and territory and Commonwealth level, and it has not been widely accepted that a public utility style organisation could charge for them.

As a consequence, Commonwealth, state and territory governments have shown reluctance to explore more cost-reflective pricing arrangements for roads while continuing to raise general revenue from motorists through fuel excise, registration fees and other taxes such as stamp duties.

By contrast other natural monopoly sectors like electricity and water are independently regulated to identify efficient costs and prices, with use-based charges used to fund the provision of the network.

While there has been a move towards tolling for new roads over the past two decades, there has not been any attempt to account for the capital costs of the road network as a whole. This has led to the situation where some routes are subject a form of road pricing while others are not, creating distortions and inequities among road users.

Heavy vehicles, being a significant contributor to road damage over time, have been the main focus of road-charging reforms. The current heavy vehicle charging regimes use a combination of registration fees and fuel-based charges to recover cost on average and do not reflect the actual cost to the road network of an individual vehicle. Moreover, taxes and charges on road users in general are not directly linked to the provision of roads.

156 Australian Trucking Association, *A Future Strategy for Road Supply and Charging in Australia*, page 3.

The lack of effective institutional arrangements to support efficient planning and investment in the road sector is raised in several submissions.

The Business Council of Australia (BCA) recommends that:

Governments should promote efficient investment and use of road transport infrastructure through adoption of broad-based user charging, as part of comprehensive tax reform and reform of Commonwealth and state funding arrangements. (BCA Summary Report, page 15)

Lack of proper road pricing distorts choices among transport modes: for example, between roads and rail in relation to freight and roads and public transport for passenger transport. Aurizon notes that the lack of commercial viability of much of the rail freight industry is:

[e]xacerbated by the lack of competitively neutral pricing for heavy vehicle freight transport on national highways and arterial roads, despite Federal, and State Government policy advocating the shift of long-haul freight from road to rail for economic and social policy reasons. (page 4)

Lack of proper road pricing also contributes to urban congestion, which is a growing problem in Australia's capital cities.¹⁵⁷ With road users facing little incentive to shift demand from peak to off-peak periods, greater road capacity is needed. As IPART notes:

During peak periods of demand, roads are allocated through queuing which imposes a far greater cost to road users and the economy than would an effective pricing mechanism. (page 22)

Technologies are available that allow greater use of cost-reflective pricing, which in turn could be linked to the provision of road infrastructure. This could make roads more like other sectors, where road authorities charge directly for their use and use the revenues raised for road construction and maintenance. The PC notes in its recent report on infrastructure that:

The adoption of a well-designed road fund model or a corporatised public road agency model is paramount to delivering net benefits from the funding and provision of roads. In the future, road funds may be able to consider direct road user charges, which would facilitate more effective asset utilisation and more rigorous assessment of new investments.¹⁵⁸

Importantly, greater use of cost-reflective pricing linked to road provision holds the prospect of both more efficient use of road infrastructure as well as more efficient investment based on clearly identified demands. Considerable work has been undertaken by the Heavy Vehicle and Investment Reform project to progress both user charging and institutional reform. The challenge is now to agree on a model of implementation.

Given the size and importance of the road transport industry for the economy and the importance of efficient road use and provision for urban and regional amenity and consumer wellbeing, much greater progress in this area needs to be made.

157 The Bureau of Infrastructure, Transport and Regional Economics estimates the costs of road congestion in Australian capital cities to have been \$9.4 billion in 2005 and projected to more than double by 2020; http://www.bitre.gov.au/publications/2007/files/wp_071.pdf

158 Productivity Commission 2014, *Public Infrastructure*, page 21.

Direct road pricing need not lead to a higher overall financial burden on motorists since existing indirect taxes could be reduced as direct charging is introduced. Direct budget funding for road authorities could also be reduced as direct charging increases and is channelled into road funds. Road authorities could be subject to prices oversight and independent pricing determinations similar to monopoly networks in other sectors.

Modelling undertaken by Infrastructure Partnerships Australia suggests that rural and regional drivers will benefit most from a move to replace indirect charges with cost-reflective direct road user charges.¹⁵⁹

This policy shift will require cooperation from all levels of government. As road pricing is introduced, the Australian Government should reduce excise and grants to the States and Territories. This would allow the reform to be fiscally neutral.

The Panel's view

Reform of road pricing and provision should be a priority. Road reform is the least advanced of all transport modes and holds the greatest prospect for efficiency improvements, which are important for Australian productivity and amenity.

Technologies are available that allow for more widespread application of cost-reflective pricing in roads, taking into account location, time and congestion. Revenue raised through road pricing should be channelled into road funds to promote more efficient road use and investment.

Cooperation from all levels of government will be needed to ensure that road pricing does not result in an additional impost on road users.

Public transport

Public transport reforms have not been pursued as part of competition policy. Public transport governance systems vary from State to State and city to city. For the most part, however, public transport is owned and operated by government. Where the private sector provides substantial operations, for example, private bus operators, taxis and hire car services, these are often regulated or licensed by governments.

The experience in Victoria serves as an example of public transport reforms that have ultimately delivered significant benefits despite some initial problems. In the early 2000s urban rail, tram and country passenger rail operations were privatised. However, within a few years most of the operators needed to be bailed out by the Victorian Government. While service levels had improved significantly and passenger satisfaction increased, overestimates of patronage built into the bids meant that the subsidies agreed to under the contracts were insufficient to keep the operators solvent.¹⁶⁰

While the Victorian Government needed to bail out operators, it did not re-nationalise services and train, tram and bus services continue to be operated privately and managed through complex contractual arrangements that provide incentives to maintain and improve service quality.

Applying the lessons learned from other sectors to public transport could see greater use of contracting out, privatisation or franchising, subject to a regulatory regime imposing safeguards to

159 Infrastructure Partnerships Australia 2014, [Road Pricing and Transport Infrastructure Funding](#), page 9.

160 See Victorian Department of Infrastructure 2005, [An Overview of Passenger Rail Franchising in Victoria](#), pages 8-9.

maintain service levels. Through careful contracting, service levels and choice can be maintained or improved through increased private provision. Bus services are likely to be contestable and, while governments may wish to provide a minimum level of service, they should not restrict other providers from entering the market.

The Panel's view

Extending NCP principles to public transport could see more franchising and privatisation of potentially competitive elements of public transport, stronger application of competitive neutrality principles and removal of regulation that limits competition. This holds the prospect of providing services more efficiently and improving service levels.

Taxis

The taxi industry in most States and Territories remains heavily regulated despite both being a priority reform area identified under the NCP regulation review program and most reviews recommending substantial reform.¹⁶¹

Regulations tend to focus on two areas: the quality of taxi services and restricting the number of taxis that can operate.

Quality regulations cover areas such as the age of vehicles, roadworthiness, driver presentation and knowledge, as well as access to radio dispatch facilities. These regulations are aimed at ensuring minimum standards to promote public confidence that taxis are safe and will provide a minimum standard of service. On the whole they appear to impose little cost on the taxi industry and their customers, because they do not significantly restrict competition between taxi services.

However, most States and Territories also restrict the quantity of taxis by requiring each taxi to have a licence and limiting the number of licences issued. This has the effect of limiting responsiveness to consumer demand.

New taxi licences are typically issued on an infrequent and ad hoc basis with different sale methods resulting in large variations in sale price. Most people wishing to obtain a taxi licence must purchase one from an existing licence holder.

While laws that regulate safety and minimum service levels are commonplace in the Australian economy, the taxi industry is virtually unique among customer service industries in having absolute limits on the number of service providers.

The Australian Taxi Industry Association considers that:

State and Territory Governments cap the supply of taxi licenses (or permits) at levels that aim to balance customer convenience and service (e.g. measurable in terms of waiting times) with the viability of taxi drivers' and operators' small businesses. This leads to supply caps well in excess of normal demand, although less than the number required to service peak demand without some acceptable diminution of service. (page 7)

However, most service industries face variable demand, and businesses are able to operate without regulation limiting the number of operators.

¹⁶¹ See National Competition Council 2005, *Annual Report 2004-2005*, page 35.

The scarcity of taxi licences has seen prices paid for licences reach over \$400,000 in Victoria and NSW, which indicates significant rents in owning a licence and is at odds with the claim that licence numbers are balanced given market conditions.¹⁶²

IPART estimates that in NSW 15 to 20 per cent of the taxi fare arises as a result of restrictions on the number of licences and notes that the passengers who stand to benefit from reform include a significant number of lower income earners, many of whom have limited transport options due to age or disabilities. (page 7)

The industry in each jurisdiction and nationally has been subject to a series of reviews dating back more than two decades.¹⁶³ However, apart from recent reforms in Victoria (see Box 9.3) there has been little reform undertaken. The Victorian case demonstrates that change for the benefit of consumers is possible.

Box 9.3: Victorian taxi reforms

In Victoria, dissatisfaction with taxi costs and service levels led the Government to undertake fundamental reforms mostly along the lines recommend by the Taxi Industry Inquiry 2012.¹⁶⁴

These reforms include:

- increased pay and higher standards for drivers under a new mandatory Driver Agreement;
- improvements to the fare structure including peak and off-peak pricing;
- cutting the service fee for card payment from 10 per cent to five per cent;
- regulated fares moving from prescribed fares to maximum fares, providing the ability for customers to be offered discounted rates, such as lower fares to the airport;
- a zoning system — metro, urban (including large regional centres), regional, and country — with separate licence fees applying;
- opening the market with the Taxi Services Commission issuing new licences as the market demands, with a set annual fee for licences—the fee will be lower in regional and country areas, and for wheelchair-accessible vehicles;
- a new ‘consumer interest test’ will apply to regional and country zones to consider the benefits of new licences for customers;
- enabling taxis and hire cars to compete for contract work to fill the gaps in public transport services; and
- removing the requirement to offer taxi services on a continual basis, allowing taxi operators to set their own hours.¹⁶⁵

Technological change is also ‘disrupting’ the taxi industry and forcing change upon it. For example, traditional booking methods are being challenged by the emergence of apps such as GoCatch and ingogo, as is the industry itself through rideshare apps like Uber that can connect individuals wanting a lift to drivers willing to take them for a fee.

162 See www.taxibrokersrus.com.au.

163 See, for example, the Industry Commission 1994, *Urban Transport*.

164 See Fels AO, A 2012, *Customers First — Service, Safety, Choice*.

165 See www.taxi.vic.gov.au/taxi-reform/about-taxi-and-hire-car-reforms.

The emergence of Uber has been particularly controversial as regulatory agencies have been questioning its legality and fining drivers, notwithstanding considerable public demand for its services. This indicates existing regulation is more concerned with protecting a particular business model than being flexible enough to allow innovative transport services to emerge.

National Seniors Australia notes that new technologies are having the effect of empowering consumers:

[T]he digital revolution — including the growing use of mobile telephone applications in combination with satellite navigation technologies — is giving rise to opportunities for new entrants to breakdown existing taxi network monopolies, enabling consumers to exercise greater choice and receive prompter service. It will be important to ensure that these innovations are not stifled by further anti-competitive regulation aimed at protecting incumbents. (pages 14-15)

While taxi reform is not expected to make a major contribution to national productivity, the sector is an important component of metropolitan transport, and can be particularly important for the mobility of the elderly and those with a disability. More affordable and convenient taxi services give consumers options. Significantly reduced barriers to entry could see more taxis operate at peak times, without needing to operate at off-peak times just to earn a return on the licence.

The Panel considers that the longstanding failure to reform taxi regulation has undermined the credibility of governments' commitment to competition policy more broadly, making it harder to argue the case for reform in other areas. The Victorian example demonstrates that change is possible and technological 'disruption' suggests that change driven by consumers is inevitable.

The focus of reform in the taxi industry needs to be twofold: to reduce or eliminate restrictions on the supply of taxis that limit choice and increase prices for consumers; while ensuring that technological change that can benefit consumers is not discouraged.

The Panel's view

Taxi industry reform in most States and Territories is long overdue. Many restrictions remain that limit competition by creating barriers to entry and preventing innovation.

The regulatory framework for taxi regulation could be enhanced considerably through independent regulators having the power to make determinations (rather than recommendations), including on the number and type of taxi licences to be issued.

Mobile technologies are emerging that compete with traditional taxi booking services and support the emergence of innovative passenger transport services. Any regulation of such services should be consumer-focused and not inhibit innovation or protect existing business models.

10 HUMAN SERVICES

The lives of Australians are immeasurably richer from access to high-quality human services. The human services sector covers a diverse range of services including health, education, disability care, aged care, job services, public housing and correctional services.

Human services are a large and growing part of the Australian economy¹⁶⁶ and governments are making significant changes in some human services sectors. For instance, encouraging innovation and greater consumer choice are important features of recent changes to disability care and support, and aged care.

The questions before the Panel are how to build on the good work already under way and whether greater choice, diversity and innovation in human services could be driven by competition policy. Increasing quality and choice of services available to Australians would create a large positive impact on wellbeing with higher quality human services better meeting peoples' needs.

This chapter addresses four key themes in relation to the human services sector. First, the separation of funding, regulation and service delivery. This is not about changing the level of government funding for human services, but about introducing some independence into service regulation and some competition into service delivery.

It is important to note that the Panel has no views on the absolute funding levels for human services, and this subject lies outside the Terms of Reference of the Review.

Second, this chapter discusses the potential for greater consumer choice in human services. Consumers can value greater choice from their service provider in education and health, as in other aspects of their lives.

Third, this chapter discusses the importance of diversity of service providers. In many sectors of human services there are already diverse providers, with both not-for-profit and for-profit service provision available. This is an important feature of human services, and should be preserved.

Last, this chapter discusses the importance of careful implementation of changes to how human services are delivered. These services can have profound impacts on peoples' lives, and so changes must be made carefully. Pilot programs, flexible rules and post-implementation reviews can be useful tools for implementing change.

10.1 ROLE OF GOVERNMENT

Governments at all levels have traditionally played an important role in human service delivery in Australia. In many cases governments, including via their departments, have determined what is supplied, how much is supplied (through the budget process), and supplied many of the services themselves.

Across most human services the power to regulate and implement policy lies with the States and Territories; however, the Commonwealth has some leverage through financial grants and Council of Australian Government (COAG) processes. For example, tied grants made to tertiary education

166 See Australian Government 2010, [Intergenerational Report](#).

institutions have given the Commonwealth an ongoing and dominant role in university policy and regulation.

State and territory governments may choose to delegate responsibilities to local government to develop and implement human services policy. The Productivity Commission (PC) has found that local governments are involved in various human services sectors including aged care and child care services, health clinics, youth centres, community housing refuges and facilities, counselling and welfare services.¹⁶⁷

Funding of human services

The Panel will not make recommendations on overall levels of funding — funding decisions are a matter for governments and are generally determined through budget processes. However, funding levels and methods can have important implications for choice, diversity and innovation in human services markets.

The question of funding centres on setting the bounds of the service that will be paid for or subsidised by governments and structuring the funds that flow from the government to providers or users. While some human services are block funded, others have 'entry criteria' that qualifies an individual for funding associated with a level of service. Policymakers may change entry criteria from time to time, for example, to better reflect changing demographics.

¹⁶⁷ Productivity Commission 2012, *Performance Benchmarking of Australian Business Regulation: The Role of Local Government as Regulator Research Report Volume 1*, page 53.

Box 10.1: Funding human services as a policy decision**Schools**

A significant portion of government funding for schools is provided on a ‘per student’ basis.¹⁶⁸ This policy decision by governments ensures that each student has an entitlement to a certain level of funding, regardless of which school they attend.

Disability care and support

The rollout of the National Disability Insurance Scheme (NDIS) required an initial decision by policymakers on who will qualify for public disability funding. During the launch period (July 2013 to 30 June 2016), individuals will qualify if they are in a launch location, are the right age for that location and meet either the disability or early intervention requirements. The disability requirements are:

- the individual has a permanent disability; and
- the impairment substantially reduces the individual’s ability to participate effectively in activities, or perform tasks or actions unless they have
 - assistance from other people on most days, or
 - they have assistive technology, equipment (other than common items such as glasses) or
 - the individual can’t participate effectively even with assistance or aides and equipment; and
- the impairment affects the individual’s capacity for social and economic participation; and
- the individual is likely to require support under the NDIS (and not another service system such as the health system) for their lifetime.¹⁶⁹

While some types of human services funding are transparent and directly relate to a specific service — for example, Medicare provides a direct benefit to patients when they visit a GP — other types of funding may be less transparent.

Many human service providers are expected to provide services on a universal basis. This can be classified as a community service obligation (CSO), which is an activity that provides community or individual benefits but would not generally be undertaken in the normal course of business. Government providers may need to fulfil CSOs or the government may contract with private providers to deliver CSOs on their behalf.

Several submissions recognise that traditional methods for funding CSOs typically lack transparency. IPART points out:

[p]roviders are often required to absorb the cost of CSOs into their operating budgets, often involving non-transparent internal cross-subsidies ... because CSOs are not directly funded by the government, agencies have to overcharge for some of their other services in order to cover the costs of their CSOs ... This in turn can lead to the restriction of competition in otherwise contestable areas so the internal cross-subsidies can be maintained. (pages 4-5)

¹⁶⁸ See the *Australian Education Act 2013*.

¹⁶⁹ National Disability Insurance Scheme, [My Access Checker: Access Requirements](#).

Better transparency of CSOs can have important impacts on diversity and choice. Where there are significant CSOs, potential suppliers may not be able to match the cost structure of public providers, and so there may be limited private and not-for-profit providers entering the market. On the other hand, providers tasked with delivering CSOs may become unsustainable as the 'higher prices needed to fund the subsidy to CSOs can be undercut by competitors that only supply those users which generate profits'.¹⁷⁰

By making CSOs transparent and funding them directly, important community services can continue to be provided, while still leaving room for new providers to enter and offer services in other parts of the market.

Regulation of human services

Regulation is separate and distinct from funding. Regulation can cover many important functions including: assessing whether a particular person qualifies to receive a service; licensing service providers; imposing standards for goods and services; and setting the rules for price regulation of services. Unlike questions of funding, which will generally form part of a longer-term policy, exercising a regulatory function may need the flexibility to adapt to changing circumstances relatively quickly.

Examples of regulatory functions in human services markets include:

- authorising a higher education institution to classify itself as an 'Australian University';
- assessing the care and support needs of an aged care resident; and
- setting an approved price for particular services provided by disability support workers.

Governments may vest these functions in a single regulator, or split them among several different regulators.

170 House of Representatives Standing Committee on Financial Institutions and Public Administration 1997, *Cultivating Competition, Report of the Inquiry into aspects of the National Competition Policy Reform Package*, pages 33-34.

Box 10.2: Disability care and support regulator

The National Disability Insurance Agency (NDIA) is a statutory agency whose functions include delivering the National Disability Insurance Scheme (NDIS).

The NDIA assists participants in the NDIS to develop plans with individualised packages of supports, which include the reasonable and necessary supports directly related to meeting a participant's ongoing disability support needs. These plans are reviewed regularly and can be modified, for example, when a participant's circumstances and needs change.

The NDIA (through its CEO) has a range of decision-making powers under the NDIS Act including:

- access decisions: assessing whether a person meets the access criteria to become a participant in the NDIS;
- planning decisions: for NDIS participants, approving and reviewing plans, including the reasonable and necessary supports that will be funded or provided through the NDIS;
- registered provider decisions: approving persons or entities to be registered providers of supports under the NDIS; and
- nominee decisions: appointing a nominee for certain NDIS participants who need assistance in developing and managing their plan.¹⁷¹

In its Disability Care and Support Report, the PC argued that the type of individualised assessment of participants undertaken by the NDIA is 'an essential element of avoiding ... chronic underfunding'.¹⁷² The design of the NDIS is intended to ensure the NDIA has the ability to quickly and efficiently change individual plans where required.

10.2 SEPARATION OF FUNDING, REGULATION AND SERVICE PROVISION

Separation of funding, regulation and provision of human services involves maintaining government funding of human services while introducing some independence into service regulation, and the potential for some competition into service delivery.

Separation has the potential to enhance the quality of service provided to consumers and the effectiveness of service provision. The PC notes that administered markets (markets where services are delivered by the government with no exposure to competition) 'often fail to provide strong incentives for service providers to improve their efficiency and to deliver the levels and quality of service required by users'. (page 35)

Australian governments have increasingly considered how to introduce competition into administered markets, including through contracting out and commissioning. However, in many human services markets in Australia, there are still services that the government block funds, regulates and provides through the same organisation.

¹⁷¹ See National Disability Insurance Scheme Act 2013 and [NDIS website](#).

¹⁷² Productivity Commission 2011, *Disability Care and Support Report Vol. 1*, page 21.

Most submissions which considered separating functions did so in the context of utilities. For example, the Australian Communications Consumer Action Network notes the positive aspects of separating functions in communications (which was done as part of the NCP reforms), including that:

Structural changes to the communications market ... substantially improved competition in the Australian market. This led to a proliferation of consumer choice. (page 4)

However, some submitters note actual or potential difficulties with separating functions in human services markets. For example, the Australian Education Union states that ‘there should not be a separation between funder and provider of service delivery’ (page 2) and goes on to add that separation of these functions may lead to increased costs to consumers and issues of access and equity. (page 3)

While the potential challenges associated with separation must be recognised, splitting the regulator from the provider can give the regulator greater scope to make decisions in the best interests of consumers. For example, the PC noted that, where a regulator and provider are the same entity, regulators ‘often find ways of favouring the arms of their own businesses’.¹⁷³

There may also be specific advantages from specialisation. For example, the regulator can focus on ensuring that service providers meet basic quality requirements, rather than micro-managing contracts; or the regulator could be responsible for licensing or registering each service provider, so that consumers know that providers are reliable, but without stifling innovation or adding unnecessary cost.

Independent regulation can also help to encourage entry in service delivery markets — leading to more choice, diversity and innovation — as providers will have a level of certainty and stability with regard to the regulatory environment.

173 Productivity Commission 2011, *Disability Care and Support Report Vol. 1*, pages 407-408.

The Panel's view

Human services are vital to all Australians' wellbeing, and the delivery of high-quality human services can significantly improve peoples' standard of living and quality of life. Particularly with Australia's ageing population, the size and importance of the human services sector will increase over the coming decades.

Governments at all levels have traditionally played a significant role in all aspects of human service delivery in Australia, including funding, regulation and provision. However there has been a trend to encourage innovation and consumer choice in areas like disability care and support, and aged care.

A separation of regulation, funding and provision of human services can improve outcomes for users, including through enhancing choice, diversity and innovation. Independent regulation can help to encourage entry by a diversity of new providers in service delivery markets, as providers will be afforded a level of certainty and stability with regard to the regulatory environment.

Separation of these functions must be carefully implemented to address any concerns relating to access, costs to consumers, and fairness.

Traditional funding for CSOs can lack transparency. Transparent and direct funding of CSOs has several advantages, including improving efficiency, accountability and equity. This can have important implications for competition, as it can minimise cross-subsidies that may have the effect of preventing potential suppliers from entering and delivering innovative services.

10.3 INTRODUCING MORE CONSUMER CHOICE

Traditionally, governments have decided what human services will be delivered. One result of this practice is that an individual's needs are not fully reflected in the standardised service offered.

The PC, in the context of disability care and support, points to some important reasons for moving to self-directed funding as a way of providing people who use services more choice.

- There is a social expectation that people should be able to run most aspects of their lives.
- Consumers will have different and changing preferences about what matters in their lives, which are not easily observable by others.
- Lack of choice can result in poorer quality and more expensive services, and less diversity and innovation. In contrast, consumer control of budgets creates incentives for suppliers to satisfy the needs of consumers, given that they would otherwise lose their business. That in turn typically leads to differentiated products for different niches.¹⁷⁴

174 Productivity Commission 2011, *Disability Care and Support Report Vol.1*, pages 355-357.

Box 10.3: Benefits of choice — aged care examples

The Brotherhood of St Laurence released a paper¹⁷⁵ on consumer choice in aged care services, which surveys some of the advantages consumers have enjoyed from increased choice.

Overall, consumers found that having control of funds meant that service providers became more responsive to their individual requirements. This increased the bargaining power that consumers had with service providers, case managers and other professionals. The paper provided some examples of choice:

- One man employed someone to fetch a meal from his local pub after rejecting ‘meals on wheels’. In another case a consumer employed a support worker who cooked meals of the person’s choosing.
- A consumer used funding to buy assistive technology, such as sensors that automatically switched on a light when the person got out of bed and a lifeline alarm to summon help if there was a fall.
- One group of consumers of mixed ages living independently in their own flats pooled their funding to buy services they needed, giving them greater purchasing power.
- Consumers also benefitted from being able to choose their support workers, rather than being assisted by agency staff who changed frequently. One consumer stated:

Direct payments give me control. I now have a say in what I eat and drink, what I do and when I do it. I can choose carers that can help me to live my life. I can have continuity instead of a different carer every day.¹⁷⁶

There are various approaches to introducing more consumer choice into human services. The UK government has decided to put consumer choice at the heart of service delivery, effectively having a presumption that consumer choice will generally be the best model (discussed in Box 10.4 below). An alternative approach is a market-by-market analysis to extend choice gradually into selected human services markets where it is appropriate.

175 Brotherhood of St Laurence 2009, [Increasing consumer choice in aged care services: A position paper](#).

176 Ibid, pages 8-9.

Box 10.4: UK public services reforms

The UK has gone further than Australia in introducing competition and choice into the delivery of public services. The Open Public Services White Paper¹⁷⁷ proposes five principles for modernising the UK's public services.

- **Increasing choice** wherever possible — which means putting people in control, either through direct payments, personal budgets, entitlements or choice. Where direct consumer control is not possible, elected representatives should have more choice about how services are provided.
- **Decentralising** to the lowest appropriate level — where possible this will be individuals; otherwise to the lowest-level body such as community groups or neighbourhood councils.
- Opening service delivery to a **range of providers** — high-quality services can be provided by the public sector, the voluntary sector and the private sector. This means breaking down regulatory or financial barriers so there is a diverse range of providers. It also means transparency about the quality and value for money of public services so that new providers can enter and challenge under-performers.
- Ensuring **fair access** — government funding should favour those with disadvantage.
- **Accountability** to users and to taxpayers.

Different public services have different characteristics. The White Paper identifies three categories of public service and more detailed principles for each type of public service.

1. Individual services:

- funding follows people's choices;
- robust framework of choice in each sector;
- publishing key data about public services and provider performance;
- target funding at disadvantage; (e.g. a 'pupil premium' paid to schools who take on disadvantaged students);
- license individual providers by a relevant regulator; and
- access to redress such as an Ombudsman.

For some individual services, consumers have a legal right to choose and must be provided with choices by law. For example, when a GP refers a consumer to a medical specialist, they must offer a shortlist of hospitals or clinics for the consumer to choose among.

2. Neighbourhood services: these are services which are used by the community collectively, such as local libraries and parks. In line with the principle of decentralising to the lowest appropriate level, the UK government is looking to more community ownership.

177 UK Government 2011, [Open Public Services White Paper](#).

3. Commissioned services: these are services where user choice is unlikely to work as a model, for reasons such as:

- the service is a natural monopoly;
- the service is being provided for people who are not able to make the appropriate choices themselves (such as drug rehabilitation); or
- there are security-related or quasi-judicial issues (such as the court system or planning laws).

In this case, the UK has decided to switch the default from the government providing the service to the government commissioning the service from a range of providers, and to separate purchasers from providers to encourage innovation.

Should consumer choice be applied to a particular human service?

There are factors which can make it easier or harder to apply consumer choice to a particular service, and some of these factors are discussed below. A consumer choice model is not the right one for all services. The traditional block funding approach where the user is a passive recipient of services, often from one provider, may remain appropriate in some circumstances. The diagram below provides high-level guidance on some of the features that may determine the suitability of consumer choice for a particular human service.

The application of consumer choice to human services

Easier to apply consumer choice		Harder to apply consumer choice	
Nature of the market			
Competitive range of providers	Somewhat competitive/contestable	Natural monopoly	
Complexity of service			
Simple, or good information available to guide consumers or intermediaries		Highly complex outputs and uncertain outcome	
Nature of the transaction			
Repeat transaction		One-off or urgent transaction	
Capacity constraints			
Low		Very high	
Switching costs or transaction costs for consumers			
Low		Very high	
Government specifications on service delivery			
Performance-based standards which allow for innovation and product differentiation		Highly prescriptive standards with limited ability for suppliers to compete on price or quality	

Sometimes the market will be a natural monopoly which can only support one supplier (e.g. a local bus route) or where the government achieves efficiencies by being the only supplier or purchaser. For example, the Australian Government is currently the sole purchaser of PBS subsidised pharmaceuticals, which may allow for lower pharmaceutical prices to be achieved.

In contrast, a market which currently has many suppliers (or the potential for many suppliers to enter) will make it easier to introduce consumer choice. The recent consumer choice reforms to aged care and disability services (see Box 10.7) were made easier because there were a number of existing private providers already operating alongside government providers.

It may be possible for government to encourage the entry of suppliers into markets which are being opened up to consumer choice, for example, by assisting with start-up costs, or guaranteeing a number of initial consumers. Social Benefit Bonds are an example of this.¹⁷⁸

If government is currently the sole (or one of few) suppliers in the market, there may also be a large investment required in building up the skills in the non-government sector to deliver the services. Unexpected implementation problems may also arise, including controlling for quality of service.

Good information is also crucial to guiding consumer choice. If consumers or their agents lack information, it will be difficult for them to make a proper choice about the best course of action.

It will be easier to apply consumer choice to a repeat or ongoing transaction, for example, choice of in-home disability support, rather than to a one-off transaction. In addition, consumers who are in a catastrophic situation, such as requiring emergency surgery, may not have the capacity to exercise choice.

Capacity constraints are also an issue in human services, as the number of places that can be offered may restrict consumer choice. For example, not all children can go to the same school and not all patients can be treated in the same hospital. If choice leads to an excess of demand over supply, some way of managing demand will be required. This may lead to constrained choice or there may be queuing. However, this may still be a better outcome for consumers than having no choice at all.

On the other hand, allowing for consumer choice, particularly in areas where the government was previously the main or sole service provider, will open up the possibility that some providers cannot attract enough customers and so will fail. Provider failure is a normal part of operating in all markets and if providers face no threat of exit if they underperform then the full consumer benefits are unlikely to be realised. As previously noted, government will need to design the market policy and regulatory oversight. This will include arrangements for service continuity in case of provider failure.

It will be easier to apply consumer choice where consumers can easily switch between service providers. Consumer choice may not lead to efficient or competitive outcomes where there are financial costs (e.g. increased travel costs associated with a new provider) or non-financial costs (e.g. a child may be unwilling to change schools due to the social networks they have established).

If government wishes to have tight control and set prescriptive standards over the product or service provided to consumers, then the usual benefits of competition — diversity of product, innovation and price competition — are unlikely to arise. In these cases, it may be more efficient for government to remain the sole provider of the service, or to pursue joint venture or managed competition models with non-government providers.

¹⁷⁸ See NSW Treasury, [Social benefit bonds](#).

Limits to consumer choice in human services

In some circumstances, consumers may not be in the best position to choose the appropriate service, and so another model (e.g. government choice or service provider choice) may be more appropriate.

In some human services, the consequences of consumers making the wrong choice can be very severe. As the Consumer's Federation of Australia notes 'the risk of making a 'wrong' choice in health or education can have significant long-term consequences ... it is not appropriate or fair to pass on those risks [to consumers] in the absence of an appropriate, and high standard, safety net in public services'. (pages 8-9)

In other cases people do not really choose to use a particular human service, but do so in response to adverse circumstances beyond their control. If the need for the service is time-critical, there may be little room for consumers to exercise choice. For example, once a patient has arrived at the emergency department, decisions need to be made by the service provider about what treatment is required (with little room for the patient or other party who may be footing the bill to decide the best treatment, price and value).

Some vulnerable consumers will be unable to exercise choice fully, for example patients in need of drug or alcohol rehabilitation. In other cases consumers may not wish to exercise choice, and consider this a burden they do not wish to shoulder. This suggests that a 'default option' should always be available.

There are also situations where it may be very costly or complex to provide adequate information to consumers to allow them to make informed decisions. CHOICE highlights 'the importance of better information on factors that matter to consumers, in forms that they can use, in any extension of competition within health and education. This will require government to ensure that suppliers make base data available, in usable formats.' (page 27)

In other circumstances, choice may need to be balanced against other factors including access to high-quality services and social equity. For example, in school education, a recent OECD report found that:

School systems with low levels of competition among schools often have high levels of social inclusion, meaning that students from diverse social backgrounds attend the same schools. In contrast, in systems where parents can choose schools, and schools compete for enrolment, schools are often more socially segregated.¹⁷⁹

Outcomes from Sweden's education choice system are consistent with the OECD findings that certain types of families tend to make better use of the choice system, increasing social segregation.¹⁸⁰ This highlights that formal equality of access is not enough in all cases to ensure that every family understands the system and uses it.

However, inequality is often worse without choice. In the context of school choice, not permitting consumers to choose between government-funded providers will constrain choice to those able to afford private schools.

There have also been demonstrated benefits from Sweden's education choice system, including the emergence of a number of innovative school models from the independent sector. There has also

179 OECD 2014, PISA in Focus 42, [When is competition between schools beneficial?](#)

180 Cowen, N 2008, [Swedish lessons: how schools with more freedom can deliver better education.](#)

been evidence that schools perform better in areas where parents are given more choice of schools.¹⁸¹ It is important to note that *someone* will always be making a choice about what service is provided to consumers, whether that is the government, the service provider (e.g. doctor), a purchase adviser or consumers themselves. When government is making the choice for the consumer, it is possible that sub-optimal decisions may be made due to factors such as poor program design or inadequate information on the consumer's needs and preferences.

Consumer information in human services

In order to choose what is right for them, consumers must be able and willing to gather and process the right information. Ideally, this information should be freely available, aggregated (e.g. on a single website), easy to interpret and access, and relevant to the user's needs. Consumers should have access to objective, outcomes-based data on available services, and/or to feedback from previous users of the services (noting that this may raise issues of privacy and misinformation).

Disadvantaged individuals and groups may need greater assistance in navigating the choices they face. This can include providing information through accessible communication channels that suit individual consumers' needs.

Where complexity is high, there can be a role for 'mediated choice', such as the use of purchase advisers (e.g. a GP to assist in the choice of surgeon), or where the individual is not in a good position to make a choice (e.g. a relative to assist in choosing care for a dementia sufferer).

Where a purchase adviser is used, the incentives of the adviser must be aligned with those of the consumer. The purchase adviser should not have financial or other incentives to over-service the consumer (for example, by referring them for unnecessary health tests) or to refer the consumer to one particular service provider.

181 Ibid.

Box 10.5: Consumer information systems

Health information: There are some national Australian databases of health information, including myhospitals.gov.au, which provides comparative data on hospitals including average waiting times and infection risks. Consumers can also visit ahpra.gov.au to check that their health practitioner is registered and see if they have been reprimanded or have any conditions on their ability to practice.

However, the UK has gone further. ‘NHS choices’ is a national website that provides extensive health information to consumers in an accessible format. Information includes: services offered by individual health professionals; their risk-adjusted patient mortality rate; and consumer reviews of health services. When data on individual consultant treatment outcomes were first provided, the National Medical Director of NHS England noted:

This is a major breakthrough in NHS transparency. We know from our experience with heart surgery that putting this information into the public domain can help drive up standards. That means more patients surviving operations and there is no greater prize than that.¹⁸²

School information: myschool.edu.au enables parents and carers to search detailed profiles of Australian schools simply by entering a school’s name, suburb or postcode. It contains data on factors including academic achievement (as measured by the NAPLAN national testing); school finances and a mapping function to show a school’s location along with other schools in the same area. It now has six years of data which parents and carers can use to compare a particular school’s progress with that of schools serving similar student populations. It is widely used, with over 1.2 million visitors in 2013.¹⁸³

Other barriers to consumer choice

As well as information issues, there are other concerns which may present barriers to consumer choice, including residing in remote or regional areas.

For example, financial or non-financial switching costs may make it difficult for consumers to exercise their choice. Wherever possible, governments should take steps to lower switching costs to make it easy for consumers to switch to a provider who can better meet their needs. Lowering switching costs was recognised as a potential improvement to the UK’s choice-based human services system in the Barriers to Choice Review discussed in Box 10.6 below.

Box 10.6: The UK Experience — The Barriers to Choice Review¹⁸⁴

The UK undertook a review in 2013 to examine how people were using the choices they had been given in human services, with a particular focus on how choices were used and valued by the most disadvantaged. Some key findings were:

- around half the population were exercising choice;
- the three top factors that people considered when choosing were the location (55 per cent), quality (15 per cent) and reputation (15 per cent) of the service;

¹⁸² NHS choices website: www.nhs.uk/choiceinthenhs/yourchoices/consultant-choice/pages/consultant-data.aspx.

¹⁸³ Reported on the myschool website: www.myschool.edu.au/.

¹⁸⁴ Boyle, D 2013, *The barriers to choice review: How are people using choice in public services?*

- there was strong public support for being able to choose, but around one third of the population found it difficult;
- the biggest barriers to choice were a combination of access and information. People without access to computers or cars were at a double disadvantage when it came to exercising choice; and
- people were generally happy with the service provided, including in situations where they had no choice.

The report proposed some improvements to the UK's choice based system, including:

- the system should give more power to service users, especially disadvantaged groups. It was found that these groups were less comfortable about exercising choice, more frustrated by bureaucratic barriers and more affected by difficulties like transport;
- it should be simple and easy for consumers to switch providers, without 'losing their place in the queue' or having to undergo further assessments of eligibility;
- consumers should have a right to request flexible service delivery (e.g. to talk to consultants on the phone or to study a different combination of subjects at school), and if the provider did not accommodate the request they would be obliged to explain why not; and
- disadvantaged groups should be given more assistance with navigating the choices before them, as many do not use the internet and may be bewildered by choice. There was a need for better information about available choices, and access to face-to-face advice so users could interpret the information.

The review concluded that, although competition between rival service providers is a very important element of choice, the choice agenda needed to be broader than this. There should be a key focus on treating service users with dignity and respect, and treating them as equal partners in the delivery of services.

Consumer choice in the Australian context

Consumer choice has recently been advanced in Australia in the aged care and disability sectors. The schemes in both of these sectors have a similar structure, in that consumers are able to develop an individual plan, choose and organise their care/support needs, manage any funding included in their plan and review their plan and make changes if needed.

In introducing choice-based models, an important element is to ensure that funding follows people's choices so that providers have signals to better tailor services to individual and community needs.

Box 10.7: Aged care and disability services — user choice**Disability services¹⁸⁵**

With the introduction of the National Disability Insurance Scheme (NDIS) over the next five years, disability service providers will move from being contracted by governments to being registered providers with the National Disability Insurance Agency (NDIA). Funding for disability support will follow individual service users rather than service providers, allowing individuals to choose the providers from whom they wish to receive services. Individuals electing to receive direct payments for purchasing their support (subject to a risk assessment) will not be restricted to choosing providers registered with the NDIA.

Aged care (in the home)¹⁸⁶

Home Care Packages are now being provided on a Consumer Directed Care basis. Home Care Packages are for older Australians who want to remain in their own home but need some assistance with transport, domestic chores, personal care etc.

Under a Consumer Directed Care package, the government provides funding to the consumer as a budget, and consumers have the right to use their budget to purchase the services they choose (services must still be within the scope of the program). The consumer enters into a contract with a home care provider to deliver the services. An advocate can represent the consumer in this process if desired.

The home care providers (the suppliers) must be approved by the government. There are a large number of approved providers across the States and Territories, including for-profit and not-for-profit, religious and non-denominational. Consumers may choose to ‘top up’ their packages by purchasing additional care and services through their home care providers.

The Panel’s view

Consumer choice in human services, as in other areas, can provide benefits to consumers and promote diversity and innovation in service delivery.

The UK has a ‘presumption of choice’ operating across most public services, and has adopted high-level choice principles. The Panel considers that, in a federation such as Australia, it would be useful for all governments to agree on common principles to guide the implementation of consumer choice in human services.

The Panel’s view is that the Commonwealth, state and territory governments should agree on choice principles, and that consumer choice should continue to be implemented into Australian social service markets, beginning with markets where it can be identified that choice is most easily established.

185 NDIS website: www.ndis.gov.au/.

186 DSS website: www.dss.gov.au/our-responsibilities/ageing-and-aged-care/aged-care-reform/reforms-by-topic/home-care.

10.4 DIVERSITY OF SERVICE PROVIDERS

Diversity in the provision of public services offers a number of potential benefits. As Professor Gary Sturgess states, these include:

- i. *Choice*. Service users value choice ...
- ii. *Adaptability*. Institutional diversity is desirable for much the same reason as biological diversity. It means that public services as a whole are more flexible. They are better able to adapt to changing circumstances ...
- iii. *Innovation*. Different kinds of service providers, with different backgrounds, bring different perspectives to the challenge of delivering better and more cost-effective public services.¹⁸⁷

While the Panel favours encouraging diversity in provider methods and types, it recognises that in some markets there will not be sufficient depth to support a number of providers — for example, certain services in remote and regional areas. Providing access to services and regulation to maintain and improve service quality will be an important implementation issue even in the absence of competitive pressures.

In Australia many of our human services including health, education, and social housing are delivered by a range of public, private and not-for-profit providers. The Panel is conscious of the current diversity of human services providers and does not underestimate the contribution currently made by the private and non-government organisation sectors.

But the UK, for instance, in its Open Public Services White Paper has gone further than Australia and encourages diversity with a policy principle to open service delivery to a range of providers, which means:

[h]igh-quality services can be provided by the public sector, the voluntary and community sector or the private sector ... That means breaking down barriers, whether regulatory or financial, so that a diverse range of providers can deliver the public services people want, ensuring a truly level playing field between the public, private and voluntary sectors. It means being totally transparent about the quality and value for money for public services so that new providers can come in and challenge under-performance.¹⁸⁸

In considering whether it should recommend change in this area, the Panel does not wish to discourage or crowd out the important contribution the not-for-profit sector and volunteers currently make to the wellbeing of Australians.

Human service providers

While the delivery of human services is widely seen as a responsibility of state and territory governments, in practice few human services are delivered exclusively by government.

In some instances, including in early childhood education and hospital care, private for-profit and not-for-profit providers operate in the same market as the government, offering similar services and increasing the range of user choice.

¹⁸⁷ Sturgess, G 2012, *Diversity and Contestability in the Public Service Economy*, pages 18–19.

¹⁸⁸ UK Government 2011, *Open Public Services White Paper*, page 9.

Increasingly services are being delivered outside the government sector. The significant changes in the disability services sector are a recent example of this development. As the ACCC points out:

Despite the historical role of government in providing human services, a degree of competition already exists in many human services markets. This includes competition between private hospitals, doctors, secondary schools and vocational training providers, to name but a few examples. (ACCC Submission 1, page 68)

Government, not-for-profit and private for-profit providers are likely to have different strengths, and there is a place for all of these types of providers in human services sectors.

Government providers

One of the features of the competition reforms following NCP was a change in the organisational arrangements for government providers of infrastructure services. Rather than being provided by government departments, electricity and water entities were set up as Government Business Enterprises which were more independent of Ministers but subject to clearer objectives and overseen by a Board of Directors.

Part of the reason for the Government Business Enterprise form in utilities was that it largely replicated the corporate for-profit form of competitors that were emerging in markets such as electricity. As the non-government organisational forms in human services markets are more complex (they include for-profit and different types of not-for-profit), developing a single model for government providers is unlikely to be practical.

Rather, government reforms to the provision of human services have focused on an expanded role for the for-profit and not-for-profit sectors. In many human services markets, particularly in aged care and disability care and support, governments have encouraged not-for-profits and charities to play an important role in meeting consumer needs.

For-profit providers

The private, for-profit sector makes up a large part of service provision in some human services sectors, including aged care and child care.

Box 10.8: For-profit provision of human services in Australia

Private hospitals service around 40 per cent of hospital inpatients.¹⁸⁹ Around 60 per cent of private hospitals operate on a for-profit basis.¹⁹⁰

General practitioner, allied health and dental services are largely delivered by the for-profit sector.

In child care, around 70 per cent of long day care is provided by the for-profit sector.¹⁹¹

The for-profit sector provides 36 per cent of residential aged care.¹⁹²

Private prisons hold around 19 per cent of prisoners in Australia.¹⁹³

189 Productivity Commission 2014, *Report on Government Services Vol. E*, page 3-4 of Table 10A.10. Data is for 2011-12.

190 Productivity Commission 2009, *Public and Private Hospitals*, page 46. Data is for 2006-07.

191 Productivity Commission 2014, *Draft Report on Childcare and Early Childhood Learning*, page 441. Data is for 2012.

192 Productivity Commission 2014, *Report on Government Services Vol. F*, page 13.5. Data is for June 2013.

193 Productivity Commission 2014, *Report on Government Services Vol. C*, page 8.6. Data is for 2012-13.

For-profit providers can bring particular strengths to human services markets. They are likely to face stronger incentives to minimise cost, including through the adoption of new technologies and innovative methods of service delivery. This may improve diversity in human services markets and increase the efficiency of government expenditure.

Consumers have been willing to place their trust in for-profit providers, with high levels of consumer confidence and satisfaction recorded in relation to for-profit providers such as local GPs.¹⁹⁴

Concerns have been raised that for-profit providers are likely to ‘cherry pick’ the lower-risk or more profitable consumers.¹⁹⁵ Policy design needs to be sensitive to this issue, and can include measures such as limiting the amount of control any service provider has over which customers they can accept; or designing the scheme to reward service providers on a ‘value added’ basis (e.g. providing greater rewards to job service agencies that find jobs for long-term unemployed people).

Not-for-profit providers

In its report on the contribution of the not-for-profit sector, the PC observed:

[Not-for-profits] have long been part of the Australian community landscape, encompassing both secular and non-secular organisations ...

The most recognised part of the sector is involved in human service delivery, including community services, education and health ... More recently, the sector is being viewed as a means to address social disadvantage. [Not-for-profits] are generally viewed as more trustworthy than government or business, and hence, worthy of support.¹⁹⁶

The Panel recognises that the not-for-profit sector makes an enormous contribution to the lives of Australians. In 2006-07, the sector accounted for 4.1 per cent of GDP (which does not include the contribution of volunteers), employed close to 890,000 people and utilised the services of some 4.6 million volunteers.¹⁹⁷

It is preserving and enhancing this contribution, while considering issues of diversity, innovation and choice that has driven the Panel’s considerations. As National Disability Services notes:

Increased competition would be counter-productive if it undermined the ability of not-for-profit disability support services to cooperate and collaborate, particularly in relation to community development and the production of social capital. (page 3)

Mutual Providers

The Business Council of Co-operatives and Mutuals and the Australian Public Service Mutual Task Force have released a White Paper on public service mutuals that seeks to explore an alternative where co-operatives and mutuals play an expanded role in delivering public services. Public service mutuals are:

194 For example, see [Roy Morgan Image of Professions Survey 2014](#) — Doctors were rated as ‘ethical and honest’ by 86 per cent of survey participants, coming second only to nurses.

195 See, for example, The Business Council of Co-operatives and Mutuals and the Australian Public Service Mutual Task Force Green Paper, [Public Service Mutuals: The case for a Third-way for delivering public services in Australia](#), page 20.

196 Productivity Commission 2010, [Contribution of the Not-for-Profit Sector](#), page 2.

197 Ibid, page 53.

An organisation ... whereby members of the organisation are able to be involved in decision-making, and benefit from its activities, including benefits emanating from the reinvestment of surpluses.¹⁹⁸

The White Paper suggests public service mutuals deliver several benefits including that they can:

- Increase organisational diversity in public service markets.
- Harness the ethos and professionalism of public service employees and unleash their entrepreneurialism.
- Increase consumer choice and control.
- Stimulate public service innovation.¹⁹⁹

Public service mutuals now play a significant role in some other jurisdictions including the UK, where there has been concerted effort through public policy levers and capacity building activities to establish and expand public service mutuals.

Commissioning of services

In many human service markets, a range of providers including for-profit providers, community groups and charities play an important role in meeting consumer needs. This diversity of service providers, as well as high-quality outcomes for consumers, can be encouraged through government commissioning decisions.

Commissioning is where the government makes decisions about: human services program objectives and priorities; designs models of service provision; and then purchases the services from the ultimate providers. While this includes directly funding choice-based models, the focus of this section is on government acting as a purchaser on behalf of the final recipient of human services.

Early models of contracting for the provision of services often relied on running a tender to select a provider or providers. Competitive tendering does have benefits over the traditional funding of a government department to provide human services, including:

- the competitive process can lead to the best value for money bidder being selected;
- in an open process, a number of potential suppliers have the opportunity to bid;
- the process is usually transparent; and
- it can identify a provider in cases where the market cannot support more than one provider.

However, the PC notes that government tendering arrangements typically use short-term and very prescriptive contracts.²⁰⁰ This may be due to:

- risk aversion on the part of governments and government agencies — agencies may try to control risk through being overly prescriptive; and
- limits on measuring outcomes — in many instances, governments may not be in a position to define and measure the outcome required from the market.

198 The Business Council of Co-operatives and Mutuals 2014, [Public Service Mutuals: A Third-way for delivering public services in Australia White Paper](#), page 9.

199 Ibid, page 13.

200 Productivity Commission 2010, [Contribution of the Not-for-Profit Sector](#), page 297.

In practice, commissioning decisions have often been structured to achieve the best ‘value for money’ which means that public sector commissioners may focus on price at the expense of other factors. This sometimes leads to unfortunate side effects, including not enough emphasis on having a local community presence that is responsive to individual needs. As the NSW Government comments:

There are more significant benefits from competition and innovation when governments take a less prescriptive approach to service delivery reform. This can allow greater adaptability and flexibility ... the focus should be on specifying desired outcomes and ensuring space for innovation. (page 27)

IPART also notes the importance of focusing on outcomes: ‘To maximise the scope for innovation and efficiency, competitive tendering processes ... should be outcomes-focused’ (page 14). As an example, an outcomes focus would emphasise the skills students learn, rather than the hours spent in the classroom.

Commissioning human services with an outcomes focus is one way that governments can encourage a diversity of providers. For example, when the job services market was originally deregulated, the Department of Employment noted that ‘[j]ob seekers and employers would benefit from the diversity in provider type, philosophy and approach to employment services by choosing a provider that suited them best’.²⁰¹

A focus on outcomes means that a diverse range of providers have the opportunity to offer different types of services and different methods of service delivery that are responsive to individual and community needs.

Governments can go further to encourage high-quality user outcomes through linking financial rewards with performance.

Over time governments have trialled more innovative approaches to commissioning. For instance, the NSW Government in partnership with the private and community sectors has developed two social benefit bonds to deliver prevention and early intervention programs. These programs are initially funded by private investors who receive a return on their investment if agreed social outcomes are achieved. This is an example of encouraging good performance by providers, by allowing for financial rewards for performance above stated targets, and penalties for performance below stated targets.

Newer approaches to commissioning focus more on contestability, rather than strict competitive tender processes. A paper on contestability in the UK health system notes:

In recognition of the limits of competition, managers and doctors have moved increasingly to establish collaborative arrangements in which purchasers and providers work together on a long term basis ...

[t]he stimulus to improve performance which arises from the threat that contracts may be moved to an alternative provider should not be lost. The middle way between planning and competition is a path called contestability. This recognises that health care requires cooperation between purchasers and providers and the capacity to plan developments on a long term basis. At the same time, it is based on the premise that performance may

201 Department of Employment and Workplace Relations, [Submission to the Independent Review of Job Network](#), page 14.

stagnate unless there are sufficient incentives to bring about continuous improvements.²⁰²

In some cases, where a range of actual or potential service providers exist, rather than commissioning directly, governments can instead allow an independent regulator to license any provider that meets and maintains prescribed standards. This approach can allow a wider range of providers to offer services in the market.

Ultimately, in line with more recent approaches to commissioning human services, the goal for public sector commissioners should be balancing the need to give providers room to innovate and respond to consumer needs, while setting down a credible benchmarking system which allows the commissioner to replace an underperforming provider.

Public Private Partnerships (PPPs)

A PPP is a contract between a government and a private party (or several private parties) for the provision of a service or delivery of a major project. PPPs may be used where there is a need for a long-term partnership between the government and the service provider, and where there is a significant level of investment on the part of the private party. PPPs are typically more complicated than conventional procurement contracts.

The WA Economic Regulation Authority Inquiry into Microeconomic Reform in Western Australia noted the benefits of PPPs including:

[T]hey represent an attractive mechanism to introduce incentives for a greater level of private sector innovation and contestability into government services and associated infrastructure delivery.²⁰³

While traditionally used to deliver large infrastructure projects, the International Finance Corporation, a member of the World Bank Group, recognises the increasing use of PPPs in human services markets, particularly the health sector. It notes that health sector PPPs can take a range of forms including:

- outsourcing non-clinical support services;
- outsourcing clinical support services;
- outsourcing clinical services;
- private management of a public hospital; and
- private financing, construction and operation of a public hospital.²⁰⁴

While PPPs may be a good model for service delivery in some circumstances, they are not without risks or costs. The International Finance Corporation notes some of these risks, including:

- PPP contracts can be very complex;
- results assessment is often subjective;

202 C Ham, C 1996, *Contestability: A Middle Path for Health Care*, British Medical Journal, Vol 312, pages 70-71.

203 WA Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia Final Report*, page 128.

204 International Finance Corporation, *PPPs in Health Care: An International Perspective*, page 4.

- public sector may be locked into contracts while health demands change; and
- PPPs may not gain the population's trust.²⁰⁵

However, it also recognises the advantages of PPPs including:

- more incentives for private sector to perform;
- new facilities available earlier;
- increased levels of efficiency and innovation;
- risks transferred to private sector; and
- forward spending commitments known and able to be planned for.²⁰⁶

Australia has a rich history of undertaking PPPs. They have typically been used to deliver large infrastructure projects, such as toll roads, railways and water supply facilities. The PC noted that outcomes from PPP infrastructure projects have been mixed, which is consistent with what has been observed internationally.²⁰⁷

While construction of infrastructure continues to be a focus for PPPs in Australia, the PC notes that:

Bundling and contracting out the financing, design, construction, maintenance and operation of public infrastructure services (as can occur under a PPP) may deliver further efficiency benefits by creating incentives and opportunities to reduce costs over the life of the project.²⁰⁸

In moving to PPP models that include service delivery, contract design takes on a new importance, with a need to ensure procurement is outcomes-based.

205 Ibid, page 14.

206 Ibid, page 14, page 13.

207 The Productivity Commission cites examples of PPPs that have successful including Melbourne's CityLink and Sydney's Eastern Distributor, as well as examples of PPPs that have not performed well including the Latrobe Regional Hospital and the Sydney Airport Rail Link. See Productivity Commission 2014, *Public Infrastructure*, page 7.

208 Productivity Commission 2014, *Public Infrastructure*, page 115.

Box 10.9: State government hospital and health service PPPs

Several States have introduced or are considering introducing PPPs to deliver health services, with Western Australia making particular progress. The Joondalup Health Campus is the largest health care facility in Perth's Northern suburbs, providing 24-hour acute care from an integrated public and private campus. In a speech at the unveiling of the expansion of the Joondalup Health Campus, Ramsay Health, the private provider stated:

The public-private partnership at Joondalup Health Campus dates back 15 years and continues to go from strength to strength. This project is a terrific example of how the public and private sector can work together to deliver services and value for money for the public.²⁰⁹

Infrastructure Partnerships Australia has noted that the Joondalup Health Campus is 'widely considered to be one of the nation's best examples of a successful healthcare PPP'²¹⁰ with estimated cost savings of 23 per cent, and an 'A' rating for reviews conducted by the Western Australian Department of Health's Licensing Standards and Review Unit every year since 2006.

The Western Australian government plans to enter a new PPP with St John of God Health Care for a 307 bed Midland Public Hospital.

South Australia is also looking to use a PPP framework in developing the new Royal Adelaide Hospital. The South Australian Department of Health web page on *Public Private Partnership and the new Royal Adelaide Hospital* notes:

The PPP process recognises that both the public sector and the private sector have certain advantages relative to the other in the performance of specific tasks, and can enable public services and infrastructure to be provided in the most economically efficient manner by allowing each sector to do what it does best.²¹¹

In addition, the NSW Government submission details a PPP for the proposed Northern Beaches Hospital:

The NSW Government is currently evaluating bids ... to design, construct, operate (on a fully outsourced basis) and maintain a hospital on Sydney's northern beaches. In partnering with the private sector, a private Hospital Operator will be responsible for all aspects of design and construction of the hospital and the provision of clinical services, clinical support services and facility related services for public patients, under a long term contract with the NSW government ... This model provides maximum opportunity to add value through innovation and whole of system integrated delivery, with significant benefits to the community. (page 24)

209 See: www.joondaluphealthcampus.com.au/News/wa-health-minister-unveils-major-expansion.aspx.

210 Infrastructure Partnerships Australia 2013, *Submission on the Future Direction for Public Private Partnerships*, page 16.

211 South Australian Department of Health, *Public Private Partnership and the new Royal Adelaide Hospital*.

The Panel's view

Many human services are delivered by a range of public, private and not-for-profit providers. Each type of provider makes an important contribution to individuals and to the broader community.

Governments may have significant influence over the diversity of providers in human services, particularly through commissioning arrangements.

In the past, contracting for the provision of human services was often achieved through competitive tendering; however, tendering can focus on price at the expense of other factors including fairness and responsiveness to individual needs.

More recently, governments have begun to trial innovative approaches to commissioning that focus on giving providers room to meet consumer needs, while allowing governments to step in and remove poor performers.

By commissioning the provision of human services with an outcomes focus, governments can encourage a diversity of provider methods and types, which can have important consumer benefits in relation to choice, adaptability and innovation.

Public Private Partnerships (PPPs) are an option for long-term infrastructure and/or service delivery arrangements and could be used in a range of human services sectors. PPPs can have specific advantages for human services users, including that new facilities may be available earlier with potentially increased levels of innovation. However, PPPs must be carefully managed in light of previous mixed results.

The primary consideration in commissioning human services should be achieving high-quality outcomes for users.

10.5 IMPLEMENTATION ISSUES

Like any changes to public policy, implementation of changes to human services needs to be well considered. In addition, human services have a lasting impact on people's lives and wellbeing, increasing the importance of 'getting it right' when designing and implementing policy changes.

The PC notes that:

Experience with market-based instruments in human services (and other sectors) in Australia suggests that such mechanisms often require refinement over time to promote improved outcomes. (page 37)

Policy changes in this area have often been implemented via a staged process, sometimes involving trials or pilot schemes, with the feedback from such schemes being used to refine the program. The Panel recognises that reform in human services sectors can seem slow, but that the ultimate goal of improving the lives of Australians makes pursuing reform worthwhile.

Well in advance of the introduction of the National Disability Insurance Scheme, Western Australia began work to reform disability care and support services. The Western Australian government has noted that its disability system has 'evolved through 25 years of bi-partisan reform and funding

growth'²¹² to a place where the key focus is on 'individualised funding, developing local relationships and for the support provided to people through the network of Local Area Coordinators'.²¹³

Even after 25 years of progress, Western Australia continues to refine its disability services system, with a key focus on giving people with disability, their families and carers genuine choice and control in their lives.²¹⁴

Box 10.10: Assessing the outcomes of competition — example from Job Network

The PC reviewed²¹⁵ the impact of the Job Network reforms, and drew some general lessons for areas where the government purchases services. While the overall impact of these reforms was positive, there were some implementation issues where the PC made specific recommendations for improvement.

Choice and information

With the advent of competition in the market, most job seekers could choose from a number of providers in their area, however, the PC found that only around one in five job seekers were making an active choice. In addition, once a job seeker was allocated to a provider, they were generally not permitted to switch providers. One method for enhancing user engagement and improving choice is through the provision of accurate and relevant information.

Tendering versus licensing

While the move from a monopoly provider to a tendered market did result in some benefits, tendering can be complex and expensive; and might also result in an excessive focus on price, ultimately leading to a lower quality of service. The PC recommended that a licensing system could be more appropriate, which would allow any agency that met and maintained the prescribed standards to provide services at the going prices.

Regulation

In the job services market, the PC found that regulatory oversight imposed excessive compliance burdens — undermining the desirable flexibility of the system. The PC recommended adoption of a risk management approach to contract monitoring, based on minimum necessary surveillance to ensure accountability and achievement of specified goals.

Potential issues with implementation do not mean that competition reforms in human services should be abandoned. In his review of government service sector reform, Peter Shergold noted:

A culture of innovation needs to be actively encouraged. Risk should be managed prudently by a willingness to pilot, demonstrate and evaluate new approaches. In the public arena, as elsewhere, any innovation carries risk of failure. In the design of community services, there should be a willingness to trial often, fail early, and learn quickly from mistakes. At present too much public innovation involves frontline employees finding workarounds to heavily prescribed processes.²¹⁶

212 Government of Western Australia, [Western Australia and the National Disability Insurance Scheme: My Way](#), fact sheet.

213 Ibid.

214 Ibid.

215 Productivity Commission 2002, [Independent Review of Job Network](#) (various pages).

216 Shergold, P 2013, [Service Sector Reform — Reflections on Consultations](#), page 6.

The Panel favours an environment where individual jurisdictions work together and share lessons learned in an effort to encourage high-quality user outcomes. Results and feedback from trials or pilot schemes can be disseminated via an intergovernmental process. Through encouraging communication and the sharing of knowledge among jurisdictions, continuous learning can be factored into human services delivery models.

The Panel's view

Implementing changes to human services needs to be well considered and will require refinement over time to promote high-quality user outcomes.

Governments can progressively introduce change through trials or pilot schemes.

While any change may result in implementation issues, the Panel considers that potential issues with implementation do not mean that competition reforms in human services should be abandoned.

Feedback and lessons learned from trials can be disseminated via an intergovernmental process that encourages jurisdictions to continually improve service delivery.

11 COMPETITIVE NEUTRALITY

11.1 WHAT IS COMPETITIVE NEUTRALITY?

The concept of competitive neutrality is broad. The Organisation for Economic Co-operation and Development (OECD) recently defined competitive neutrality as occurring:

[W]here no entity operating in an economic market is subject to undue competitive advantages or disadvantages.²¹⁷

Competitive neutrality can be affected by ownership, institutional forms or specific objectives of entities.

The rationale for pursuing competitive neutrality is to improve the allocation of the economy's resources and to improve competitive processes. Governments compete with the private sector in a variety of markets. If government has undue advantage relative to other players, this can result in government having lower costs and therefore being able to charge lower prices than private sector competitors.

Government ownership can result in undue advantage if one or more of the following exist:

- tax exemptions or concessions, for example income tax, payroll tax, land tax and stamp duty;
- cheaper debt financing reflecting the credit risk of governments;
- the absence of a requirement to make a commercial rate of return on assets; and
- exemptions from regulatory constraints or costs.

As part of the Competition Principles Agreement (CPA), all Australian governments committed to applying competition principles to government business activities. The objective of competitive neutrality, as expressed in the CPA is:

[T]he elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership.²¹⁸

Each jurisdiction developed its own competitive neutrality policy, guidelines and complaint-handling mechanism (some are handled by independent units; others by regulators or departments).²¹⁹

Although there is some variation, the policies require government business activities to charge prices that fully reflect costs and to compete on the same footing as private sector businesses in terms of taxation, debt, regulation and earning a commercial rate of return. The principle of competitive neutrality does not extend to competitive advantages arising from factors such as business size, skills, location or customer loyalty.²²⁰

217 OECD 2012, [Competitive Neutrality, Maintaining a level playing field between public and private business](#), OECD Publishing, page 15.

218 Council of Australian Governments 1995 (as amended to 13 April 2007), [Competition Principles Agreement](#), page 3.

219 Victorian Competition & Efficiency Commission, [Competitive neutrality inter-jurisdictional comparison paper](#).

220 [Australian Government Competitive Neutrality Complaints Office](#).

Competitive neutrality arrangements apply to significant government businesses (where the benefits from doing so outweigh the costs), not to non-profit, non-business activities (Box 11.1). The threshold test used for identifying 'significant' business activities varies across the jurisdictions.

Box 11.1: Significant government business activity

The Australian Government Competitive Neutrality Complaints Office asks two questions to determine whether government entities are operating a significant business activity.²²¹

Question 1: Is the entity conducting a business?

- a) are they charging for goods or services (not necessarily to the final consumer);
- b) is there an actual or potential competitor (either in the private or public sector) — purchasers are not to be restricted by law or policy from choosing alternative sources of supply; and
- c) do managers have a degree of independence in relation to the production or supply of the good or service *and* the price at which it is provided?

If the answer is yes to all these questions, then the entity is conducting a business.

Question 2: Is the business significant?

The following business activities are automatically considered significant for the purposes of competitive neutrality policy:

- all government business enterprises and their subsidiaries;
- all Commonwealth companies;
- all business units;
- baseline costing for activities undertaken for market testing purposes;
- public sector bids over \$10 million; and
- other government business activities undertaken by prescribed agencies or departments with a commercial turnover of at least \$10 million per annum.

Competitive neutrality arrangements apply to significant business activities, but only to the extent that the benefits of the arrangements outweigh the costs.

The application of competitive neutrality involves separating out commercial and non-commercial activities. As the OECD says:

An important aspect in addressing competitive neutrality is the degree of corporatisation of government business activities and the extent to which commercial and non-commercial activities are structurally separated. Separation makes it easier for the commercial activities to operate in a market-consistent way.²²²

The CPA states that significant government business enterprises (classified as Public Trading Enterprises and Public Financial Enterprises under the Government Financial Statistics Classification) should adopt (where appropriate) a corporatisation model and impose similar commercial and regulatory obligations as those faced by private sector businesses. For other significant business

221 Commonwealth of Australia 2004, *Australian Government Competitive Neutrality Guidelines for Managers*, pages 9 and 13.

222 OECD 2012, *Competitive Neutrality, A Compendium of OECD Recommendations, Guidelines and Best Practice*, page 5.

activities undertaken by agencies as part of a broader range of functions, the CPA suggests that the same principles should be applied or agencies should ensure that prices charged for goods and services reflect the full costs of service delivery (Box 11.2).

Box 11.2: Corporatisation, commercialisation and full cost-reflective pricing

A range of measures have been adopted to achieve competitive neutrality including corporatisation, commercialisation and cost-reflective pricing.²²³

Corporatisation — the creation of a separate legal business entity to provide the relevant goods and services. Such an entity is characterised by:

- clear and non-conflicting objectives;
- managerial responsibility, authority and autonomy;
- independent and objective performance monitoring; and
- performance-based rewards and sanctions.

Commercialisation — organising an activity along commercial lines without creating a separate legal business entity. This is typically achieved by introducing and applying a set of commercial practices to the business functions of the government agency. Relevant commercial practices include separate accounting for, and funding of, non-commercial activities and separation of regulatory functions from commercial activities.

Full cost-reflective pricing — taking into account all the costs that can be attributed to the provision of the good or service (including cost advantages and disadvantages of government ownership).

Competitive neutrality policy does not require governments to remove community service obligations (CSOs) from their businesses. But competitive neutrality does require that any CSOs are transparent, appropriately costed and directly funded by governments. The Australian Government Competitive Neutrality Guidelines for Managers states that:

A best practice approach would be for CSOs to be funded from the purchasing portfolio's budget, with costs negotiated as if it were part of a commercially negotiated agreement. CSOs should include similar CN [competitive neutrality] requirements as other activities. For example, CSO activities should incorporate CN adjustments (e.g. tax adjustments) and earn a RoR [rate of return] (just as if they had been contracted out).²²⁴

One of the benefits of competitive neutrality is improved transparency and accountability of government business activities, including greater transparency around CSOs which in turn provides a safeguard against distorting cross-subsidisation.

The need to comply with a competitive neutrality policy can also lead to improved performance of government business activities. As Trembath has said:

CN's requirement for government entities to face comparable costs and regulations to the private sector (that is, to face market incentives) means that the owner governments make better informed decisions about the future of those entities. Full attribution of costs often leads governments to assess afresh whether they wish to provide a good or service

223 For example, the Department of Treasury and Finance (Victoria) 2012, [Competitive neutrality policy](#), pages 4-5.

224 Australian Government 2004, [Australian Government Competitive Neutrality Guidelines for Managers](#), page 41.

directly through a subsidiary entity, to introduce tenders to allow competitive bidding for the provision of the good or service, or to vacate the area of production.²²⁵

11.2 CONCERNS RAISED WITH COMPETITIVE NEUTRALITY

There is overwhelming support from stakeholders for the principle of competitive neutrality with calls for Australian governments to recommit to competitive neutrality policy.²²⁶

The OECD recently commented that:

The most complete competitive neutrality framework implemented today is the one found in Australia. As described in other OECD documents this framework is backed by separate implementation and complaints handling mechanisms.²²⁷

Capobianco and Christiansen also state:

Australia's competitive neutrality policy has apparently worked well for the following reasons: (1) it deepened the reform of public enterprises in Australia; (2) it has been implemented by large governmental businesses, which led to significant efficiency gains; and (3) it substantially eliminated the advantages of government ownership.²²⁸

But stakeholders raised concerns about the application of competitive neutrality.

Concerns are raised about the practical application of competitive neutrality in a wide range of activities that compete with government, including businesses in insurance, transport, energy, telecommunications, health, commercial land development, construction, accommodation, waste collection, printing, legal services, agriculture, tourism, child care and education. For example:

- the Australian Information Industry Association notes that 'there are some instances, notably in the telecommunications sector, where competitive neutrality seems to not function effectively' (page 12);
- the Australian Private Hospitals Association says 'distinctions between regulatory arrangements applicable to public and private sectors not only work against competitive neutrality but also limit private sector patient access to affordable and appropriate treatment options' (page 8);
- Paramedical Services Pty Ltd claims a lack of competitive neutrality in the non-emergency patient transport sector, with government ambulance services enjoying an unfair advantage due to subsidisation (pages 11-12); and
- the Australian Education Union says that 'competitive neutrality policy has been disastrous where it has been introduced (primarily in VET)'. (page 2).

A number of submissions express concerns about businesses competing with local government. For example:

225 Trembath, A 2002, [Competitive Neutrality: Scope for Enhancement](#), NCC Staff Discussion Paper, page 7.

226 For example, ACCC Submission 1, page 69, Australian Information Industry Association, page 12, Australian Newsagents Federation, page 8, BCA Summary Report, page 14.

227 OECD 2012, [Competitive Neutrality, Maintaining a level playing field between public and private business](#), page 107.

228 Capobianco, A and Christiansen, H 2011, [Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options](#), OECD Corporate Governance Working Papers, No. 1, page 16.

- The Chamber of Commerce and Industry Queensland raises the issue of councils charging for waste collection through rate payments, impeding private competitors who are able to offer lower prices, increased services and more choice for consumers. It also raises concerns about local councils providing free access to showgrounds or parklands for motorhomes which make it difficult for local caravan park owners (who are subject to fees, licences, taxes and the need for insurance) to compete (page 5).
- The difficulty in competing with childcare centres subsidised by local councils is raised in an anonymous submission: ‘Council subsidises its two centres ... to the tune of \$700,000+ per year using rate payer’s money ... This allows them to keep fees to a minimum and pay staff well above award wages ... This current behaviour is anti-competitive and makes it difficult for private centres to compete.’ (Anonymous Childcare, page 1)

The breadth of sectors where competitive neutrality issues are raised points to this as an area potentially representing an obstacle to alternative providers offering services in a range of markets.

The Panel cannot adjudicate every claimed breach of competitive neutrality raised in submissions. However, it is possible that some of the complaints fall outside the parameters of current policy. For example, the government activity may not meet the current definition of a significant business activity.

However, as the Queensland Competition Authority states:

The revenue thresholds may not be met on a council by council basis, but the impact could be significant if the same problems are recurring for the same types of businesses across the state. This is particularly problematic for small businesses that compete, or would like to compete, to provide services. (page 14)

Stakeholders raise concerns about a number of instances where governments exercise regulatory or planning approval functions while also operating businesses that compete with private sector enterprises. For example, Cement Concrete and Aggregates Australia raises concerns about local governments being both applicant and assessor within the planning and development application process (page 2). The Construction Material Processors Association raises a similar concern about councils considering planning permits for an extractive operation which was in direct competition with the Council’s quarry (page 11).²²⁹

IPART also raises concerns about State Owned Corporations having a mix of commercial and non-commercial principal objectives.

[I]t is important that SOCs are not placed at a disadvantage because they are required to pursue unfunded non-commercial objectives. We have identified some aspects of the *State Owned Corporations Act 1989* (NSW) (SOC Act) that inhibit competitive neutrality. (page 23)

The operational practices under which government businesses operate can have implications for competitive neutrality. As the OECD recently said:

It is easier to pursue neutrality when competitive activities are carried out in an entity with an independent identity, operated at arm’s length from general government. To achieve this governments can incorporate government businesses according to best

229 Additional examples can be found in submissions from the Australian Taxi Industry Association (page 10) and the Chamber of Commerce and Industry Queensland (page 5).

practices (i.e. the OECD Guidelines on Corporate Governance of State-Owned Enterprises) or to structurally separate commercial from non-commercial activities. This could also be useful in countering ad-hoc political interventions that might impede competitive neutrality.²³⁰

Calls to improve transparency

Some submissions suggest that there is a lack of community awareness about competitive neutrality and limited public disclosure of governments' compliance with competitive neutrality. The Business Law Section of the Law Council of Australia notes that:

[T]he current system has limited visibility in the legal and business community, and lacks the machinery to enforce a complaint and incentives for ongoing compliance.

A more effective system for dealing with specific complaints would need to involve formal obligations and enforceable adjudication by an independent body such as the Australian Competition Tribunal. Because most complaints would be likely to involve competing public policy objectives, any claim based on non-adherence to a competitive neutrality principle would need to be subject to an overall assessment as to whether the conduct had a net public benefit. (pages 5-6)

Typical of the concerns are those expressed by the Australian Chamber of Commerce and Industry (ACCI):

Few businesses know exactly what competitive neutrality is, few complaints are filed, and for those upheld, government's response is usually slow. A fundamental issue remains regarding the inadequacy of the enforcement process. (page 23)

The ACCC also notes that since 2005, there has not been significant reporting on competitive neutrality compliance across the jurisdictions. Prior to 2005 the NCC considered competitive neutrality implementation across jurisdictions as part of its annual progress assessment of NCP. (ACCC Submission 1, page 26)

The PC recommends that governments review 'whether processes for handling competitive neutrality complaints are identifiable, independent and accessible'. (page 34)

ACCI points to the small number of complaints as evidence that the system is not performing well. (page 24)²³¹

In 2013 the Victorian Competition and Efficiency Commission undertook a comparison of competitive neutrality across Australian jurisdictions. It found that 112 competitive neutrality complaints were investigated across all jurisdictions between 1996 and 2012. During 2011-12 there were five complaints investigated across all jurisdictions.²³²

The declining number of complaints could reflect government business activities becoming familiar with their competitive neutrality responsibilities and ensuring that breaches do not occur. The Panel heard from some jurisdictions that competitive neutrality was now part of the culture with

230 OECD 2012, Competitive Neutrality: [A Compendium of OECD Recommendations, Guidelines and Best Practice](#), page 12.

231 The ACCC also notes the significant decline in the number of completed competitive neutrality complaint investigations since 2006 (ACCC Submission 1, page 26).

232 Victorian Competition and Efficiency Commission 2013 Competitive Neutrality Inter-jurisdictional Comparison Paper, page 6.

government businesses seeking advice on complying with competitive neutrality before making changes to business activities.

A recent article by competition law authors Alexandra Merrett and Rachel Trindade also noted:

The very low level of complaints could be because government businesses across the country are so compliant that there's not even a suspicion that they could be failing to fulfil their obligations. On the other hand, it just might be that private businesses have no clue that such obligations exist or they (or their advisors) have no faith in the competitive neutrality process and cannot be bothered wasting time and money in pursuit of a complaint.²³³

The PC recommends that competitive neutrality policy require self-reporting in annual reports by government businesses of the steps taken to comply with the policy. The PC argues that this would:

[B]oth aid in the assessment of compliance and also provide some transparency to private sector competitors that the business is operating in line with government policy.
(page 34)

In addition the PC recommends that the Heads of Treasuries should produce their annual competitive neutrality matrix within six months of the end of each financial year. (page 34)

A number of submitters raise the issue of the need for stronger obligations on government to respond to the findings of competitive neutrality policy breaches and recommendations.²³⁴ The PC notes that there are no formal requirements and recent investigations undertaken by the Australian Government Competitive Neutrality Complaints Office have not had official responses. The ACCC suggests that a review into the timeliness and transparency of complaints handling and the implementation of recommendations could promote more effective regimes. (ACCC Submission 1, page 26)

Calls to review competitive neutrality policy

Submissions contain calls for a review of competitive neutrality policy.²³⁵ Areas identified where competitive neutrality policy could be improved to ensure better policy outcomes include:

- clearer guidelines on the application of competitive neutrality during the start-up stages of new government business enterprises that are or will be engaged in significant business activities, including the extent to which competitive neutrality provisions should be included in business models and initial planning;
- defining the 'longer term' to which the policy applies — a critical component of the application of the competitive neutrality policy is that government businesses earn a commercial rate of return to justify the retention of assets over the longer term, but as the PC states 'this term is not defined, nor is there guidance on its application to a start-up business' (page 34); and
- principles for identifying and specifying non-commercial objectives of government businesses and those activities that should be transparently funded.

233 Merrett A and Trindade R 2013, *The State of Competition: Has competitive neutrality run its course?*, page 5.

234 For example, the PC, page 34, BCA Summary Report, page 14, ACCI, page 24, ACCC Submission 1, page 26, Queensland Competition Authority, page 13.

235 For example, from the ACCC Submission 1, page 69, ACCI, page 24, BCA Summary Report, page 14, NSW Government, page 10 and Chamber of Commerce and Industry Queensland, page 4.

The Chamber of Commerce and Industry Queensland suggests that the small business community would be better served if the policy covered all government businesses that engage in commercial operations. (page 5)

National Seniors Australia also argues for extending competitive neutrality policies:

[T]o any area where government agencies may compete with private or not-for-profit bodies for the supply of services. (page 6)

As discussed earlier, assessment of government activities to which the current competitive neutrality policy applies is based on an interpretation of a 'significant business activity' and where the benefits of implementing the policy outweigh the costs (Box 11.1). An important question is whether the scope of competitive neutrality should be extended to cover a wider set of government activities.

What is captured by competitive neutrality policy varies across the OECD. As the OECD recently said:

Some national authorities apply competitive neutrality policies only to the activities of 'traditional' state-owned enterprises (SOEs). Others apply competitive neutrality practices to all types of government activities that can be characterised as 'commercial' in nature (e.g. where they provide goods and services in a given market), regardless of their legal form or profit objectives. There is no universal definition for what constitutes government 'business' activities; neither is there a clear definition for the demarcation between what constitutes commercial and non-commercial activities.²³⁶

That said, activities which are commercial in nature are typically characterised as a combination of the following: where there is a charge for the good or service; there are no restrictions on profitability; and there is actual or potential competition.²³⁷ These characteristics are in line with the current business test applied under competitive neutrality policy (Box 11.1).

A further issue is the appropriateness of the threshold tests for identifying 'significant business activity'. As discussed earlier, the threshold tests vary across the jurisdictions.

Some jurisdictions have not revised their competitive neutrality policy statements in more than a decade. The Australian Government has not revised its competitive neutrality policy since 1996. The ongoing applicability of competitive neutrality requires that governments maintain up-to-date policies. Updating the policies can also reinvigorate government commitment to competitive neutrality policy.

In addition, since each jurisdiction is able to adopt its own approach to competitive neutrality, there is an opportunity to compare across jurisdictions to determine 'best practice' as a basis for updating policies and improving current arrangements.

Trembath²³⁸ suggests that a best practice model for determining the scope of competitive neutrality involves regularly reviewing the activities' status of significance or non-significance. Also, allegations of non-compliance should be heard by a body separate from the government businesses that could be the subject of complaint.

236 OECD 2014 *Competitive Neutrality, Maintaining a level playing field between public and private business*, page 18.

237 OECD 2012, *Competitive Neutrality: A Compendium of OECD Recommendations, Guidelines and Best Practice*, page 11.

238 Trembath, A 2002, *Competitive Neutrality: Scope for Enhancement*, National Competition Council Staff Discussion Paper, page 38.

The Panel's view

The principle of competitive neutrality is a key mechanism for strengthening competition in sectors where government is a major provider of services.

Concerns around competitive neutrality were raised with the Panel, particularly where businesses, in many instances small businesses, compete with local government. While the government activities may not be 'significant' as judged by relevant guidelines, the breadth of sectors where issues were raised points to this as a potential obstacle to small business competing in a range of markets.

The Panel is also concerned by the number of instances where local governments act as regulator and provider in a contested market. The operational practices under which government businesses operate can have implications for competitive neutrality.

The absence of any requirement to respond to breaches of competitive neutrality is clearly undermining the efficacy of competitive neutrality policy.

Competitive neutrality policies need to remain relevant and up-to-date. 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.

There is scope to increase the transparency and effectiveness of competitive neutrality complaints processes and compliance with competitive neutrality policy, including by:

- assigning responsibility for investigation of complaints to a body independent of government;
- requiring governments to respond publicly to the findings of complaint investigations; and
- requiring government businesses to include a statement on compliance with competitive neutrality in their annual reports.

Since each jurisdiction is able to adopt its own approach to competitive neutrality, there is an opportunity to compare across jurisdictions to determine 'best practice' as a basis for updating policies and improving current arrangements.

Scope of current competitive neutrality principles

Current competitive neutrality policies apply to significant business activities but the Panel seeks to extend competition into human services.

The ACCC notes the scope for greater competition in human services and suggests that mechanisms by which this could be achieved include facilitating competitive neutrality between private and public providers and also by promoting competition between 'public' providers (page 8).

The NSW Government also suggests that there is scope to increase the contestability of public service markets:

In some areas, impediments exist that make it challenging for the private sector to effectively compete with the public sector, despite competitive neutrality requirements. There may be scope to increase contestability in public service markets, including for individual components of the service delivery chain, if community service obligations (CSOs) were transparent, explicitly priced and directly funded by the government. (page 22)

The NSW Government notes that changes to increase contestability in the vocational education and training market in NSW will require TAFE Institutes to compete on a more neutral basis.

These reforms include introducing a demand-driven system through individual student entitlements to government subsidised training for identified skills (from 1 January 2015), allowing the funds to follow the student to their choice of approved training organisation and increasing the contestability of government subsidies for training. The reforms also change TAFE governance structures, increasing competitive neutrality by separating the purchaser and provider roles and ensuring TAFE Institutes compete on a more neutral basis. (page 25)

Key challenges associated with obtaining competitive neutrality in human services include structural separation, determining the operational form for government business activities (particularly when the activities sit within a broader range of government functions) and transparent costing and funding of CSOs.

Appropriate cost allocation mechanisms for identifying shared costs, assets and liabilities are also particularly important when business activities share costs across a broader range of government activities. If all costs are not correctly attributed to the business activity the government business could undercut private competitors. Transparency around cost structures also ensures that any CSOs are not used to cross-subsidise commercial activities.

Getting the right competitive neutrality policy settings in place in human services will be crucial to securing the benefits of a diverse range of innovative providers, including expanding choice to users.

The Panel's view

There may be scope to extend the principles of competitive neutrality to markets where governments and other providers are supplying services, including human services.

The case for extending the principle of competitive neutrality is greatest when:

- there are different arrangements for government providers operating in the same market as alternative providers; and
- the differential treatment is not justified on net public benefit grounds.

Getting the competitive neutrality settings right in human services will be crucial to facilitating choice for users and securing the benefits of a diverse range of service providers.

12 PROCUREMENT

Governments purchase a range of goods and services from external sources to help meet their policy goals. Procurement is the process of acquiring goods or services, and government procurement arrangements cover a very broad range of purchase contracts — from cleaning and maintenance of government buildings, to large infrastructure projects such as the building of a new road, to special one-off financial advice on the sale of a government asset, and even to the direct provision of human services such as out-of-home care.

Through making direct purchase decisions, governments can have a big impact on the range of goods and services ultimately offered to consumers.

A number of submissions raise procurement issues, including in relation to complexity, risk and accessibility, particularly for small businesses trying to win government contracts.

As discussed in [Chapter 10](#) on human services, government procurement processes have often been risk averse and prescriptive. Kevin R Beck states that tender documents are ‘prescriptively written to place the entire onus on the respondent with risk and accountability deflection away from the agency’ (page 3). Catherine Collins notes that ‘tender documents for government contracts are unnecessarily large and complex’ (page 1) which can make it particularly difficult for smaller businesses to compete.

Even in cases where governments require very specific goods or services, governments can play a role in helping a range of businesses understand and bid for tenders. For example, the Western Australian government hosts seminars for businesses wanting information on the government quote and tender process.²³⁹ Governments can also take steps to ensure that contracts are written in a way that is easy for businesses to understand and which allows for a range of innovative solutions to be considered. The Chamber of Commerce and Industry Queensland observes:

[T]he tender process itself is highly onerous and often small businesses do not have the time and resources that large businesses do to effectively compete for local tenders.
(page 9)

In line with our observations on commissioning human services, where possible the Panel favours procurement practices with a focus on outcomes rather than outputs. An outcomes focus allows bidders to suggest different approaches for achieving the government’s desired result, rather than having to demonstrate specific activities, tasks or assets. It allows potential bidders to offer new and innovative ways to meet government demands and helps to encourage a diverse range of potential providers.

An example of outcomes-based procurement can be as simple as a tender for building maintenance specifying that floors must be clean and have a uniformly glossy finish (outcome focus), rather than specifying that a contractor must strip and re-wax the floors weekly (output focus).²⁴⁰

Of course, moving to outcomes-based procurement is not without challenges, and governments will need to find ways to define desired outcomes and measure performance. But the Panel notes the

239 See www.smallbusiness.wa.gov.au/tender-process/.

240 Example taken from North, J and Keane B, 2014, [Australia: Outcome-based contracting is on the up: Who’s doing it, why, and what you need to know about it](#).

steps governments are already taking, including the NSW Government's Procurement Roadmap for 2013 and 2014, which includes a commitment to move away from 'one-size fits all' tenders and use more flexible and less complex procurement strategies.²⁴¹

The balance in ensuring that procurement processes meet community needs while allowing room for new innovative firms to compete is captured in the NSW Government comment:

Where reform involves contracting with non-government service providers, contracts should be structured to ensure competitive tension is maintained. For example, contract durations should be short enough to maintain competitive pressures on incumbent service providers, but of sufficient length to ensure service providers obtain a satisfactory return. (page 27)

In considering ways to encourage innovation, choice and responsiveness in procurement practices, governments could have trials or pilots of different types of tenders. Feedback and lessons learned from pilot tenders could then be incorporated into future procurement guidelines and practices.

In addition, the competition principles set out in the Panel's [Draft Recommendation 1](#) are directed at promoting choice and a diversity of providers. Both of these principles could be incorporated into procurement decisions.

Under the NCP, governments agreed to extend the CCA so that it applied to the Crown so far as it carried on a business, either directly or through an authority. The CCA states that a business includes a business not carried on for profit.

While the CCA does not define what the term 'carry on business' means, section 2C sets out some activities that are excluded:

- imposing or collecting taxes, levies or licence fees;
- granting or varying licences; and
- a transaction involving only the Crown and/or non-commercial authorities.

There is also considerable case law on the question of what constitutes 'carrying on a business'.

There are many circumstances in which the Crown (whether as a department or an authority) participates in markets, sometimes with a substantial presence, but may not necessarily carry on a business for the purposes of the CCA. This is particularly the case in the area of procurement: whether for the delivery of large infrastructure projects or the regular requirements of the health or education systems.

241 NSW Government Procurement Roadmap.

Applying competition law to government activities in other jurisdictions

New Zealand

The New Zealand Commerce Act has a broader application to the Crown than the Australian law. The Commerce Act 'shall bind the Crown insofar as it engages in trade'. If the Crown is engaged in trade for certain activities, then it is subject to the Commerce Act in relation to those activities. The Crown is regarded as all government and quasi-government bodies.

'Trade' is defined in the New Zealand Commerce Act as any trade, business, industry, profession, occupation, activity of commerce, or undertaking relating to the supply or acquisition of goods or services, or to the disposition or acquisition of any interest in land. The courts have interpreted the phrase 'engaged in trade' to have the meaning 'carrying on trade'. This means the Crown must be doing more than just carrying out activities that affect trade, to invoke the application of the Act.

The trading functions of the Crown will be subject to the Act; its administrative and regulatory functions will not. Often Crown Corporations carry out trading activities of the Crown. Unlike the Crown itself, when a Crown Corporation is engaged in trade its whole sphere of activity becomes subject to the Act, not just its trading activities.

The Crown is subject to almost all the same penalties as private sector organisations, including third-party damages actions and other court orders. The only penalty to which the Crown is not subject is a pecuniary penalty payable to itself.

Interconnected bodies corporate are not subject to the prohibition against anti-competitive mergers or agreements, where arrangements are solely between subsidiaries and/or the parent company. Amendments in NZ have:

- following the electricity reforms, ensured agreements between bodies corporate owned by the Crown are subject to the Commerce Act as if they were arrangements between independent companies.
- subsequently reversed this for Crown owned health trading enterprises, with the result that a public hospital merger is treated as a reorganisation within an interconnected body corporate rather than as a merger between two independent entities.

United Kingdom

The *Competition Act 1998* (UK) applies to government activities where the body is an 'undertaking' for the purposes of the law and where its activities are commercial in nature.

In determining whether a public body is acting as an undertaking in relation to the purchase of goods or services in a market, the economic or non-economic nature of that purchasing activity depends on the end use to which the public body puts the goods or services bought.

A public body is likely to be engaging in economic activity if it is supplying a good or service, and that supply is of a commercial nature. Conduct will not amount to economic activity if it is of a wholly social nature.

In 2012 the UK Parliament passed the *Health and Social Care Act 2012* (UK), which specifically applies the competition law merger controls in the *Enterprise Act 2002* to NHS Foundation Trust hospital mergers.

The Panel's view

Government procurement guidelines and decisions can have a big impact on the range of goods and services ultimately available to consumers.

Tender documents have traditionally been written prescriptively and with an overarching focus on value for money. While risk management and value for money are both important considerations, too narrow a focus on these factors can constrain choice, innovation and responsiveness in the government-commissioned provision of goods and services.

Governments can take steps to encourage diversity, choice and innovation in procurement arrangements. Tendering with a focus on outcomes, rather than outputs, and trials of less prescriptive tender documents could encourage bidders to suggest new and innovative methods for achieving the government's desired result, while education and information sessions can help a broad range of businesses understand the procurement process.

Competition principles, particularly those promoting choice and a diversity of providers, should be incorporated into procurement policies.

Through its commercial transactions entered into with market participants, the Crown (whether in right of the Commonwealth, state, territory or local governments) has the potential to harm competition. The Panel considers that the NCP reforms should be carried a step further and that the Crown should be subject to the competition law insofar as it undertakes activity in trade or commerce.

13 KEY RETAIL MARKETS

Competition in the grocery and fuel retailing markets in Australia has been an area of considerable public, media and political interest and concern over many years, not least because these products are frequently purchased, largely non-discretionary for most consumers, and account for a significant proportion of consumer spending.

13.1 SUPERMARKETS

A number of small businesses, supermarkets and their representatives, consumers and other stakeholders made submissions raising concerns about the major supermarket chains Woolworths and Coles. For example, Master Grocers Australia states:

[T]he market dominance of two major retailers is seriously affecting the ability of smaller independent retailers to compete effectively. (page 6)

Other stakeholders, including Woolworths (page 7) and Coles (page 4), alternatively submit that the grocery industry is highly competitive, and has become more so in recent years.

Australia's grocery market is concentrated, but not uniquely so (see Box 13.1 below). While concentration is relevant, it is not determinative of the level of competition in a market. A concentrated market with significant barriers to entry may be conducive to weak competition, but competition between supermarkets in Australia appears to have intensified in recent years following Wesfarmers' acquisition of Coles and the expansion of ALDI and Costco; consequently, few concerns have been raised about prices charged to consumers by supermarkets.

Box 13.1: Market concentration

Choice of measure affects outcome:

- Estimates of market share and international comparisons are fraught. There is no single 'true' measure. Each may be useful depending on the question being asked.
- The ACCC's 2008 Grocery Inquiry Report devoted over 20 pages to measures of market share in Australia and overseas, and concluded that while the level of concentration was not optimal, it did not in its own right prevent competition; other factors must be assessed before drawing any conclusions on the degree of competition in the market.
- It reported a number of market share figures published by overseas supermarket investigations (generally by competition agencies). We have supplemented these figures with other published estimates to produce the table below:

Table: Estimated grocery market shares (%) by country

Largest 4 firms	Australia*	NZ*	UK*	Canada*	Ireland*	Austria*	USA^	Switzerland~
1	30+	56	27.6	29	20-25	N/A	25	32
2	~25	44	14.1	22	15-20	N/A	17	24
3	IGA, 15-17 ^(a)	N/A	13.8	14	15	N/A	8	N/A
4	ALDI, 6 ^(a)	N/A	9.9	11	10	N/A	5	N/A
Top 4 total	75-80	100	65.4	76	50-70	N/A	55	N/A
Top 2 total	55-60	100	41.7	51	35-45	65-70	42	56

Sources: *ACCC 2008, [Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries](#), page 48, [www.theconversation.com](#) '2013 Fact check on Grocery Market Concentration' (note this measure is 'share of food retail sector'), [www.euromonitor.com](#) 'Grocery Retailers in Switzerland'.

(a) These figures were not generated on the same basis as those shown for the largest two firms.

A separate issue to market concentration is whether there is anti-competitive conduct by some players in the market.

Stakeholders raise a number of concerns about what might broadly be categorised as competition issues (including competition law issues) in relation to supermarkets. These include: concerns that the pricing and other behaviour of major supermarket chains including 'predatory capacity' drives out independent retailers, and the CCA fails to prevent this; the prices they pay to suppliers are too low (disadvantaging both suppliers and other retailers); their treatment of suppliers is unfair; and that their fuel discount shopper dockets unfairly disadvantage independent supermarkets and fuel retailers.

For example, Business SA submits:

Smaller, independent retailers are not worried about competing with the larger retailers, but are concerned about being pushed out of the market with tactics which will eventually result in a duopoly or monopoly market. This is not only at a supermarket level, but also at an individual brand level. (page 6)

Another category of concern is that increasing use of private brands is reducing shelf space for branded products. Lynden Griggs and Jane Nielsen comment on the rise of supermarket private labels, noting that:

In the short term they may well see reduced prices, but long term, potentially, a reduction in choice and a reduction in innovation as small suppliers to the supermarket giants are removed from the market. (page 1)

There are a range of provisions in the CCA that are designed to address anti-competitive conduct. In particular, provisions that relate to the misuse of market power and unconscionable conduct. The Panel's views on these provisions and possible amendments are set out at [Chapter 3](#) of this Draft Report.

The Panel notes that the ACCC has recently instituted proceedings in the supermarket sector alleging unconscionable conduct in dealings with suppliers. The Panel does not make any comment on the merits of the case. However, the Panel does note that it provides an opportunity for these issues to be aired and assessed in the courts, where they are best considered.

The Panel cannot adjudicate on whether a CCA breach has occurred or not in particular cases. However, the Panel can reaffirm that these provisions should only prohibit conduct that harms competition, not individual firms. In particular, the CCA does not, and should not, seek to restrain a

competitor because it is big, or because its scale or scope of operations enables it to innovate and thus provide benefits for consumers.

The introduction of a properly designed and effective industry code should assist in ensuring that suppliers are able to contract fairly and efficiently. However, any such code should not lead to agreements that benefit retailers and suppliers at the expense of consumers.

The Panel considers instead that consumers and small businesses operating in the retail sector can benefit from the introduction of more competition through eliminating barriers to entry that currently exist.

In particular, there remain some restrictions on trading hours and on the goods that can be sold within a supermarket or service station (e.g. alcohol and pharmacy products).

Further, the ACCC's 2008 grocery report noted that planning and zoning laws act as a barrier to the establishment of new supermarkets. It noted that independent supermarkets were particularly concerned with impediments to new developments given the difficulties they have in obtaining access to existing sites.²⁴² ALDI also indicates that these laws are a barrier to expansion (page 1). The Panel has recommended changes to planning and zoning regulation at [Draft Recommendation 10](#).

Concerns have also been raised with the range of retail outlets now operated as part of the corporate structures of Woolworths and Wesfarmers. For example, Vito Alfio Palermo notes that one or both of Woolworths or Wesfarmers are involved in '... groceries, liquor, hotels, hardware, electronics, apparel and homeware, office supplies ...' (page 1)

The move of the large supermarket chains into regional areas has also raised concerns about a loss of amenity and changes to the community. For example, Drakes Supermarkets submits:

It is my view that [Coles and Woolworths] are land banking in many parts of [SA] where ... competition already exists. They are applying for rezoning of industrial and or commercial land usually outside existing shopping zones with the intent to shift the market away from existing zones. They have created major problems in the Riverland, South East and Adelaide Hills by locating outside traditional main streets. (page 2)

Structural changes such as these raise reasonable concerns for individuals about how their amenity will be affected. Changes that affect the level of activity occurring on the main street or in other traditional retail modes, or that result in some small, long-term or family-run businesses closing can have real impacts on the local community.

These issues have been strongly stated and are clearly of concern to consumers and small business. The Panel is grateful to the small businesses and individuals who have been prepared to share their stories with us. But the Panel has also heard of new small businesses opening up in new retail centres to take advantage of the customers attracted by the introduction of Coles or Woolworths. The Panel has also heard members of local communities who intend to continue to provide custom to the small, family-run businesses that they have traditionally frequented.

The Panel considers that these concerns are not matters to be addressed by the competition laws. They reflect broader economic and social changes that are often the outcome of competition. Undoubtedly these changes can damage individual businesses. However, consumer preferences and choice should be the ultimate determinant of which businesses succeed and prosper.

242 ACCC 2008, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, page xix.

The Panel's view

Australia's grocery market is concentrated, but not uniquely so. Competition appears to have intensified in recent years with Wesfarmers' acquisition of Coles and the expansion of ALDI and Costco; consequently, few concerns have been raised about prices.

Small supermarkets have alleged that the major supermarkets are misusing their market power, including through 'predatory capacity' and targeting particular retailers. Suppliers have raised concerns about misuse of market power and unconscionable conduct by the major supermarket chains. The Panel's views on the relevant provisions of the CCA are set out at [Chapter 3](#) of this Draft Report.

The Panel cannot adjudicate on whether a CCA breach has occurred or not in particular cases. However, the Panel can reaffirm that these provisions should only prohibit conduct that harms competition, not individual competitors. The Panel also notes the present litigation concerning the ACCC's allegations of unconscionable conduct in the supermarket sector.

The introduction of a properly designed and effective industry code should also assist in ensuring that suppliers are able to contract fairly and efficiently.

The removal of some regulatory barriers would strengthen competition in the supermarket sector. Planning and zoning restrictions are limiting the growth of ALDI, and the ACCC has previously identified that they particularly affect the ability of independent supermarkets to compete.

Trading hours restrictions and restrictions preventing supermarkets from selling liquor are also an impediment to competition.

There have been a number of structural changes in the operation of supermarkets, such as greater vertical integration and use of 'home brands', an increase in the range and categories of goods sold within supermarkets, and greater participation by supermarket operators in other sectors. Like all structural changes, these can result in dislocation and other costs that affect the wellbeing of others.

The move of larger supermarket chains into regional areas can also raise concerns about a loss of amenity and changes to the community. While the Panel is sensitive to these concerns, they do not of themselves raise competition policy or law issues.

13.2 FUEL RETAILING

The fuel retailing sector has been the subject of numerous reviews. Most notably, in 2007 the ACCC conducted an inquiry into the price of unleaded petrol.²⁴³ It found that wholesaling was dominated by four large players (Shell, BP, Caltex and Mobil) and identified options to improve competition but did not identify serious market failures warranting government intervention.

In particular it identified a need to ensure that access to fuel terminals did not act as an impediment to the importation of fuel by independent wholesalers. The ACCC's 2013 fuel monitoring work shows that independent imports have increased in recent years.²⁴⁴

The retail level was found to have far more competitors, and the petrol operations of the supermarkets were an important presence, as well as the operations of independent retailers.

243 ACCC 2007, *Report of the ACCC inquiry into the price of unleaded petrol*, Foreword.

244 ACCC 2013, *Report of the ACCC into the prices, costs and profits of unleaded petrol in Australia*, page xiii.

NRMA raises concerns about concentration in the fuel market in Australia (page 2). It commends the ACCC for having opposed some acquisitions in the fuel retail sector, but considers that prices are still higher than they should be, particularly in regional areas where competition is more limited. (pages 2-3)

Some stakeholders raise concerns that the use of discount fuel shopper dockets constitutes a misuse of market power.²⁴⁵ Following an investigation, the ACCC accepted court-enforceable undertakings from Woolworths and Coles limiting the extent of fuel discounts to four cents per litre. This appears to have addressed the concerns of these submitters for the time being.

Should larger discounts reappear following the expiry of the undertakings, the ACCC could pursue court action under the CCA if it formed the view that such conduct constituted a breach of the CCA. In this context, the Panel notes its proposed changes to the misuse of market power provisions of the CCA at [Section 3.7](#).

The Panel is not persuaded that consumers are made worse off by the availability of fuel discounts at their current levels.

The Australian Automobile Association (pages 4-5) raises petrol price boards, and proposes a national standard be developed. Presently, in most of Australia, price boards are permitted to show the discounted 'shopper docket' price, but it was submitted that this may mislead consumers and unfairly advantage firms offering such discounts. The ACCC has not taken court action in response to such conduct to date, but the Panel notes that the CCA contains provisions dealing with misleading and deceptive conduct.

National Seniors Australia draws attention to the relevance of price signalling provisions, which presently apply only to banking, to the fuel retailing market:

National Seniors questions whether competition law is working effectively to ensure genuine price competition in automotive fuel retailing, where weekly price movements posted by the major distribution companies appear to move in tandem. The Review should consider whether price signalling provisions ... should be extended to fuel suppliers and other sectors. (National Seniors Australia, page 8)

The Panel's views on price signalling provisions of the CCA are set out in [Section 3.6](#). The Panel also notes the current litigation in which the ACCC alleges that Informed Sources service, which shares pricing information between fuel retailers, and participating petrol retailers have breached section 45 of the CCA, which prohibits contracts, arrangements and understandings that have the purpose, effect or likely effect of substantially lessening competition.

The Australasian Convenience and Petroleum Marketers Association has made public comments emphasising the importance of terminal access to facilitate wholesaling competition.²⁴⁶

The availability of a timely and effective scheme to allow access, where appropriate, to natural monopoly infrastructure, provides a possible avenue should independent wholesalers be frustrated in their attempts to gain access through commercial negotiations. The Panel's views on the access regime under the CCA are set out at [Section 3.16](#). The Panel has not seen evidence that would justify industry-specific intervention to facilitate such access for fuel terminals.

²⁴⁵ For example, Australian Automobile Association, page 5; Drakes Supermarkets, page 2.

²⁴⁶ Moulis, N (ACAPMA CEO) [Fuel industry: Not drowning, waving](#), 9 April 2014,

As noted in relation to other sectors, the Panel notes the importance of planning and zoning regulations taking into account competition. To the extent that they allow only one service station serving a given area and discourage the opening of multiple service stations in close proximity, such restrictions may reduce the likelihood of close competition that allows and encourages price comparison by consumers.

The ACCC submits that the NSW government mandate requiring that a certain proportion of petrol sold in the state should contain ethanol is an example of regulation that limits competition and imposes costs on society (ACCC Submission 1, page 40). The ACCC submits that the mandate has failed to achieve its industry assistance goals while at the same time it has diminished consumer choice and has led to consumers paying higher prices as they switch to premium fuels to avoid ethanol. The Panel considers that this mandate should be reviewed and repealed unless it can be shown that it is in the public interest and that its objectives can only be achieved by restricting competition.

The Panel's view

Shopper docket were a source of considerable concern, particularly for small competitors. These were up to 45 cents per litre but are now limited to 4 cents per litre through undertakings to the ACCC.

The Panel has heard submissions on this issue but at present is not persuaded that consumers are made worse off by, rather than benefitting from, the availability of discounts at their current levels. The Panel notes the undertakings accepted by the ACCC and the availability of the misuse of market power provisions of the CCA should future competition concerns emerge in this context.

Stakeholders expressed concerns that prices are higher in certain regional areas, but the Panel does not consider that this is explained by any clear shortcoming in the law or policy.

We express no view as to any effect the Informed Sources pricing information sharing service has on competition. The Panel's views on the price signalling provisions of the CCA are set out in [Section 3.6](#).

The NSW ethanol mandate should be reviewed against the public benefit test set out at [Draft Recommendation 11](#) and repealed unless it can be shown that it is in the public interest and that its objectives can only be achieved by restricting competition.

In relation to the regulation of petrol price boards, the Panel considers that the case for regulation to require the undiscounted price (only) to be displayed has not been made out.

PART 4 — COMPETITION LAWS

14 INTRODUCTION TO COMPETITION LAW ISSUES

In this Part we examine Australia's competition laws, which are contained in Part IV of the *Competition and Consumer Act 2010* (CCA), to assess whether they remain fit for purpose having regard to consumer and business experience with the laws, changes that have occurred in the Australian economy and that are anticipated, and relevant international developments.

Part 1 sets out a number of principles that guide the Panel's review of Australia's competition laws. An important principle is that competition policy should foster choice and increased responsiveness to consumers. This is reflected in the objective of the CCA, 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection' (section 2).

The CCA (and competition policy more generally) is not designed to support a particular number of participants in a market or to protect individual competitors; it is designed to ensure that the behaviour of competitors does not damage the competitive process to the detriment of consumers.

The robust competitive process supported by Part IV of the CCA may inevitably lead to market participants being damaged or leaving the market completely. Those adversely affected by competition may feel aggrieved by the damage that competition inflicts on their business, which in some cases may cause them to exit the market. But the CCA is neither intended nor designed to protect individual competitors or classes of competitors from such outcomes.

Another guiding principle is that the law should be simple, predictable and reliable. Those objectives can be met if:

- the law prohibits specific categories of anti-competitive conduct, with economy wide application;
- only conduct that is anti-competitive in most circumstances is prohibited per se — other conduct is only prohibited if it can be shown that the conduct has the purpose, effect or likely effect, of substantially lessening competition;
- contraventions of the law are adjudicated by a court, with proceedings able to be initiated by a public administrator or through private suit; and
- there is facility for business to seek exemption from the laws in individual cases on public benefit grounds.

The existing competition laws can be measured by how well they reflect these attributes.

The law must balance two principles:

- that its scope not over-reach (by prohibiting pro-competitive conduct) or fall short (by failing to prohibit anti-competitive conduct); and
- that the language of the law be clear to market participants and enforceable by regulators and the courts.

A law characterised by either under- or over-reach will reduce the level of competition and will fall short of the stated objective of enhancing the welfare of Australians, especially consumers. A law that is unclear creates business and regulatory uncertainty, imposing costs on the economy.

The law should also keep pace with international best practice. International best practice provides an important point of comparison to assess whether the scope of our law is correct and that the language and approach used is as simple as possible.

Another guiding principle is that policies and systems be adaptable to changing economic circumstances. The more complex and specific the provisions of the law, the less it is able to adapt readily to change.

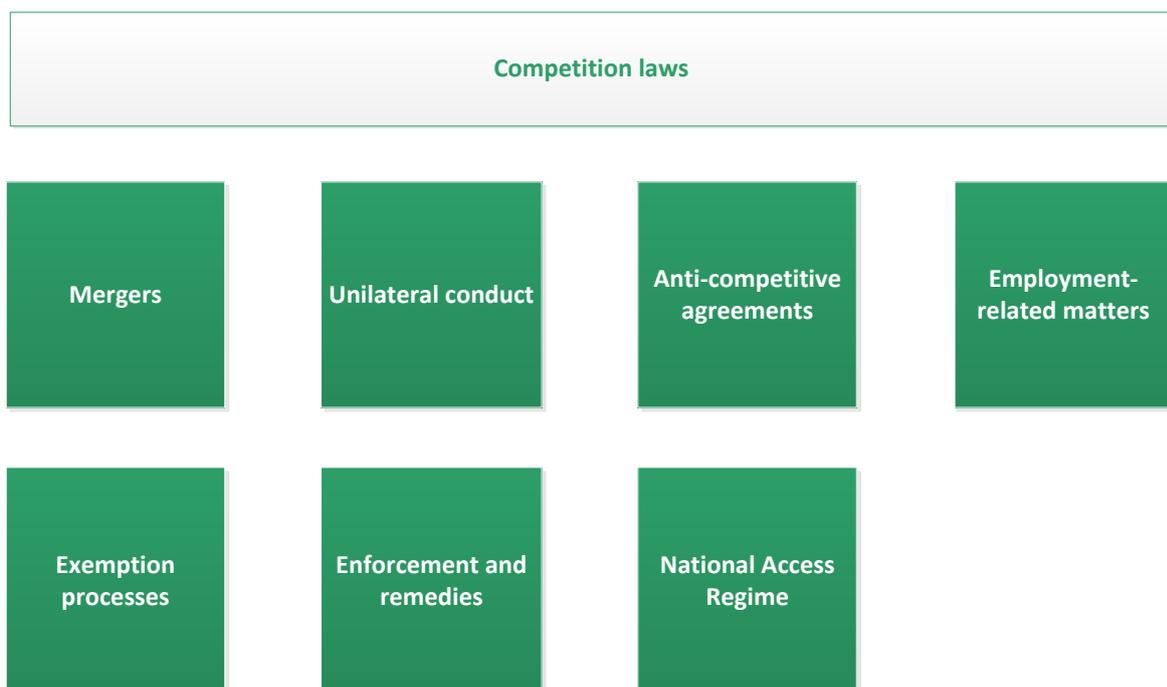
Broadly speaking, submissions to the Review support Australia’s current legislative framework. Some submissions identify improvements that could be made in drafting simplicity, clarity for users and better adherence to key economic underpinnings. However, difficulties in simplifying the law are also noted, including where simpler drafting may lead to increased uncertainty.

Some of the complexity in the law has arisen from amendments and additions made in response to calls for more ‘effective’ regulation (for example, following judicial interpretation of the words of section 46) or where there has been a perceived shortfall or over-reach resulting from a court judgment. There is a need to balance the certainty provided by specific drafting against the complexity that arises from attempts to address all possible contingencies.

The Panel considers that the current competition law provisions of the CCA, including the provisions regulating the granting of exemptions, are unnecessarily complex. Laws that are complex impose costs on the economy: indirect costs are imposed by reason of business and regulatory uncertainty and direct costs are imposed by reason of the necessity for legal advice and prolonged legal disputation. Australia’s competition laws would benefit from simplification while retaining their underlying policy intent.

Specific instances where the law could be improved are explored in the remainder of this chapter. The Panel has been guided by the Review’s Terms of Reference and issues brought to our attention in submissions and consultations.

The discussion is organised according to the separate topics indicated in the diagram below.



The Panel's view

Competition laws that are fit for purpose support an adaptable economy by protecting the competitive process, so that a diversity of producers can respond to the changing needs and preferences of consumers.

The concepts, prohibitions and structure of the CCA are sound. However, there are some provisions that are unnecessarily complex, contributing to business and regulatory uncertainty and imposing costs on business and the economy. Such provisions can also inhibit the adaptability of the CCA to changing circumstances.

The Panel considers that the competition laws could be simplified while maintaining their current policy intent. Business and consumers would benefit from simplification of the law. The Panel recommends that this task be undertaken in conjunction with the recommended revisions set out below.

The Panel specifically recommends the removal of unnecessary or now redundant competition law provisions including:

- 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.

The task of simplification would best be implemented by an expert legal panel, acting upon agreed recommendations and undertaking focused public consultation on draft simplified laws.

15 MERGERS

15.1 INTRODUCTION

Section 50 of the CCA prohibits mergers that would, or would be likely to, substantially lessen competition in any market. The ACCC is empowered to bring proceedings in court to prevent, or break apart, a merger that contravenes the law, or to seek a penalty. Third parties may also bring proceedings in court to break apart a merger that contravenes the law, or to seek damages.

Anti-competitive mergers can cause harm to efficiency and consumers and can bring about long-term adverse changes to markets. However, most mergers do not unduly harm competition; indeed, mergers can deliver substantial economic benefits to business and consumers, including through economies of scale and the transfer of assets to more efficient managers.

Australia's merger laws make provision for a merger to be authorised (that is, exempted from the merger prohibition) if it is likely to result in public benefits that outweigh the likely harm to competition.

Parties who want to seek approval before they merge to avoid the risk of court action have three separate processes available to them, as set out in the diagram below. Merger parties can choose any of the three processes, taking into account whatever factors they think relevant, such as legal test, decision-maker, onus of proof, timing, level of transparency and certainty, and legal costs.

Parties need only obtain one clearance or authorisation from one process to proceed with a transaction, and it is open to them to pursue more than one. For example, AGL sought informal clearance from the ACCC in early 2014 for its proposed acquisition of Macquarie Generation and, when this was not granted, it applied successfully to the Australian Competition Tribunal (the Tribunal) for merger authorisation.

It is not compulsory to seek approval before proceeding with a merger. However, despite the lack of a legal obligation to do so, firms proposing to engage in mergers that may affect competition generally choose one or more of the available processes. While this involves some time and expense, it avoids the risk that the ACCC or a third party may ask a court to unwind a completed transaction (through a court-ordered divestiture) and/or impose penalties if it is found to breach the CCA.

Merger clearance and authorisation processes

	Informal merger clearance	Formal merger clearance	Merger authorisation
Process			
Decision maker	ACCC	ACCC	Tribunal
Test	Substantial lessening of competition	Substantial lessening of competition	Public benefit
Clearance	Parties may seek confidential or public clearance	Public only	Public only
Process and information gathering	No set information requirements or forms. Submissions not published. May be a public Statement of Issues. May be a Public Competition Assessment.*	Set information requirements Statutory forms All non-confidential submissions public	Set information requirements Statutory forms All non-confidential submissions public
Timing	Indicative timeline only	Statutory timeline of 40 business days With possible 20 business day extension	Statutory timeline of three months with possible three month extension
Nature of decision	Indicative view but no formal decision. If the ACCC opposes a merger but the parties wish to proceed, the parties may seek a declaration from the Federal Court. The ACCC may seek an injunction from the Federal Court to block the merger.	Formal decision by the ACCC	Formal decision by the Tribunal
Appeal body	Injunction or declaration may be appealed to the Full Federal Court	Merits review by the Tribunal	Administrative review by the Federal Court
Other features	No immunity from third party action. The ACCC can accept undertakings to address competition concerns	Immunity from third party action. The ACCC can accept undertakings to address competition concerns	Immunity from third party action. The Tribunal can impose conditions on the transaction
Fees	No fees	\$25,000 fee	\$25,000 fee

* Public documents such as statement of issues and public competition assessments do not contain confidential information

Past reviews of Australia's competition laws have generated debate about the appropriate legal test for mergers. In 1992, the law was altered from a 'dominance test' to a 'substantial lessening of competition' test.²⁴⁷ In submissions to the Review, the substantial lessening of competition test appears to enjoy near-universal support.

Submissions raise the following issues with respect to the merger law:

- the market definition applied in the assessment of mergers, particularly when merging firms compete in global markets;
- creeping acquisitions;
- whether merger review under the CCA should be aligned with other approval processes, such as those associated with the Foreign Investment Review Board (FIRB); and
- the timeliness and transparency of merger approval processes.

15.2 MARKET DEFINITION AND GLOBAL COMPETITION

The Panel received submissions from a number of parties including the BCA, Australian Dairy Farmers, Telstra, Foxtel, Woolworths and Wesfarmers on how a 'market' is defined in the CCA and/or by the ACCC and whether market definition and merger review more broadly take full account of globalisation and competition (including the threat of competition) from overseas firms. For example, the BCA emphasises the need for a 'commercially realistic' market definition and expresses concern that '[t]he administrative approach to market definition can be at times unduly narrow'. (BCA Summary Report, page 18)

The concept of a market is central to the application of competition law, including the merger law. It is an economic concept that focuses attention on the relevant sources of competition that constrain the parties to a merger. The meaning of the term 'market' under Australian law has been very stable. It was explained in 1976 by the former Trade Practices Tribunal (now the Australian Competition Tribunal) in the context of a merger authorisation in the following terms:

A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them ... Within the bounds of a market there is substitution — substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.²⁴⁸

This explanation has stood the test of time. It has been approved by the High Court. In *Queensland Wire v BHP*,²⁴⁹ Mason CJ and Wilson J²⁵⁰ and Toohey J²⁵¹ agreed with the above passage. Deane J used the same language and said that: 'market' should, in the context of the Act, be understood in the sense of an area of potential close competition in particular goods and/or services and their

²⁴⁷ *Trade Practices Legislation Amendment Act 1992*.

²⁴⁸ *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited (QCMA)* (1976) 8 ALR 481 at 518.

²⁴⁹ *Queensland Wire v BHP* (1989) 167 CLR 177.

²⁵⁰ *Ibid* at 188.

²⁵¹ *Ibid* at 210.

substitutes'.²⁵² To the same effect was the statement of Dawson J that: 'A market is an area in which the exchange of goods or services between buyer and seller is negotiated'.²⁵³

Similarly, in *Boral Besser Masonry v ACCC*,²⁵⁴ McHugh J referred to the above passage from the former Trade Practices Tribunal and said:

[A] market describes the transactions between sellers and buyers in respect of particular products that buyers see as close or reasonable substitutes for each other given the respective prices and conditions of sale of those products.²⁵⁵

The assessment of the likely effect of a merger on competition, including the identification of markets that are relevant to such an assessment, involves judgment. Differences of opinion can and do emerge. Very few mergers are opposed by the ACCC. For example, the ACCC publicly opposed six out of 277 mergers reviewed on a non-confidential basis in 2012-13, or around 2 per cent.²⁵⁶ This suggests that the concerns raised with the Panel emanate from a small number of high profile, contentious cases.

It is not the role of the Panel to adjudicate whether the ACCC has been right or wrong in its interpretation of the law in individual cases; when the ACCC and merger parties differ about whether a merger breaches the CCA, it is the place of the Tribunal or the courts to decide the outcome. The Panel is directed to assess whether the legal framework within which mergers are assessed is appropriate.

Submissions raise the specific question of whether Australia's merger laws give proper consideration to global markets within which many businesses compete. Concerns have been expressed that the term 'market' in the CCA is defined as a market 'in Australia' and that this causes the competition analysis to be narrowly focused. Similar concerns about market definition and global competition have arisen overseas²⁵⁷ and also arose in submissions to the Dawson Review (which did not recommend a change to the way markets are defined).²⁵⁸

The Panel considers that it is necessary and appropriate for the term 'market' to be defined as a market in Australia. This is because the CCA is concerned with the economic welfare of Australians, not citizens of other countries. The law is intended to protect competition in Australian markets for the benefit of Australian consumers. If that aspect of the CCA were to be changed, and competition were to be assessed by reference to global markets, Australian competition law would be at risk of failing in its central objective.

This should not mean, however, that the CCA ignores the forces of competition that arise outside Australia but which bear upon Australian markets. Today, more than ever, Australian consumers are able to use the internet to browse for and purchase goods and services from overseas suppliers.

252 Ibid at 195.

253 Ibid at 199.

254 *Boral Besser Masonry v ACCC* (2003) 215 CLR 374.

255 Ibid at 248.

256 *ACCC Annual Report 2012-2013*, page 41.

257 See for example Professor Frederic Jenny in *Competition Policy Analysis*, edited by Einar Hope, Routledge, 2002, page 31.

258 Trade Practices Act Review Committee 2003, *Review of the Competition Provisions of the Trade Practices Act*, pages 50 and 59.

While the objective of the CCA is to protect and promote competition in Australian markets, frequently the sources of competition in Australian markets are global.

The CCA has been framed to take account of all sources of competition that affect markets in Australia. The definition of the term 'competition' in the CCA is important. In the CCA, 'competition' is defined to include competition from imported goods and services.

The geographic boundaries of many markets extend beyond Australia. In those circumstances a corporation that competes for the supply of goods or services in Australia does so in the broader geographic market. Any assessment of competition under the CCA must take account of those market realities. This has been recognised in decisions of the courts and the Tribunal.

In *Re Fortescue Metals Group*, the Tribunal concluded that the relevant concept of a market for the purposes of the competition law:

[c]onsists of groups of buyers and groups of sellers in a geographic region who seek each other out as a source of supply of, or as customers for, products. The interaction of the buyers and sellers determines the price for the products.²⁵⁹

The Tribunal described the process of defining the relevant market as 'the identification of the participating firms, a description of the products exchanged and the borders within which the exchange occurs'.²⁶⁰

While the CCA is concerned with the wellbeing of Australian consumers, it takes account of all sellers that compete to supply products in Australia, wherever they may be located.

This is also acknowledged by the ACCC. In a submission to the Panel the ACCC states:

The CCA ... recognises that Australia operates in a global economy and provides a framework for such matters to be taken into account. For example when assessing the likely competitive effect of a proposed merger, the potential for competitive constraint to be provided by suppliers located outside Australia is taken into account by considering import competition. (ACCC Submission 1, page 126)

Nevertheless, given the importance of ensuring that global sources of competition are considered where relevant, the Panel considers that the current definition of 'competition' in the CCA could be strengthened so that there can be no doubt that it includes competition from *potential* imports of goods and services, not just *actual* imports.

Some stakeholders also question whether the ACCC's application of the CCA is constraining the ability of Australian businesses to achieve efficient scale in order to become globally competitive. For example:

Competition Policy [is] frustrating mergers of companies in the global traded goods sector in the name of competition in the domestic market, but in the process denies a producer the extent of the market required for an operation to be internationally competitive ... It is recommended priority be given to mergers which favour the formation of a strong group which can compete in international markets rather than having weak fragmented entities. (The Industry Group, page 12)

259 [2010] ACompT 2 at [1011].

260 Ibid at [1014].

In order to compete effectively, businesses must continuously pursue economic efficiency. In many industries, efficiency requires scale. Businesses may pursue mergers in order to achieve efficient scale to compete more effectively in global markets.

In many markets in Australia achieving efficient scale will not substantially lessen competition because of the constraining influence of imports. Such mergers are allowed under the CCA. However, in some markets, the opposite will be the case: the influence of imports may be weak and unable to constrain the resulting market power of the merged businesses. When that occurs there are conflicting interests: the gain to the businesses that wish to merge through achieving greater efficiency against the potential detriment to Australian consumers due to the reduction in competition.

From time to time there are calls for competition policy to be changed to allow the formation of 'national champions' — national firms that are large enough to compete globally. While the pursuit of scale efficiencies is a desirable economic objective, it is less clear whether, and in what circumstances, suspending competition laws to allow the creation of national champions is desirable from either an economic or consumer perspective.

Porter²⁶¹ and others have noted that the best preparation for overseas competition is not insulation from domestic competition but exposure to intense domestic competition. Further, the purpose of the competition laws is to enhance consumer welfare through ensuring that Australian consumers can access competitively priced goods and services. Allowing mergers to create a national champion may benefit the shareholders of the merged businesses but could diminish the welfare of Australian consumers.

261 Porter, M E 1990, [Competitive Advantage of Nations](#), Harvard Business Review, page 86.

Box 15.1: Fonterra and calls for national champions in Australian agriculture

Fonterra, a co-operative that is the dominant dairy company in New Zealand, was formed from the 2001 merger of the two largest co-operatives, New Zealand Dairy Group and Kiwi Co-operative Dairies, together with the New Zealand Dairy Board. Some recent commentary has suggested that Australia should seek to emulate the formation of Fonterra and our competition policy and laws should be amended to facilitate this outcome.

The Panel considers that important differences between the circumstances surrounding Fonterra's formation and those applying in Australia mean that this conclusion is not soundly based.

The New Zealand dairy market was highly regulated prior to the formation of Fonterra, including through the New Zealand Dairy Board having a legislated export monopoly. The merger to create Fonterra was not permitted under New Zealand's competition laws but was instead facilitated through special legislation. The legislation included provisions and obligations on Fonterra designed to provide for domestic competition and prevent harm to consumers and farmers as a result of the merger.

Concerns were raised that the farm-gate price would be depressed due to Fonterra's dominance as a buyer. These were addressed through a combination of regulation and incentives. Ongoing price monitoring, as well as Fonterra's obligations to allow its farmer-shareholders open entry and exit at a 'fair' price, and to supply milk to competing processors, provide competitive pressure and an incentive for competitive pricing. To achieve domestic competition in the sale of milk products Fonterra had to divest several brands to competitors and is obligated to supply them on competitive terms.

'Sometimes they think in Australia that we've got a monopoly and it works, but we don't and having one doesn't,' New Zealand's Deputy Prime Minister and Minister of Finance, Bill English, has observed.²⁶²

The CCA has sufficient flexibility to allow public benefit issues to be adjudicated and determined by the ACCC or the Tribunal. The merger authorisation process (as set out in Box 15.2) applies a public benefit test that covers all potential benefits and detriments, including economies of scale. There may be occasions where 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.

²⁶² Binsted, T and Malpass, L, *Tough cheese*, Australian Financial Review, 2 August 2014, page 17.

Box 15.2: Authorisation and the public benefit test

Parties may seek authorisation for an acquisition. This process allows mergers even if they result in a substantial lessening of competition, but only if they meet a public benefit test. Applications have been rare (only two since the Tribunal became the first-instance decision-maker in 2007).

The test applied by the Tribunal in assessing applications is that authorisation must *not* be granted unless it is satisfied that the acquisition is likely to result in such benefit to the public that it should be allowed. The Tribunal *must* consider as benefits:

- a significant increase in the real value of exports;
- a significant substitution of domestic products for imported goods; and
- all other relevant matters that relate to the international competitiveness of any Australian industry.

Other factors may also be considered.²⁶³

The non-exhaustive list of factors that must be taken into account enables merger parties to argue that their proposed merger will result in public benefits through improving the business's ability to expand exports or compete against imports.

There has been some criticism of the factors that must be considered under the merger authorisation process:

Placing emphasis on these particular indicators is very likely to lead to sub-optimal outcomes. There is no *a priori* reason why growth in exports or the substitution of domestic production for imported products increases (or decreases) public welfare ... Deeming benefit to lie with increased exports or import substitution has the potential to distort production, waste scarce resources, and ultimately reduce community incomes.²⁶⁴

The Panel agrees that this list provides a narrow view of public benefits. However, it is a non-exhaustive list, and the Tribunal has interpreted public benefit to have a broad meaning. Given that the Tribunal is already able to take into account whatever factors it deems appropriate, a change in the law may have limited utility.

The Panel considers that issues concerning the creation of 'national champions' can be addressed under the existing CCA framework. It is appropriate that a competition regulator, whether the ACCC or the Tribunal, adjudicate such issues as they arise from time to time.

As noted elsewhere in this Draft Report, the Panel recommends some procedural changes to the merger approval process and a change to the governance structure of the ACCC to ensure that broader business, consumer and economic perspectives can be brought to the work of the ACCC.

²⁶³ *Competition and Consumer Act 2010*, section 95AZH.

²⁶⁴ Productivity Commission 2014, *Relative Costs of Doing Business in Australia: Dairy Product Manufacturing*, page 80.

The Panel's view

The Panel considers that it is necessary and appropriate for the term 'market' to be defined as a market in Australia. This is because the CCA is concerned with the economic welfare of Australians, not citizens of other countries.

While the objective of the CCA is to protect and promote competition in Australian markets, frequently the sources of competition in Australian markets are global. The CCA has been framed to take account of all sources of competition that affect markets in Australia. However, the current definition of 'competition' in the CCA could be strengthened so that there can be no doubt that it includes competition from *potential* imports of goods and services, not just *actual* imports.

In many markets in Australia, achievement of efficient scale will not substantially lessen competition because of the constraining influence of imports. Such mergers are allowed under the CCA.

If the achievement of efficient scale through a merger will also result in a substantial lessening of competition in Australia, conflicting interests arise: the gain to the businesses that wish to merge through achieving greater efficiency against the potential detriment to Australian consumers due to the reduction in competition.

The Panel considers that such issues can be addressed under the existing CCA framework. It is appropriate that a competition regulator, whether the ACCC or the Tribunal, adjudicate such issues as they arise from time to time.

As noted elsewhere in this Draft Report, the Panel recommends some procedural changes to the merger approval process and a change to the governance structure of the ACCC to ensure that broader business, consumer and economic perspectives can be brought to the work of the ACCC.

15.3 CREEPING ACQUISITIONS

The merger provisions of the CCA focus on the effect or likely effect on competition of a merger or acquisition. In 2008 and 2009 government discussion papers considered possible changes to deal with 'creeping acquisitions', which the 2008 paper described as:

[C]onduct that comprises the accumulated effect of a number of small individual transactions which, when considered in isolation at the time that each transaction occurred, would not breach section 50. That is, while each transaction considered at the time it occurred may have a limited impact on competition, and would therefore not fall within the scope of section 50, over a longer period a series of such transactions may have the cumulative effect of substantially lessening competition in a market.²⁶⁵

In 2011 the CCA was amended so that it now prohibits mergers likely to result in a substantial lessening of competition in 'any' market, instead of applying only to a 'substantial' market. Despite this change, many submitters consider that creeping acquisitions remain a problem. For example, Australian Airports Association, NRMA, Retail Guild of Australia, COSBOA, Friends of Hawker Village, Metcash and AURL Foodworks all call for changes to address creeping acquisitions. These calls are mainly in the context of concerns about the size and expansion of Woolworths and Coles in the supermarket and fuel retailing sectors.

²⁶⁵ Treasury 2008, [Discussion Paper — Creeping Acquisitions](#), pages 3-4.

Other stakeholders, including Woolworths, Wesfarmers, and the Business Law Section of the Law Council, argue that no such change is warranted.

The ACCC's position in its 2008 Grocery Inquiry was that, although amendments to deal with creeping acquisitions would be desirable, 'such acquisitions do not appear to be a significant current concern in the supermarket retail sector'.²⁶⁶ Rather, the expansion of Woolworths and Coles had occurred mainly via organic growth, not acquisition.

As a matter of concept, competition law should assess the overall effect of business conduct and not be narrowly focused on individual transactions. Various areas of competition law assess the anti-competitive effect of a commercial arrangement by reference to the aggregate effect of similar arrangements (specifically, section 45 that prohibits anti-competitive arrangements and section 47 that prohibits anti-competitive exclusive dealing).

A legitimate question therefore arises regarding whether section 50, which addresses anti-competitive mergers, should be applied so that the anti-competitive effect of an individual merger is assessed by reference to the aggregate effect of other mergers undertaken by the same corporation (or group of corporations) within a stated period (for example, the previous three years).

There would be complexities in introducing a concept of 'merger aggregation' into the CCA. Mergers rarely occur at the same time; they occur over time. Therefore, it is necessary to choose a period of time over which to look back and 'aggregate' mergers undertaken by the corporation. The complicating factor is that market conditions may have altered materially over the period chosen.

Competition may have increased or decreased over the period. In those circumstances assessing the aggregate effect on competition of mergers that have occurred over a period becomes a difficult exercise. The longer the period that is chosen, the more difficult the task becomes. Any such change to the law would affect every corporation that undertook a merger. The assessment of every merger would involve an assessment of previous mergers undertaken by the corporation over the stated time period. This would impose additional costs associated with merger review.

On balance, in the absence of evidence of harmful acquisitions proceeding because of a gap in the law on creeping acquisitions, the Panel does not consider that the case for change has been made.

15.4 SHOULD MERGER REVIEW UNDER THE CCA BE ALIGNED WITH OTHER APPROVAL PROCESSES?

Some stakeholders, including Australian Dairy Farmers (page 4), raise concerns about the coordination of the timing of the various merger approval processes that exist under Australian law. Beyond the CCA, there are various approval processes that may apply to certain mergers and acquisitions, such as foreign investment, media diversity and financial regulator approvals.

The particular concern raised by Australian Dairy Farmers arises from the bidding process for Warrnambool Cheese and Butter in 2013. One bidder, Murray Goulburn, was a competitor of Warrnambool Cheese and Butter for the acquisition of milk and made its bid conditional upon obtaining ACCC or Tribunal approval. Another bidder, the Canadian firm Saputo, had no activities in Australia and decided not to seek ACCC or Tribunal approval, although it did seek and obtain

²⁶⁶ ACCC 2008, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, page xxi.

approval from the Treasurer under the *Foreign Acquisitions and Takeovers Act 1975* since it was a foreign investor.

The Treasurer provided Saputo with approval on 12 November 2013, while Murray Goulburn did not lodge its application for merger authorisation until 29 November 2013. Saputo's bid was accepted by the majority of Warrnambool Cheese and Butter shareholders before the Tribunal could rule on Murray Goulburn's application (which was then withdrawn).

It is suggested that the Treasurer's decision on Saputo's bid should have been delayed until the merger authorisation process for Murray Goulburn's bid had concluded. Since any given merger may be subject to numerous approval processes, the logical extension of this proposal is that all approvals for all competing bids should be delivered simultaneously.

The Panel does not support this proposal. The various approval processes are not related. While it is desirable that decision-makers be cognisant of other processes, to require that each decision-maker delay its decision until all approval processes have been completed for all bidders would impose an unwarranted burden on bidders and sellers. Bidders and sellers are aware of the various approvals that may be required under various Australian laws and have some understanding of the time that could be taken. Sellers have incentives to ensure that competition between potential bidders is maximised in any sales process.

15.5 MERGER APPROVAL PROCESSES

As noted earlier, parties wishing to seek approval before they merge to avoid the risk of court action have three separate processes available to them: informal clearance by the ACCC; formal clearance by the ACCC; and authorisation by the Tribunal. Many submissions are directed to these processes, with various proposals for change. The Panel has weighed these various proposals.

ACCC's informal merger clearance process

The informal clearance process is the most commonly used of the merger clearance options; the ACCC considered 289 transactions on this basis in 2012-13.

Under the informal merger clearance process, the ACCC considers information provided by the merger parties and other parties, conducts its own analysis, and forms a view as to the likely competition effects of the proposed transaction. Informal 'clearance' by the ACCC does not provide statutory protection from legal action under section 50; it provides the ACCC's view on whether an acquisition is likely to breach the CCA. Similarly, ACCC opposition to a merger does not legally prohibit the merger; only a court can do that.

The vast majority of submissions support the informal clearance process because of its flexibility and relatively low cost. The fact that the process leads to the ACCC forming a view, rather than being a decision of a court, means that it is not necessary for parties to provide legally admissible evidence. This reduces the complexity and expense associated with the process.

Changes to the informal process following the Dawson Review have generally been welcomed:

These reforms include Statements of Issues, Public Competition Assessments and letters to the merger parties often referred to as 'transparency letters'. The ACCC should be commended for its efforts to improve the level of accountability and transparency in its informal merger review process. (Herbert Smith Freehills, page 2)

However, for more complex matters, some stakeholders consider that the informal process can be slow and/or unpredictable in timing. Foxtel suggests that there should be a strict timetable for completion of merger clearances (page 7) rather than the current system where the ACCC can change its indicative timetable (for example, at the request of the merger parties or to allow it to gather more information in order to form a concluded view).

Some stakeholders, such as the Business Law Section of the Law Council, consider that the informal process does not go far enough in providing transparency to merger parties (page 67). In its view, merger parties should generally have access to third-party submissions about the merger, not just the ACCC's summary of these concerns (sometimes referred to as a 'transparency letter').

The BCA goes further, proposing the ACCC's decision on whether or not to oppose a merger should be subject to 'an internal review' by 'a panel of Associate Commissioners with expertise in competition law and economics', with the merger parties making submissions. The BCA's suggestions include that the ACCC could allow this panel of Associate Commissioners to overturn the ACCC's original decision and make a new decision (BCA Main Report, page 99).

However, as the Dawson Review noted, '[t]he strengths of the current informal clearance process [including its speed and efficiency] stem from its informal nature, as do its weaknesses'.²⁶⁷ Attempts to formalise further the informal merger clearance process would reduce its flexibility and would inevitably have timing and resourcing implications. There do not appear to be any examples of merger regimes overseas that offer a high level of transparency without also imposing stricter information requirements and longer timelines than the Australian system.

The Panel considers that it is not sensible to attempt to regulate an informal process which, by definition, operates outside any formal legal framework. The flexibility of the informal process is widely recognised as being beneficial.

Nevertheless, the public interest is served by timely merger decisions and by transparency in the public administration of the merger law. The Panel considers 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 Panel considers that the identified concerns about merger clearance should also be addressed through streamlining the formal approval process.

Formal merger processes — clearance and authorisation

Since 2007 (following recommendations made by the Dawson Review) the ACCC has been empowered under the CCA to grant a formal clearance to merger parties if it is satisfied that the merger would not substantially lessen competition; ACCC decisions are subject to review by the Tribunal. Also since 2007 the Tribunal has been empowered to grant authorisation to merger parties if it is satisfied that the public benefits resulting from the merger outweigh the anti-competitive detriment. Prior to 2007 there was no formal clearance mechanism and the power to grant merger authorisations was vested in the ACCC, with decisions subject to review by the Tribunal.

The formal clearance process has not been used since its introduction in 2007. Stakeholders have indicated that, while improvements to the ACCC's informal process partly explain this, unattractive features of the formal process also deter merger parties from using it.

²⁶⁷ Trade Practices Act Review Committee 2003, *Review of the Competition Provisions of the Trade Practices Act*, page 60.

The formal merger clearance process has not been used, in part because it is unduly complicated by strict technical formal requirements for a compliant application, including for example, the detailed and prescriptive standard form application ... which is onerous and inflexible. (BCA Main Report, page 63)

[However], the availability of this alternative to the informal process, particularly in potentially contentious cases, is desirable and should be retained. (BCA Main Report, page 63)

Herbert Smith Freehills submits that the onus on merger parties to establish that the merger does not breach the CCA and the requirement for Tribunal review of merger clearance decisions to be 'on the record' contributes to its lack of use (page 9). The Business Law Section of the Law Council and Herbert Smith Freehills both call for the formal process to be amended or repealed. The Business Law Section of the Law Council advocates replacing it with a new formal process to be triggered at a point in the informal process (page 69), while Herbert Smith Freehills prefers a new system of notification. The BCA considers that the formal process should be retained and improved via a review to be conducted by the Treasury, in consultation with business, competition law practitioners and the ACCC. (BCA Summary Report, page 18)

The Panel considers that the existence of a formal merger clearance option serves a useful purpose even if it is seldom used, since it provides a time-limited, accessible alternative to the ACCC's informal clearance process. Feedback from stakeholders and the fact that the process has never been used supports the view that the process needs reform to remove unnecessary restrictions and requirements that may have acted as a deterrent to its use. Reform should be considered in conjunction with the authorisation process, addressing the question of whether there is a need for two separate merger approval processes in addition to the informal merger clearance process.

The merger authorisation process was not commonly used when it was administered by the ACCC (with appeal to the Tribunal), and it has been used even more rarely since 2007 when administration was transferred to the Tribunal. The process has now been used twice: by Murray Goulburn in 2013 (whose application was withdrawn for commercial reasons) and by AGL this year. In AGL's case the authorisation was obtained in three months from application. However, the application followed a period of three months in which AGL sought informal clearance from the ACCC.

The Business Law Section of the Law Council notes that its members have 'mixed views as to the efficacy of the current authorisation process contained within the Act, and the extent to which improvements could or should be made ...' (page 72). It suggests some immediate changes, including the appointment by the Tribunal of a Counsel Assisting to allow for smoother running of matters. (page 72)

The ACCC submits that, while the Tribunal is a highly regarded and experienced merits review body, it is not well suited to the role of first-instance decision-maker, and nor is the ACCC's dual role under the current merger authorisation process satisfactory. In particular, it is required both to act as an investigative body and to assist the Tribunal. The former role involves conducting market inquiries and gathering information from market participants, while the latter involves preparing a report on matters specified by the President of the Tribunal and any matter the ACCC considers relevant, calling witnesses, reporting on statements of fact, examining and cross-examining witnesses, and making submissions on issues relevant to the application. The ACCC also raises concerns about the lack of a merits review process under the present merger authorisation process, which is inconsistent with the process for all other (non-merger) authorisations. (ACCC submission 1, pages 83-86)

The Panel considers that an efficient and effective formal merger approval process is important for the economy. While the informal approval process has been shown to work effectively for the

majority of mergers, parties to complex and contested mergers should have an alternative merger review process available to them that delivers transparent and timely decision-making, consistent with international best practice.

The Panel considers that the current dual processes for formal merger clearance have features that are sub-optimal. It agrees with the BCA that a formal approval process should be retained and improved with the specific features settled in consultation with business, competition law practitioners and the ACCC. Notwithstanding, the Panel considers that the general framework should contain the following elements:

- It would be preferable for the ACCC to be the first instance decision-maker, rather than the Tribunal. The ACCC, having regard to its composition and powers, is better suited to investigation and first instance decision making in the administration of the competition law, including mergers. In comparison, the Tribunal, having regard to its constitution and powers, is better suited to an appellate or review role.
- 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. Empowering the ACCC to apply both tests would enable merger parties to make a single application for approval that addresses both the anti-competitive effects of the merger and any public benefits that arise.
- The formal process should not be subject to any prescriptive information requirements. As the merger parties will have the onus to satisfy the ACCC of the competitive consequences, or public benefits, of the merger, they will have sufficient incentive to place relevant information before the ACCC (or face the risk that the ACCC will not be so satisfied). However, the ACCC should be empowered to require the production of business and market information to test the arguments that are advanced by the merger parties.
- The formal process should be subject to strict timelines that cannot be extended except with the consent of the merger parties.
- Decisions of the ACCC should be subject to merits review by the Tribunal.

The Panel notes that this change could be implemented without increasing the current maximum statutory time period of six months for the determination of a merger authorisation, by allowing the ACCC and the Tribunal each a maximum of three months to make their respective determinations.

The Panel's view

The Panel's assessment is that overall the merger provisions of the CCA are working effectively. The Panel does not recommend any changes to the substantive law.

In relation to merger approval processes, the informal process works quickly and efficiently for a majority of mergers. Issues of transparency and timeliness arise with the informal process when dealing with more complex and contentious matters. Addressing those issues by changing the informal process could weaken it. Nevertheless, there should be further consultation between the ACCC and business representatives with the objective of delivering more timely decisions in the informal review process.

It is important to ensure that the formal merger approval mechanism, as an alternative to informal merger clearance, is accessible and effective. Specifically, the Panel supports reforms to combine the two current formal merger exemption processes (i.e. the formal merger clearance process and the merger authorisation process) and remove unnecessary restrictions and requirements that may have deterred their use. The Panel also considers that it is undesirable that merger authorisation applications be taken directly to the Tribunal, by-passing the ACCC.

The Panel considers that the specific features of the improved formal approval process should be settled in consultation with business, competition law practitioners and the ACCC. Notwithstanding, the Panel considers that 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 if 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 Tribunal.

16 UNILATERAL CONDUCT

Firms that have a substantial degree of power in a market have the ability to engage in behaviours that damage the competitive process and thereby restrict the ability of other firms to compete effectively. Most industrialised countries have enacted competition laws with prohibitions against monopolisation or abuse of a dominant market position.²⁶⁸

Common to those laws is the principle that firms are entitled, and indeed are encouraged, to succeed through competition — by developing better products and becoming more efficient — even if they achieve a position of market dominance through their success. Those laws only prevent firms with substantial market power from engaging in conduct that damages competition.²⁶⁹

Large firms may also enjoy strong bargaining power that can be abused in dealings with their suppliers and their business customers. While imbalance in bargaining power is a normal feature of commercial transactions, policy concerns are raised when strong bargaining power is exploited through imposing unreasonable obligations on suppliers and business customers. Such exploitation can traverse beyond accepted norms of commercial behaviour and can be damaging to efficiency and investment in the affected market sectors, requiring the law to respond both as a matter of commercial morality and to protect efficient market outcomes.

Many countries have enacted prohibitions against unconscionable or unfair trading conduct between businesses (see Box 16.1). Those laws must strike a balance. On the one hand, it is important that the law not intrude excessively into the bargaining process between businesses, as the bargaining process underpins the competitive market process that serves consumers and the welfare of Australians. On the other hand, there are occasions when the bargaining process is exploited by large or powerful firms in a manner that is inconsistent with commercial morality, requiring a response.

²⁶⁸ OECD 1996, *Abuse of Dominance and Monopolisation*, page 35.

²⁶⁹ Section 46 of the *Competition and Consumer Act 2010*.

Box 16.1: Examples of overseas approaches to anti-competitive unilateral conduct

United States: Prohibits monopolisation and attempted monopolisation by any firm (dominant or not) and requires an intent to monopolise and engage in predatory or anticompetitive conduct to prove a contravention. (Sherman Act, section 2)

European Union: Prohibits any abuse by an undertaking of a dominant position in a market. Abuse can include imposing unfair trading conditions, limiting production to the prejudice of consumers, or applying dissimilar conditions to equivalent transactions. (Article 102, Treaty on the Functioning of the European Union)

Canada: Prohibits firms substantially or completely in control of a market from engaging in anti-competitive practices, which have the effect or likely effect of preventing or lessening competition substantially in a market. (Competition Act, section 79)

New Zealand: Prohibits a person with a substantial degree of power in a market from taking advantage of that power, for the purpose of restricting entry into, preventing or deterring competitive conduct in, or eliminating a person from, that or any other market. (Commerce Act, section 36)

In this section, the Panel considers the laws that regulate conduct by firms that have substantial market or bargaining power, in light of the principles set out in Chapter 1.

16.1 MISUSE OF MARKET POWER

Section 46 of the CCA prohibits corporations that have a substantial degree of power in a market from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.²⁷⁰

Many submissions to the Review comment on section 46. As reflected in those submissions, opinions are divided on whether section 46 is framed in a manner that is effective in deterring anti-competitive behaviour by firms with substantial market power.

Those seeking reform of the law most commonly propose that the prohibition should be revised or expanded to include an ‘effects test’ — that is, a firm with substantial market power would be prohibited from taking advantage of that power if the effect is to cause anti-competitive harm. Two main arguments are advanced for the inclusion of an effects test:

- as a matter of policy, competition law ought to be directed to the effect of commercial conduct on competition, not the purpose of the conduct, because it is the anti-competitive effect of conduct that harms consumer welfare; and
- as a matter of practicality, there can be difficulties in proving the purpose of commercial conduct because it involves a subjective enquiry, whereas proving anti-competitive effect is less difficult because it involves an objective enquiry.

Those opposing reform are concerned that introducing an effects test would ‘chill’ competitive behaviour by firms in the market, which would be harmful to consumer welfare.

²⁷⁰ Part IV of the CCA is mirrored in the Competition Code, which applies the anti-competitive conduct laws through application legislation in the States and Territories.

The debate around whether section 46 should be based solely on a ‘purpose’ test or should also (or alternatively) have an ‘effects test’ is one of the enduring controversies of competition policy in Australia. Section 46 has been the subject of a large number of independent reviews and parliamentary inquiries (see Box 16.2 below).

Box 16.2: History of proposals for an effects test²⁷¹

Year	Review	Recommend effects test?	Reasons
1976	Trade Practices Act Review Committee (Swanson Committee)	No	The section should only prohibit abuses by a monopolist that involve a proscribed purpose.
1979	Trade Practices Consultative Committee (Blunt Review)	No	Would give the section too wide an application, bringing within its ambit much legitimate business conduct.
1984	Green Paper, The Trade Practices Act Proposals for Change	Yes	Difficulty in proving purpose.
1989	House of Representatives Standing Committee on Legal and Constitutional Affairs (Griffiths Committee)	No	Insufficient evidence to justify the introduction of an effects test into section 46.
1991	Senate Standing Committee on Legal and Constitutional Affairs (Cooney Committee)	No	Might unduly broaden the scope of conduct captured by section 46 and challenge the competitive process itself.
1993	Independent Committee of Inquiry into Competition Policy in Australia (Hilmer Committee)	No	It would not adequately distinguish between socially detrimental and socially beneficial conduct.
1999	Joint Select Committee on the Retailing Sector (Baird Committee)	No	Such a far reaching change to the law may create much uncertainty in issues dealing with misuse of market power.
2001	House of Representatives Standing Committee on Economics, Finance and Public Administration (Hawker Committee)	No	Await the outcome of further cases on section 46 before considering any change to the law.
2002	Senate Legal and Constitutional References Committee Inquiry into section 46 and section 50 of the <i>Trade Practices Act 1974</i> .	No	Referred consideration of section 46 to the Dawson Review
2003	Trade Practices Act Review Committee (Dawson Review)	No	The addition of an effects test would increase the risk of regulatory error and render purpose ineffective as a means of distinguishing between pro-competitive and anti-competitive.

271 Adapted from Trade Practices Act Review Committee 2003, *Review of the Competition Provisions of the Trade Practices Act*, Box 3.2 *History of the effects test*, page 83.

2004	Senate Economics References Committee Inquiry into the Effectiveness of the <i>Trade Practices Act 1974</i> in protecting Small Business	No	While sympathetic to some of the arguments for an effects test, the difficulties with introducing it meant that the Committee did not recommend the inclusion of an effects test.
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The Panel considers that the long-running debate concerning ‘purpose’ and ‘effect’ in the context of section 46 has been somewhat unproductive. In one sense the concerns raised by both sides of the debate are correct. Internationally, competition laws have been framed so as to examine the effects on competition of commercial conduct, as well as the purpose of the conduct. In Australia section 45 (anti-competitive arrangements) and section 47 (exclusive dealing) apply if the purpose, effect or likely effect of the conduct is to substantially lessen competition; section 50 (mergers) applies if the effect or likely effect of the conduct is to substantially lessen competition. Equally, competition laws have been framed (and interpreted) in a manner that is designed to minimise the risk that the law might chill competitive behaviour.

The challenge is to frame a law that captures anti-competitive unilateral behaviour but does not constrain vigorous competitive conduct. Such a law must be written in clear language and state a legal test that can be reliably applied by the courts to distinguish between competitive and anti-competitive conduct.

Difficulties with the current language of section 46

Section 46 only applies to firms that have a substantial degree of power in a market. The threshold test of substantial market power enjoys broad support and the Panel did not receive any submissions making a case for change.

Section 46 defines conduct as a misuse of market power if it satisfies two legal tests:

- first, the conduct must have involved taking advantage of the firm’s market power; and
- secondly, the conduct must have been undertaken for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.

Both the courts and the legislature have wrestled with the meaning of the expression ‘take advantage’ over many years. Its meaning is subtle and difficult to apply in practice. The ordinary meaning of the words ‘take advantage’ is to use to one’s advantage. But when the words are coupled with market power, it is necessary to understand how a firm might use market power to its advantage and what constitutes a use of market power.

The difficulty with the expression lies in the fact that market power is not a physical asset (such as an airport) or a commercial instrument (such as a lease), the use of which can be observed. Market power is an economic concept, describing the state or condition of a market. A firm possesses market power when it has a degree of freedom from competitive constraint. Recognising that, the High Court concluded in *Queensland Wire v BHP*²⁷² that taking advantage of market power means engaging in conduct that would not be undertaken in a competitive market (because the firm would be constrained by competition).

²⁷² *Queensland Wire Industries v BHP* (1989) 167 CLR 177.

In the years since the decision in *Queensland Wire* the difficulties in interpreting and applying the ‘take advantage’ test and determining whether specific business conduct does or does not involve taking advantage of market power have become apparent. The following cases illustrate some of the difficulties:

- In *Melway*,²⁷³ trial and appellate courts differed on whether refusing to supply Melway street directories to a particular retailer involved taking advantage of market power — the High Court ultimately concluding that it did not.
- In *Boral*,²⁷⁴ trial and appellate courts differed on the circumstances that are required to show that selling products at low prices involved taking advantage of market power (and constituted predatory pricing). Following *Boral*, Parliament amended section 46 in an attempt to capture predatory pricing conduct.²⁷⁵ However, the amendments themselves are cast in language that is difficult to interpret and apply in practice (while the amendments seek to prohibit pricing below cost, the expression ‘cost’ is not defined and there are circumstances in which pricing below certain measures of cost might be an ordinary business strategy in a competitive market).
- In *Rural Press*,²⁷⁶ trial and appellate courts differed on whether a threat by one regional newspaper publisher to begin distributing its newspaper in a neighbouring region, in order to deter the neighbour from distributing its newspaper in the first publisher’s region, involved taking advantage of market power — the High Court ultimately concluding that it did not. Following *Rural Press*, Parliament amended section 46 in an attempt to explain the meaning of ‘take advantage’.²⁷⁷ It is doubtful that the amendments assisted.
- Most recently, in *Cement Australia*,²⁷⁸ the meaning of the expression ‘take advantage’ was again a central matter of dispute in determining whether conduct, involving the acquisition of flyash (a by-product of coal fired electricity generation which can be used as a cementitious material in concrete), involved a misuse of market power. The Federal Court reached the conclusion that the conduct did not involve a misuse of market power in contravention of section 46, but did have the likely effect of substantially lessening competition in contravention of section 45.

The important point is not whether the outcomes of those cases, on the facts before the court, were correct or incorrect from a competition policy perspective. The issue is whether the ‘take advantage’ limb of section 46 is sufficiently clear and predictable in interpretation and application to distinguish between anti-competitive and pro-competitive conduct.

Given these difficulties of interpretation that have been revealed in the decided cases, and the attempts by Parliament to address the problem, a serious question arises whether ‘take advantage’ is a useful expression by which to distinguish competitive from anti-competitive unilateral conduct.

The second legal test in section 46 is the ‘purpose’ test. As noted earlier, the purpose test has been the primary focus of debate concerning section 46. Compared to the ‘take advantage of market

273 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13.

274 *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374.

275 Subsections 46(1AAA) and (1AA) of the *Competition and Consumer Act 2010*.

276 *Rural Press Limited v ACCC* [2003] HCA 75.

277 Subsection 46(6A) of the *Competition and Consumer Act 2010*.

278 *ACCC v Cement Australia* [2013] FCA 909.

power’ test, the meaning of the ‘purpose’ test in section 46 is at least clear and capable of reliable application by the courts.

The debate whether a subjective purpose test or an objective effects test should be included in section 46 tends to obscure a more significant issue. Presently, the purpose test in section 46 focuses upon harm to individual competitors — conduct will be prohibited if it has the purpose of eliminating or substantially damaging a **competitor**, preventing the entry of a **person** into a market, or deterring or preventing a **person** from engaging in competitive conduct. Ordinarily, competition law is not concerned with harm to individual competitors. Indeed, harm to competitors is an expected outcome of vigorous competition. Competition law is concerned with harm to competition itself — that is, the competitive process.

Given the existing focus of the purpose test in section 46, it is understandable that there is resistance to changing the word ‘purpose’ to ‘effect’. It would not be sound policy to prohibit unilateral conduct that had the effect of damaging individual competitors. However, an important question arises whether section 46 ought to be directed at conduct that has the purpose of harming individual competitors (under the existing purpose test) or whether it ought to be directed at conduct that has the purpose or effect of harming competition (consistent with the other main prohibitions in sections 45, 47 and 50 of the CCA).

A proposal for reform

The Panel considers that the difficulties experienced in the application of section 46 to business conduct establish a case for reform. The Panel considers that section 46 can be reframed in a manner that will clarify its intended meaning and scope and thereby improve its effectiveness in targeting anti-competitive unilateral conduct.

The Panel proposes that the primary prohibition in section 46 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.

The primary prohibition would make two significant amendments. First, it would remove the ‘take advantage’ element from the prohibition. Second, it would alter the ‘purpose’ test to the standard test in Australia’s competition law: purpose, effect or likely effect of substantially lessening competition. The test of ‘substantially lessening competition’ would enable the courts to assess whether the conduct is harmful to the competitive process. The application of that test will ordinarily make the ‘take advantage’ test redundant.

However, in recommending reform, the Panel wishes to minimise the risk of inadvertently capturing pro-competitive conduct, thereby damaging the interests of consumers. To remove any 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 by a corporation that did not have a substantial degree of power in the market; and
- would be likely to have the effect of advancing the long-term interests of consumers.

The onus of proving that the defence applied should fall on the corporation engaging in the conduct.

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

The proposed reform would allow section 46 to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments that attempt to explain the meaning of ‘take advantage’.

Divestiture remedy to address market power concerns

There is a broad range of remedies a court may order following a finding that a firm has engaged in misuse of market power in contravention of section 46. The remedies include declarations, injunctions, damages and civil penalties.²⁷⁹ There is no remedy available to the ACCC or a private party to seek a divestiture order from the court to break up the firm which has been found to have misused its market power.

The Hilmer²⁸⁰ and Dawson²⁸¹ reviews considered proposals for a specific divestiture remedy (to be used in circumstances other than mergers) to address competition concerns about businesses with significant market power. Those reviews did not recommend its adoption because of the potentially broad nature of such a remedy and difficulties targeting such a remedy at the conduct of concern.

While reducing the size of a firm may limit its ability to misuse its market power, divestiture is likely to have broader impacts on the general efficiency of the firm. Such changes could also have negative flow-on effects to consumer welfare. It is also possible that divested parts of a business might be unviable.²⁸²

The Panel considers that the existing range of remedies is sufficient to deter a firm from misusing its market power and to protect and compensate companies that have been harmed by such unlawful conduct.

279 Part VI of the *Competition and Consumer Act 2010*.

280 Independent Committee of Inquiry into Competition Policy in Australia 1993, [National Competition Policy](#), page 163.

281 Trade Practices Act Review Committee 2003, [Review of the Competition Provisions of the Trade Practices Act](#), page 150.

282 See discussion in Senate Standing Committee on Legal and Constitutional Affairs 1991 (Cooney Committee) [Mergers Monopolies and Acquisitions — Adequacy of Existing Legislative Controls](#), pages 89-93.

The Panel's view

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.

The Panel also proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question:

- a) would be a rational business decision by a corporation that did not have a substantial degree of power in the market; and
- b) 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 further 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 reframing 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 that attempt to explain the meaning of 'take advantage'.

16.2 PRICE DISCRIMINATION

Price discrimination is the practice of charging different prices for the same or similar goods or services, where the price difference does not reflect differences in the cost of supply. Examples of price discrimination include student, seniors and family discounts, 'early bird specials', and may include discounts for bulk purchases and group buying.

The effects of price discrimination will depend on the particular circumstances of the market. Pricing according to consumer willingness to pay can result in more consumers being able to obtain the good or service than if a common price were charged. In these circumstances price discrimination can make goods or services more accessible and can enhance consumer choice.

Nonetheless, awareness of price discrimination can irritate consumers who find themselves unable to purchase goods at the same price that others can.

Box 16.3: The former prohibition on price discrimination

Prior to 1995 there was a specific provision in the then TPA against certain types of price discrimination. The Hilmer Review found that this provision was contrary to the objective of economic efficiency and had not assisted small business. Further, instances where price discrimination may have an anti-competitive effect could be adequately dealt with by other parts of the law. The Hilmer Review recommendations were adopted and in 1995 the former section 49 was repealed.

The Hilmer recommendations followed on from recommendations of the Swanson (1976) and Blunt (1979) Committees, which had also recommended that the prohibition on price discrimination be repealed.²⁸³ The issue was reconsidered in the Dawson Review in 2003. The Dawson Review found that empirical evidence did not indicate the need for further regulation of price discrimination.²⁸⁴

The Panel has received some submissions calling for reinstatement of a specific anti-competitive price discrimination provision, particularly in relation to the supply of goods to supermarkets. For example, AURL FoodWorks states that:

The practice of suppliers selling to some customers at one price and to other comparable customers at a higher price is an on-going concern ...Independent wholesalers are not able to obtain goods or services at prices comparable to those charged by suppliers to the major chain supermarkets. This is despite having central distribution warehouses of comparable size and capable of like performance to the major chains. (pages 7-8)

Supporters of a price discrimination provision often argue that it would improve the ability of small businesses to compete, and allow them to be more responsive to consumer needs because it would remove the capacity of larger firms to price their product below the level charged by local, smaller retailers.²⁸⁵ However, restricting pricing flexibility can be harmful to competition and thereby harm consumers.

Price discrimination should only be unlawful where it substantially lessens competition. The Panel agrees with the conclusions of previous reviews that anti-competitive price discrimination is best addressed under section 46. The Panel's proposal for the reform of section 46 should also assist the identification and prohibition of such conduct.

International price discrimination

International price discrimination occurs when a supplier charges different prices for goods or services according to the country in which the products are sold. It is a common practice for products that enjoy intellectual property (IP) protection such as books, digital music and videos, and software.

283 The Trade Practices Act Review Committee 1976, [Report to the Minister for Business and Consumer Affairs](#) noted that section 49 drew more criticism in submissions than any other and found that some suppliers took the law to mean that they were required to charge similar prices to all customers, which led to price rigidity and overall price increases.

The Trade Practices Consultative Committee 1979, [Small business and the Trade Practices Act](#) again called for the repeal of section 49. The Committee noted that the flexibility of pricing was impaired by the operation of section 49 and certain rigidities were introduced both by the section and the uncertainties of its application.

284 Trade Practices Act Review Committee 2003, [Review of the Competition Provisions of the Trade Practices Act](#), page 97.

285 See generally submissions to the Senate Economics Committee, [Inquiry into the Trade Practices Amendment \(Guaranteed Lowest Prices — Blacktown Amendment\) Bill 2009](#).

Both IP laws and technology provide the means to segment markets by country. The ACCC notes that:

While such practices are not new, the rise of the digital economy has increased consumers' access to global marketplaces and awareness of different (higher) prices that may be charged in their home country. (ACCC Submission 1, page 117)

The Panel heard concerns about international price discrimination. CHOICE, for example, points to evidence of price differences for music and movies from Apple's Australian and US iTunes stores. According to CHOICE, Australians can also pay up to 60 per cent more for clothing and up to 200 per cent more for cosmetics (pages 13 — 15).

The Issues Paper noted that the Canadian Government recently announced plans to introduce legislation to address country-specific price discrimination against Canadian consumers.²⁸⁶ The Panel received submissions calling for a similar policy in Australia. Consumers SA states that it:

[E]ncourages the review to explore the possibility of legislation to inhibit international price discrimination. (page 3)

There are significant implementation difficulties associated with any attempt to prohibit international price discrimination. The American Bar Association notes:

Regulation of international price differences is a risky endeavor. Even if regulation is limited to ... 'unjustified' price discrimination, identifying such cases is extremely difficult given the complexity of the factors influencing pricing decisions in a given country ... It could also create incentives for foreign suppliers to abandon or choose not to enter the Australian market, resulting in less choice for consumers... Likewise, Australian companies might opt out of overseas markets, or be constrained in their ability to compete in certain countries. (page 3)

While technology, including geoblocking, can contribute to instances of international price discrimination, the growth of distribution channels, both physical and technological, can help consumers and businesses overcome price discrimination. For example:

- in markets for physical goods, mail-forwarding companies allow Australian consumers to buy goods in overseas jurisdictions and then have them forwarded to Australia;
- in markets for digital content, virtual private networks can help consumers access digital content in overseas jurisdictions at the prices offered in those jurisdictions; and
- product review websites and price monitoring and comparison sites can help consumers find the product or service that best meets their needs and at the best price.

In its evidence to the House of Representatives Standing Committee Inquiry into IT pricing, the ACCC noted that mechanisms to circumvent international price discrimination can help to put competitive pressure on prices:

If the methods start to become a big enough way in which consumers are circumventing the limitations ... those methods can start to have ... an impact in the market ... An illustration of that is the response of some of the television networks to bring forward

286 The Canadian Government announcement which formed part of the 2014 Budget states that the government will introduce 'legislation to prohibit unjustified cross-border price discrimination to reduce the gap between consumer prices in Canada and the United States'. No further detail on the proposal is publicly available. See: www.budget.gc.ca/2014/docs/plan/ch3-4-eng.html.

their broadcast of some of the popular overseas programming that would otherwise be made available through some of the illegal downloading sites.²⁸⁷

The Panel favours encouraging the use of market-based mechanisms to address international price discrimination, rather than attempting to introduce a legislative solution.

The Panel notes the recommendations of the July 2013 report of the House of Representatives Standing Committee on Infrastructure and Communications into IT pricing in Australia.²⁸⁸ That Committee recommended the removal of restrictions on parallel imports, consistent with [Draft Recommendation 9](#) of this Draft Report. In addition, the Committee made a number of recommendations (as set out in Box 16.4) that the Panel endorses in principle as a means of encouraging a market-based, consumer driven solution to concerns about international price discrimination, as well as a number of recommendations that could form part of the overarching review of intellectual property proposed at [Draft Recommendation 7](#).

287 Bezzi M, Executive General Manager ACCC, Official Committee Hansard, House of Representatives Standing Committee on Infrastructure and Communications, Information Technology Pricing, 31 October 2012.

288 House of Representatives Standing Committee on Infrastructure and Communications 2013, [IT pricing in Australia](#).

Box 16.4: Relevant recommendations of House of Representatives Standing Committee Report on IT pricing in Australia²⁸⁹

Recommendations that the Panel supports in principle include:

House of Representatives Committee Recommendation 5

The Australian Government amend the Copyright Act's section 10(1) anti-circumvention provisions to clarify and secure consumers' rights to circumvent technological protection measures that control geographic market segmentation.

House of Representatives Committee Recommendation 6

The Australian Government investigate options to educate Australian consumers and businesses as to:

- the extent to which they may circumvent geoblocking mechanisms in order to access cheaper legitimate goods;
- the tools and techniques which they may use to do so; and
- the way in which their rights under the Australian Consumer Law may be affected should they choose to do so.

House of Representatives Committee Recommendation 8

The Committee recommends the repeal of section 51(3) of the *Competition and Consumer Act 2010*.

Recommendations that the Panel considers should form part of a review of IP laws:

House of Representatives Committee Recommendation 7

The Committee recommends that the Australian Government, in conjunction with relevant agencies, consider the creation of a 'right of resale' in relation to digitally distributed content, and clarification of 'fair use' rights for consumers, businesses, and educational institutions, including restrictions on vendors' ability to 'lock' digital content into a particular ecosystem.

House of Representatives Committee Recommendation 9

The Committee recommends that the Australian Government consider enacting a ban on geoblocking as an option of last resort, should persistent market failure exist in spite of the changes to the Competition and Consumer Act and the Copyright Act recommended in this report.

House of Representatives Committee Recommendation 10

That the Australian Government investigate the feasibility of amending the Competition and Consumer Act so that contracts or terms of service which seek to enforce geoblocking are considered void.

289 Ibid.

The Panel's view

Price discrimination can be of benefit to consumers. As a result, reintroducing specific provisions prohibiting anti-competitive price discrimination could ultimately reduce consumer choice by discouraging flexible and innovative pricing.

Anti-competitive price discrimination can be adequately dealt with by the existing provisions of the law, particularly section 46 (and especially if amended as proposed in this Draft Report).

Attempting to legislate against international price discrimination could result in significant implementation and enforcement difficulties and risks 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 and ensuring that consumers are able to take legal steps to circumvent attempts to prevent their accessing cheaper legitimate goods.

16.3 UNFAIR AND UNCONSCIONABLE CONDUCT IN BUSINESS TRANSACTIONS

The Terms of Reference ask the Review to examine the Australian Consumer Law (ACL) provisions that deal with unfair and unconscionable conduct, but only insofar as they relate to small business.

As noted earlier in this section, a firm that enjoys a strong bargaining position because of its size and importance in a market has the potential to abuse that strength in dealings with suppliers and business customers. Such conduct may not contravene section 46 — it may not materially harm competition. It may, though, so offend accepted standards of business behaviour that it is unconscionable.

Statutory protection against unconscionable conduct, which recognises the disparity in bargaining power between buyers and sellers,²⁹⁰ was first introduced into the law in 1986 as a consumer protection measure.²⁹¹ Since then, the effectiveness of the unconscionable conduct provisions in the CCA has been reviewed a number of times, leading to an expansion of their scope to cover certain business transactions,²⁹² the unification of consumer and business unconscionable conduct provisions,²⁹³ and the introduction of interpretive guidance for the provisions.²⁹⁴ The introduction of the business unconscionable conduct provision was intended to 'improve business conduct in the

290 Trade Practices Act Review Committee 1976, [Report to the Minister for Business and Consumer Affairs](#), at 9.56-9.62.

291 *Trade Practices Revision Act 1986*.

292 For example, former section 51AA of the then *Trade Practices Act 1974*, inserted by the *Trade Practices Legislation Amendment Act 1992*; and section 51AC of the then *Trade Practices Act 1974*, inserted by the *Trade Practices Amendment (Fair Trading) Act 1998*. For background see Report to the Hon Dr Craig Emerson MP Minister for Small Business, Independent Contractors and the Service Economy, Minister for Competition Policy and Consumer Affairs 2010, [Strengthening statutory unconscionable conduct and the Franchising Code of Conduct](#),.

293 *Competition and Consumer Legislation Amendment Act 2011*.

294 Ibid. See section 22 of the Australian Consumer Law (ACL) and Part 2-2 of the ACL more generally.

Australian economy and provide a more efficient and equitable basis upon which the forces of competition can operate'.²⁹⁵

As discussed in Part 1, the competition laws are not directed at protecting competitors but rather competition. This requires the competition law to balance preventing anti-competitive behaviour that undermines competition with not inhibiting behaviour that is part of normal vigorous competition.

A separate but parallel principle is that the business and wider community expect business to be conducted according to a minimum standard of fair dealing. There are sound economic and social reasons for enshrining minimum standards within the law. Because it is difficult to prescribe such minimum standards, the law prohibits unconscionable conduct, leaving it to the courts to determine in a given case whether the conduct fails to conform to the dictates of good conscience. Unconscionable conduct is assessed by reference to the particular circumstances in which the conduct occurs and often (but not always) includes a pattern of behaviour which taken together constitutes unconscionability.

In a number of submissions, particularly from agricultural producers, concerns are raised that the unconscionable conduct provisions are deficient because of the lack of specific definition or the difficulty in proving that the conduct meets the standard of judicially defined unconscionable conduct.²⁹⁶

The Panel considers that the current unconscionable conduct provisions appear to be working as intended to meet the policy goals, but active and ongoing review of these provisions should occur as matters progress before the courts. In that context the Panel notes the present litigation concerning the ACCC's allegations of unconscionable conduct in the supermarket sector against suppliers.

Issues in relation to whether small business in particular can access justice in a time-efficient and low-cost way are addressed in [Chapter 20](#).

295 See Minister Reith's second reading speech to the Trade Practices Amendment (Fair Trading) Bill 1997. Prohibitions against unfair contract terms are also aimed at addressing unequal bargaining power. These provisions were introduced as part of the ACL reforms in 2010 to protect consumers from unfair terms in standard form contracts and reflect concerns that consumers have little or no opportunity to negotiate with businesses about such contracts — see Minister Emerson's second reading speech to the Trade Practices Amendment (Australian Consumer Law) Bill 2010. The Australian Government announced prior to the 2013 election that it would seek to extend the ACL protections dealing with unfair contract terms to small business. — see www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Unfair-Contract-Terms.

296 See for example AgForce Queensland, page 2, Australian Chicken Growers' Council Limited, pages 7-8, Australian Dairy Farmers Limited, pages 9-10, Australian Newsagents' Federation, page 11, National Farmers' Federation, page 7.

The Panel's view

The Panel has heard concerns expressed by small businesses and suppliers in respect of behaviours of larger businesses in their supply chains. The business unconscionable conduct provisions were introduced specifically to address these concerns.

The Panel finds there is not a strong case that the current unconscionable conduct provisions are not working as intended to meet their policy goals.

Enforcing business-to-business unconscionable conduct provisions is an important function of the ACCC and the Panel notes the Commission's current actions in the supermarket sector alleging unconscionable conduct in dealings with suppliers.

Active and ongoing review of these provisions should occur as matters progress through the courts to ensure the provisions meet their policy goals. If deficiencies become evident, they should be promptly remedied.

16.4 CODES OF CONDUCT

An industry code is 'a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry'.²⁹⁷ In the context of the CCA there are three types of codes — mandatory prescribed codes, voluntary opt-in prescribed codes and voluntary codes.²⁹⁸

Codes are intended to influence or control commercial behaviour within a particular industry. Codes may also contain a dispute resolution framework for those covered by the code.

Most of the submissions which refer to codes of conduct supported their use, although a number of the parties who sought to rely on the protection of authorised or voluntary codes expressed concerns with their coverage and/or the effectiveness of dispute resolution processes.²⁹⁹

The Panel notes that on 4 September 2014 the Parliament passed the Competition and Consumer Amendment (Industry Code Penalties) Act which amended the CCA to give the ACCC additional powers to issue infringement notices for alleged breaches of industry codes. It also allows the court to impose penalties on businesses that breach prescribed industry codes which incorporate these new penalties. The new powers will apply from 1 January 2015 and only apply to future arrangements.

The first code to incorporate the new civil penalties is the proposed new draft Franchising Code.³⁰⁰ If implemented, a breach of the Code will expose a franchisor or franchisee to an infringement notice penalty of \$8,500 issued by the ACCC or a pecuniary penalty of up to \$51,000 imposed by the court.

²⁹⁷ Subsection 51ACA(1) of the *Competition and Consumer Act 2010*.

²⁹⁸ The language used in the CCA is confusing, as voluntary codes may be created by legislation or ministerial order. The paradox of this is noted by Freiberg who states 'There are thousands of voluntary codes of conduct or practice that operate independently of government. However and possibly oxymoronicly 'voluntary codes' may be recognised or created by legislation or ministerial order.' Freiberg, A 2010, *The Tools of Regulation*, page 192.

²⁹⁹ See for example AgForce Queensland, page 2, Australian Automotive Dealer Association, pages 7-8, Australian Dairy Farmers Limited, page 12, Australian Food and Grocery Council, pages 29-30, Australian Forest Products Association, page 2, Australian National Retailers Association, pages 48-49, CHOICE, pages 36-43, Consumer Action Law Centre, pages 21-24, Insurance Australia Group, page 16, Master Grocers Australia, pages 53-57, National Farmers' Federation, pages 10-11.

This new industry code remedies and powers framework is a significant development. However, experience with administering such new provisions is needed before determining whether they should be applied more broadly.

The Panel's view

Codes of conduct play an important role under the CCA by providing for a flexible regulatory framework to set norms of behaviour, and are generally applied to relationships between businesses within a particular industry.

The Panel has heard of codes that are perceived to be lacking in meaningful enforcement sanctions and the capacity for public enforcement.

The introduction of civil penalties and infringement notices for breaches of codes strengthens the CCA enforcement options.

Having these options available for CCA codes is a significant development. Any new CCA codes could consider whether they should apply penalties for non-compliance.

300 See The Treasury 2014, [Amendments to the Franchising Code and the Competition and Consumer Act](#).

17 ANTI-COMPETITIVE AGREEMENTS, ARRANGEMENTS AND UNDERSTANDINGS

The CCA prohibits certain types of provisions within agreements, arrangements and understandings between competitors. Cartel provisions and exclusionary provisions (where competitors agree not to supply or acquire from particular persons or classes of persons) are prohibited per se. Other provisions are prohibited if they have the purpose, or has or is likely to have the effect of substantially lessening competition. These types of arrangements are commonly called horizontal arrangements because they occur between firms that are competitors, and therefore trading at the same level of the supply chain.

The CCA also prohibits certain types of conditions that are imposed as part of the trading arrangements between suppliers and their customers. These types of arrangements are commonly called vertical arrangements because they occur between firms that are trading at different levels of the supply chain.

Resale price maintenance (where a supplier requires a retailer to price its products at no less than a minimum retail price specified by the supplier) is prohibited per se. Third-line forcing (where a supplier requires its customer to acquire another product from another supplier) is also prohibited per se. Exclusive dealing (where suppliers restrict the freedom of their customers to deal with other suppliers or within particular geographic areas, and likewise for acquirers) and other conditions are prohibited if the condition has the purpose, or has or is likely to have the effect of substantially lessening competition.

17.1 CARTEL CONDUCT

Prior to 2009 price-fixing provisions and exclusionary provisions were prohibited per se and were subject to civil penalty sanctions.

The Dawson Review recommended the introduction of criminal sanctions for cartel conduct.³⁰¹ That recommendation was implemented in 2009 by the enactment of Division 1 of Part IV of the CCA, which introduced criminal and civil prohibitions of cartel conduct. In line with overseas practice and OECD recommendations³⁰² the CCA now prohibits arrangements between competitors that fix prices, restricting outputs in production and supply chains, divide markets by allocating customers, suppliers or territories, or rig bids.

Despite the introduction of the cartel prohibitions, the prohibition of exclusionary provisions remains in the CCA.

Submissions express broad support for the per se prohibition of serious cartel conduct and for the imposition of criminal sanctions for that conduct.³⁰³

However, a range of submissions are critical of the form and scope of the cartel prohibitions. Two principal concerns are raised:³⁰⁴

301 Trade Practices Act Review Committee 2003, *Review of the Competition Provisions of the Trade Practices Act*.

302 OECD 1998, *Recommendation of the Council concerning Effective Action Against Hard Core Cartels*.

303 See Stewart, I B, p 13; BHP Billiton, page 41.

- the provisions are unnecessarily complex, making the law difficult to understand and comply with; and
- the provisions have been framed too broadly and criminalise commercial conduct that ought not be characterised as cartel conduct, including joint venture activity and vertical arrangements between suppliers and their customers.

Complex drafting

The Panel agrees that the cartel provisions are complex. One explanation for the complexity of the provisions is that laws that impose criminal sanctions must take account of the requirements of the Commonwealth Criminal Code. The Criminal Code provides that criminal offences consist of physical elements and fault elements. The ACCC notes that:

The process of prescribing the cartel offences with the necessary degree of specificity required of a criminal offence has resulted in drafting that is complex and which may not provide adequate certainty. (ACCC Submission 1, page 93)

Serious cartel conduct can cause significant damage to the competitive process and the Panel therefore supports the use of criminal sanctions to punish and deter cartel behaviour. While drafting criminal conduct provisions must necessarily involve a degree of specificity, the Panel considers that the cartel provisions in their current form are overly complex and do not provide businesses with sufficient clarity and certainty.

The New Zealand Parliament is considering amendments to that country's competition law to introduce criminal sanctions for cartel conduct. The proposed amendments are contained in the Commerce (Cartels and Other Matters) Amendments Bill 2014. The proposed cartel provisions are similar in many respects to the Australian cartel law, but are in a shorter and simpler form. The Panel considers that the proposed approach in New Zealand provides a useful illustration of how the law might be simplified in Australia.

The Panel also considers that the prohibition of exclusionary provisions, separately from cartel conduct, is unnecessary and increases the complexity of the law. The definition of exclusionary provisions overlaps substantially with the definition of market sharing, a form of cartel conduct. The Panel recommends that the separate prohibition of exclusionary provisions be removed from the CCA.

Modifying the scope of the cartel prohibitions

As noted earlier, it is important that competition law achieve the correct balance between prohibiting anti-competitive conduct and not prohibiting pro-competitive conduct. This is particularly important in the context of the cartel law, which prohibits conduct per se and imposes criminal sanctions.

Concerns are raised in submissions that the existing cartel law captures conduct that ought not to be prohibited, either because the prohibitions are too broad or the current exemptions are too narrow. Four specific problems with the current law have been raised.

304 Business Law Section of the Law Council, pages 50-52, Arnold Bloch Leibler, page 2, Baker and McKenzie, page 1 and Beaton-Wells C and Fisse B, page 9.

Market limitation

Australia's competition law is generally directed to conduct that harms competition in markets in Australia (see [Chapter 14](#)). This is because the CCA is concerned with the economic welfare of Australians, not citizens of other countries.

However, the cartel conduct prohibition is not expressly limited to arrangements affecting competition in Australian markets. In *Norcast v Bradken*,³⁰⁵ the first and only case that has considered the cartel prohibitions to date, the cartel prohibitions were found to be applicable to an arrangement concerning a tender for the sale of a Canadian corporation, which had business operations in Canada, Malaysia and Singapore, where the seller was based outside Australia, and the tender was conducted outside Australia.

The Panel considers that there is no reason why the cartel conduct prohibitions should differ from the other competition law prohibitions. As a comparison, the New Zealand Bill proposes to restrict the cartel conduct prohibition to conduct affecting the supply or acquisition of goods or services in New Zealand.

Competing firms

Cartel conduct involves two or more competitors agreeing with each other not to compete. Cartels harm consumers because they usually increase prices or reduce choice.

The cartel prohibition sets a very low threshold for its application. In *Norcast v Bradken* the Federal Court concluded that the prohibition applies to an arrangement between corporations if there is a possibility (other than a remote possibility) that they are or would be in competition with each other.³⁰⁶

The Panel considers that this threshold is too low. It is common for corporations that are not in competition with each other in their immediate markets to undertake joint or collaborative activities that produce consumer benefits. Under the current law those activities would constitute cartel conduct and be subject to criminal sanctions, if there is a possibility that they might compete in the relevant field of activity.

The Panel considers that the cartel prohibition should only apply to corporations that are in competition with each other or are likely to be in competition with each other, where likelihood is assessed on the balance of probabilities (i.e. more likely than not).

Joint ventures

Joint ventures are a means by which two or more corporations collaborate to undertake a commercial activity. They can be pro-competitive when they are employed as a means of developing new products or services or producing existing products or services more efficiently. However, they may have anti-competitive effects, particularly where the participants are strong competitors in the field of activity that is proposed to be the subject of the joint venture.

305 *Norcast S.ár.L v Bradken Limited (No 2)* [2013] FCA 235.

306 *Ibid*, at para 259.

The CCA provides exemptions from the criminal and civil cartel prohibitions for joint ventures, but the exemption is narrowly framed. It only applies where:

- the cartel provision is in a contract;
- it is for the purposes of a joint venture;
- the joint venture is for the production and/or supply of goods or services;
- in the case of an unincorporated joint venture, it is carried on jointly by the parties to the contract; and
- in the case of an incorporated joint venture, the joint venture company has been formed to enable the parties to carry on the joint venture under their joint control or ownership of shares.

Submissions raise concerns that the narrow application of the current exemption is limiting legitimate commercial transactions. Some submissions note inconsistencies with other provisions of the CCA dealing with joint ventures.³⁰⁷

Exempting joint ventures from the cartel conduct prohibition does not remove them from the scope of the CCA. A joint venture that has the effect of substantially lessening competition will be prohibited by section 45 of the CCA. Accordingly, the relevant question is whether joint ventures should be assessed under the cartel prohibition, which imposes per se liability and criminal sanctions, or assessed under the usual test of substantially lessening competition.

The Panel considers that joint ventures should be assessed against a competition test and that the current joint venture defence to cartel conduct is too narrow. The various limitations in the defence are unnecessary and increase business compliance costs. In particular, the defence need not be confined to provisions within written contracts (joint ventures include less formal documentation, including operating procedures) nor confined to production and supply joint ventures.

Again, as a comparison, the New Zealand Bill contains a broader exemption in respect of collaborative activity. While the New Zealand exemption may be too broad, the limitations in the Australian law should be broadened.

Vertical supply arrangements

As discussed below, restrictions imposed in connection with the supply or acquisition of goods or services are common and may be pro-competitive or anti-competitive depending on the circumstances. For example, a franchisor may require its franchisees to confine their trading to a particular geographic region. Provided the products supplied by the franchise compete with a wide range of other products, the geographic restriction may increase competition by encouraging franchisees to invest in their designated business area.

For that reason, vertical supply restrictions are usually only prohibited if they have the purpose, or has or is likely to have the effect of substantially lessening competition. Likewise, vertical supply restrictions should be exempted from the cartel prohibitions so that they are not captured by the per se prohibition.

³⁰⁷ See for example Arnold Bloch Leibler, page 3, Baker and McKenzie, page 3, Beaton-Wells, C and Fisse, B, pages 13-14, Consult Australia, pages 1-2, International Bar Association (Antitrust Committee), pages 25-26, Law Council of Australia, Business Law Section, page 9, Minter Ellison, page 5, Queensland Law Society, pages 10-12 and Shopping Centre Council of Australia, pages 25-27.

The CCA currently provides an exemption from the cartel conduct prohibitions for vertical supply restrictions that constitute exclusive dealing within section 47 of the CCA. Submissions raise concerns that the exemption is too narrow. While section 47 covers various forms of exclusive dealing, it does not cover all forms of vertical supply restrictions. Accordingly, vertical supply restrictions not covered by section 47 are also outside the exemption to the cartel conduct prohibitions.

The Panel considers that a broader exemption should be included to ensure that vertical supply restrictions are assessed under a competition test rather than a per se prohibition. Again, as a comparison, the New Zealand Bill contains a broader exemption in respect of vertical supply restrictions.

The Panel's view

The Panel supports a specific set of per se prohibitions in the CCA, with criminal sanctions, dealing with serious cartel conduct. However, the current drafting of those provisions has given rise to concerns about their scope, and whether they target harmful anti-competitive conduct.

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 should be confined to conduct involving firms that are actual or likely competitors, where likely means on the balance of probabilities;
- a broader 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, or has or is likely to have the 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, recognising that such conduct will be prohibited by section 45 or 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, of substantially lessening competition.

The CCA should also be amended to remove the prohibition on exclusionary provisions.

Immunity policy

The cartel conduct legislation was accompanied by administrative arrangements to support a joint Commonwealth Director of Public Prosecutions (CDPP)/ACCC leniency program to be available for criminal cartel offences and the corresponding civil prohibitions. Owing to their secretive nature, detecting the existence, activities and impact of cartels can be difficult. An immunity policy can encourage businesses and individuals to disclose cartel behaviour, and be a powerful disincentive to the formation of cartels.³⁰⁸

Submissions support the existence of the ACCC's immunity policy, which applies to cartel conduct and provides protection against civil proceedings instituted by the ACCC. Immunity from criminal

308 ACCC 2014, *Immunity & cooperation policy for cartel conduct*.

prosecution is determined by the CDPP in accordance with the same principles that determine immunity under the ACCC's immunity policy.³⁰⁹

Where the ACCC is of the view that the applicant satisfies the conditions for immunity under the immunity policy, it will make a recommendation to the CDPP that immunity from prosecution be granted to the applicant. The CDPP will exercise an independent discretion when considering a recommendation by the ACCC. Where the CDPP is satisfied that the applicant meets the ACCC's conditions for immunity, the CDPP will grant immunity, pursuant to subsection 9(6D) of the *Director of Public Prosecutions Act 1983*.

The ACCC publishes guidance on its immunity policy and has stated that it 'regularly reviews the effectiveness of its immunity policy'.³¹⁰ An attempt to legislate the immunity policy could limit its success by reducing its flexibility.

An important consideration for immunity applicants, and those suffering loss or damage as a result of the activities of cartels, is whether the outcome of an immunity application has an impact on the liability of the immunity applicant to compensate cartel victims. Submissions note the availability of 'bar orders' in some jurisdictions to deal with the interface between cartel prosecutions and compensation litigation.³¹¹

There are advantages and disadvantages of bar orders. Bar orders may increase the incentive for cartel participants to disclose cartel conduct, thereby bringing the cartel to an end. On the other hand, bar orders prevent those who have been harmed by cartel conduct from recovering compensation from the immunity applicant (although they may still be able to recover compensation from other cartel participants who have not received immunity).

The Panel considers there is no evidence showing that current arrangements are failing to achieve their objective of bringing about the deterrence and disclosure of cartel conduct. Accordingly, the Panel does not recommend the introduction of bar orders.

The Panel's view

The immunity policy is an important component of the detection and successful prosecution of cartel conduct. The immunity arrangements provide an adequate level of certainty, and fit within the broader regime of the scheme for immunity for accomplices administered by the Commonwealth Director of Public Prosecutions.

17.2 ANTI-COMPETITIVE DISCLOSURE OF INFORMATION

Since June 2012 the CCA has prohibited the private disclosure of pricing information to a competitor on a per se basis and the general disclosure of information where the purpose of the disclosure is to substantially lessen competition in a market (Part IV, Division 1A of the CCA). These prohibitions have become known as the 'price signalling' provisions.

309 Ibid.

310 ACCC media release, MR 225/14,
www.accc.gov.au/media-release/updated-immunity-policy-to-uncover-cartel-conduct.

311 Beaton-Wells, C and Fisse, B, page 31; Law Council of Australia, Business Law Section, page 56.

At present, by regulation, the provisions only apply to banking services and there are a number of exceptions to both provisions.³¹² To date, there have been no cases brought under these provisions.

The background to the provisions stems from the 2007 ACCC report on unleaded petrol prices.³¹³ That report identified conduct (the exchange of retail petrol prices between competitors) which was considered to be anti-competitive, but which did not amount to a 'price-fixing understanding' within the current judicial interpretation of section 45 of the CCA. The ACCC recommended that amendments to the law be made in order to broaden and clarify the meaning of the term 'understanding'. In particular, it recommended that the law provide that an understanding may be found to have been arrived at, notwithstanding that it was ascertainable only by inference from surrounding circumstances.³¹⁴

In October 2010 the then ACCC Chair, Graeme Samuel, expressed concerns about price signalling in the banking sector.³¹⁵ Subsequently, in December 2010, the then Australian Government, as part of its Competitive and Sustainable Banking package, legislated to prohibit anti-competitive price signalling, initially in the banking sector.

Price signalling has the potential to harm the competitive process. Competitors may be able to use the disclosure of price information as a means of coordinating their pricing decisions. Depending on the form of price signalling and the market circumstances, the price signalling may reduce the commercial risks for competing firms to engage in coordinated behaviour and thereby increase the likelihood of anti-competitive pricing outcomes.

312 Reg 48, *Competition and Consumer Regulations 2010*.

313 ACCC 2007, *Petrol Prices and Australian Consumers — Report of the ACCC Inquiry into the price of unleaded petrol*.

314 See in particular, Appendix R of the 2007 ACCC petrol report (ibid) — Legal Advice on section 45 of the *Trade Practices Act 1974* from Julian Burnside QC 6 December 2007, page 368.

315 ABC RN Breakfast, *ACCC warns banks about price signalling*, 25 October 2010.

Box 17.1: International comparisons of anti-competitive disclosure of information

Anti-competitive price signalling and information exchanges (or ‘concerted practices’ as they are known in some jurisdictions) are subject to different laws in the US, Canada, the UK, and the EU.

In the **US**, the general provisions in section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act have been used to bring actions involving price signalling conduct (e.g. the *Ethyl case*³¹⁶ and the *Petroleum Products case*).³¹⁷

In **Canada**, the general provisions in subsection 45(1) of the Competition Act dealing with cartel conduct and section 90.1 dealing with agreements that prevent or lessen competition substantially in the market are relied upon. The Competition Bureau has noted that an agreement may be inferred in circumstances where there is unilateral information exchange together with parallel conduct.

In the **UK**, the general Chapter I prohibition in the Competition Act, which includes the concept of ‘concerted practice’, can be relied on to capture price signalling conduct. Similarly, the **EU**’s general Article 101 prohibition, which includes the concept of ‘concerted practice’ can be relied on to capture price signalling conduct.

Submissions contain a range of views and generally reflect those previously expressed in the debates leading up to the introduction of the legislation. It is fair to say that no one seems happy with the provisions in their current form — submissions either argue for modification,³¹⁸ repeal³¹⁹ or the extension of the provisions to all sectors of the economy.³²⁰

Public disclosure of prices is common business practice by which businesses communicate with a broad customer base and help consumers make informed choices. For this reason the current public disclosure price signalling laws may over-capture pro-competitive or benign conduct.

Private disclosure of price information between competitors will generally have more potential to harm competition. Private disclosure enables competitors to communicate their pricing intentions with each other without consumers observing the communication, and thereby reduce the risk of adverse consumer reaction before a new pricing level becomes settled.

However, there are also circumstances in which competitors disclose pricing information in the ordinary course of business. As discussed in the context of cartel conduct, price disclosure may occur in connection with joint ventures and similar collaborative arrangements (for example, a bank lending syndicate or insurance layers offered by numerous insurers). Price disclosure may also occur in connection with a supply arrangement, but where the supplier also competes with its business customer in a downstream market.

The difficulties of defining the circumstances in which disclosure of price information is pro-competitive or benign, and the circumstances in which it is likely to be harmful to competition, have resulted in a complex set of provisions now contained in Division 1A of Part IV. The provisions

316 *E I Du Pont De Nemours & Co v FTC*, 729 F.2d 128.

317 *Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation State of Arizona v Standard Oil Co of California* 906 F.2d 432 (1990).

318 Australian Automobile Association, page 12.

319 For example, Queensland Law Society, page 9; see also American Bar Association, pages 11-15.

320 For example, ACCC Submission 1, page 9; Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia (submission 1), page 11.

have endeavoured to craft suitable exemptions from the prohibitions. However, the difficulty in catering for all circumstances has resulted in a general exemption for disclosure that is in the ordinary course of business.

The fact that the provisions were, from their enactment, confined to the banking sector indicates an understandable concern about the application of the provisions to all parts of the economy. The Panel considers that competition laws ought be capable of general application to all parts of the economy.

Unlike most parts of the competition laws, the price signalling provisions do not enjoy wide support. The provisions are complex and create an additional compliance burden for business.

Other provisions of the competition law are capable of addressing anti-competitive price signalling. For example, if the price signalling causes competitors to agree the level of their prices, the conduct will be prohibited as price-fixing by the cartel provisions. If, on the other hand, the price signalling falls short of price-fixing but has the effect of substantially lessening competition (by enabling competitors to co-ordinate their pricing decisions), the conduct will generally be prohibited by section 45.

The concern originally raised by the ACCC was that a practice of exchanging price information between competitors may not constitute an 'understanding' within the meaning of section 45, and thereby not be regulated by section 45. Whether that concern is realistic might be debated (as it would be usual to infer that competitors had an understanding to exchange price information if they engaged in that conduct on a regular basis). Nevertheless, that concern can be readily addressed by expanding section 45 so that it applies to contracts, arrangements, understandings and concerted practices, where a concerted practice is a regular and deliberate activity undertaken by two or more firms. It would include the regular disclosure or exchange of price information between two firms, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange.

Ensuring that section 45 of the CCA can apply to instances of 'concerted practices' that substantially lessen competition will meet the policy intent of the price signalling provisions. This would remove the need for a separate division on price signalling within the CCA and is consistent with simplifying the CCA and ensuring that its provisions apply generally throughout the economy.

The Panel's view

Competition laws should apply generally across the economy, not to particular sectors. There is no policy rationale for price signalling laws to apply only to the banking sector.

Public disclosure of pricing information is a common business practice by which suppliers communicate to their customers. It can help consumers to make informed choices and is therefore unlikely to raise significant competition concerns in most instances.

Private disclosure of pricing information has the potential to harm consumer interests as it can facilitate collusion or co-ordination between competitors. However, there are many business circumstances in which such disclosure is necessary and usual.

Section 45 of the CCA should be able to address instances of anti-competitive price disclosure. That can be achieved by expanding the section to cover 'concerted practices' (a regular and deliberate activity undertaken by two or more firms) in addition to contracts, arrangements and understandings.

17.3 VERTICAL RESTRICTIONS (OTHER THAN RESALE PRICE MAINTENANCE)

As products are supplied down through a supply chain, it is not uncommon for suppliers (whether manufacturers, importers or wholesalers) and acquirers (whether wholesale distributors or retailers) to impose and agree trading restrictions. For example:

- a manufacturer of sporting equipment may supply its products to a retailer on condition that the retailer does not purchase similar products from a competing manufacturer (often referred to as full-line forcing);
- a food franchisor may supply a franchise to a company on condition that the franchise is only operated within a specified geographic region;
- a retail chain may acquire whitegoods from an importer on condition that the importer does not supply its products to a competing retail chain (often referred to as exclusive dealing);
- a retailer may sell a particular mobile telephony plan on condition that the customer also acquires a particular mobile phone (often referred to as second-line forcing or bundling);
- a franchisor may supply a franchise on condition that the franchisee purchases products for sale from third-party suppliers approved by the franchisor (such practices are often referred to as third-line forcing).

Usually, vertical trading restrictions are unlikely to cause any significant competitive harm. In most markets there are many manufacturers and importers of competing goods, and many competing wholesalers and retailers. A vertical restriction agreed between one manufacturer and one retailer would be unlikely to cause any significant harm to competition. Vertical restrictions can also be commercially advantageous to the parties to the agreement and consumers. The restrictions are a means by which independent traders can align their commercial interests and objectives to the benefit of each and can as a result offer a better quality product to consumers.

In some circumstances, though, vertical trading restrictions can be damaging to competition. This is likely to occur when a significant proportion of the market for a particular product becomes subject to such restrictions. The effect of vertical restrictions can be to restrict or exclude other traders from reasonable access to the market, reducing consumer choice. For example, this might occur if a particular manufacturer enjoys a position of market dominance for its product and supplies the

product to retailers on condition that they do not acquire any competing products. It may then become difficult for a competing manufacturer to gain access to the retail market.

For these reasons vertical restrictions are usually only prohibited under the CCA if they have the purpose, or has or is likely to have the effect, of substantially lessening competition of substantially lessening competition. The one exception is third-line forcing. Under the CCA, third-line forcing is prohibited per se — that is, regardless of the purpose or effect of the conduct.

Submissions raise two main issues in relation to section 47:

- whether third-line forcing should be prohibited per se; and
- whether the complexity in the language of section 47 can be reduced.

Third-line forcing

Broadly, third-line forcing involves the supply of goods or services on condition that the purchaser acquires goods or services from another person, or a refusal to supply because the purchaser will not agree to that condition.

Third-line forcing is similar in character to second-line forcing. Second-line forcing occurs where a corporation supplies a product on condition that the purchaser acquires another product from that corporation (or a related company); i.e. the corporation bundles products together as a package.

Under the CCA, third-line forcing is prohibited per se whereas second-line forcing is only prohibited if it has the purpose, or has or is likely to have the effect, of substantially lessening competition.

Australia is the only comparable country that prohibits third-line forcing per se. The US, Canada, the EU and New Zealand all leave the conduct to be dealt with by their general prohibitions against anti-competitive agreements or unilateral conduct — which are all assessed under a competition-based test.

There has been significant debate for many years about whether the per se nature of Australia's prohibitions is appropriate. Both the Hilmer and Dawson Reviews recommended introducing a competition test to third-line forcing. The Hilmer Review noted that '[t]here is a broad spectrum of tying arrangements, with many having a positive implication for economic welfare' and concluded that third-line forcing should only be prohibited when it substantially lessens competition.³²¹

Submissions to the Review supported the view that third-line forcing should no longer be a per se prohibition.³²²

Third-line forcing conduct can be exempted from the CCA by filing a notification with the ACCC. The ACCC is empowered to remove the exemption if it considers that the anti-competitive detriment outweighs any public benefit from the conduct. In practice, the vast majority of third-line forcing conduct notified to the ACCC is permitted by the ACCC, which strongly supports the view that the conduct is not overwhelmingly anti-competitive. The ACCC states that, in 2012-13, it received over

321 Report by the National Competition Policy Review 1993, [National Competition Policy](#), pages 50 and 54.

322 Baker & McKenzie, page 3; Business Council of Australia, Summary Report, page 19; Duke A, page 28; Law Council of Australia Business Law Section, page 9; Energy Australia, page 12; Federal Chamber of Automotive Industries, page 7; Foxtel, page 2; Raitt G, page 2; Woodward L & Rubinstein M, page 4; Metcash Limited, page 5; Queensland Law Society, page 13.

750 third-line forcing notifications and that, in the vast majority of cases, no further action was taken. (ACCC Submission 1, page 87)

The Panel considers that third-line forcing can be beneficial for traders and consumers and that firms should be free to package products in a manner they believe consumers will want, provided the conduct does not substantially lessen competition. From an economic standpoint, there does not appear to be a justification for treating third-line forcing in a different manner to other vertical restrictions; nor to sustain a view that such conduct will be overwhelmingly anti-competitive in the current Australian marketplace. Although exemption can be gained through the notification process, the process imposes an unnecessary regulatory cost on business.

Accordingly, the Panel considers that third-line forcing conduct should be prohibited only where it has the purpose, or has or is likely to have the effect, of substantially lessening competition.

Complexity of the provisions

Submissions have criticised the complexity of section 47.³²³ Section 47 attempts to describe many of the common forms of vertical trading restrictions. Given that restrictions can take many forms, section 47 takes a detailed form.

The Panel considers that the present form of section 47 suffers from two deficiencies. First, because it attempts to describe a considerable number of categories of vertical restriction, it is difficult for a business person to read and understand. The complexity might be tolerated if it constituted a comprehensive code of prohibited trading conduct. But it does not: the types of vertical restrictions described in section 47 are not exhaustive. Vertical restrictions not addressed by section 47 are covered by section 45, which is expressed in more general terms. Therefore the second deficiency is that, despite being complex, section 47 does not address every form of vertical restriction and is not a code that can be used by business people.

Some submissions suggest that section 47 could be deleted from the CCA, leaving vertical restrictions to be addressed by section 45. That is a reasonable proposal save for one matter. Section 47 prohibits both the imposition of a trading restriction in connection with the supply or acquisition of goods and services, as well as a refusal to supply goods and services because the acquirer or supplier will not agree to the trading restriction.

In contrast, section 45 does not address refusal to supply conduct but only addresses the imposition of a trading restriction within a supply agreement. It is possible to leave refusals to supply to be addressed by section 46 (misuse of market power). On balance, though, the Panel believes that it would be preferable to retain section 47 to address both the imposition of vertical restrictions and the refusal to supply because a vertical restriction is not agreed.

The Panel considers that the complexity in the form of section 47 could be greatly reduced. The provision could be redrafted so that it prohibits the following two 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

³²³ See for example Duke, A, page 11.

- 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;

and 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 Panel's view

The Panel has not heard an economic or practical reason to retain the per se prohibition on third-line forcing. Retaining the per se prohibition imposes unnecessary costs on business because business must either refrain from preferred trading arrangements or file a notification with the ACCC.

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

The prohibition on exclusive dealing is unnecessarily complex in its drafting. Section 47 could be significantly simplified.

17.4 RESALE PRICE MAINTENANCE

Resale price maintenance (RPM) is a form of vertical restraint concerning resale prices. RPM involves a supplier (for example, a manufacturer or importer) supplying a product to a person (for example, a retailer) on condition that the product will not be advertised for sale or sold below a price specified by the supplier. Section 48 of the CCA prohibits RPM and makes it a per se offence; however, RPM may be authorised if a manufacturer can demonstrate that the imposition of RPM results in a public benefit.

The Dawson Review stated that:

The rationale behind a per se prohibition is that the conduct prohibited is so likely to be detrimental to economic welfare, and so unlikely to be beneficial, that it should be proscribed without further inquiry about its impact on competition.³²⁴

The Business Law Section of the Law Council of Australia notes this position³²⁵ and argues that RPM should not merit a strict prohibition, as in markets where there is sufficient inter-brand competition RPM will have a limited effect on competition and, in some instances, RPM may even be beneficial.

³²⁴ Trade Practices Act Review Committee 2003, [Review of the Competition Provisions of the Trade Practices Act](#), page 123
³²⁵ Page 61.

Is a per se prohibition appropriate?

The appropriateness of a per se prohibition of RPM has been debated for many years, both in Australia and overseas. In 2007 the US Supreme Court ruled that the practice of RPM should no longer be subject to a per se prohibition under US Federal law, and would instead be tested under a rule of reason (competition) analysis (*Leegin Creative Leather Products Inc v PSKS Inc*).³²⁶ RPM in Canada is also subject to a competition test, with conduct prohibited only when it has or is likely to have an adverse effect on competition in a market.³²⁷ Other jurisdictions such as the UK, the European Union and New Zealand maintain a per se prohibition, though generally with some provision to authorise conduct.³²⁸

Like many forms of vertical trading restrictions, in many circumstances RPM may have little effect on competition in a market. This will be the case if the product is subject to strong rivalry from competing products. In those circumstances a manufacturer or importer would be unable to specify a minimum price that is above the level determined by competition. Further, in a competitive market RPM may be beneficial to competition and consumers. The usual purpose of imposing a minimum retail price within distribution arrangements is to create a financial incentive (through the retail margin) for a retailer to invest in retailing services (whether in the form of store fit-out or retailing staff). Otherwise, retailers that invest in their stores and staff training may be vulnerable to undercutting by ‘discounter’ retailers that do not make that investment.

Nevertheless, concerns remain about the likely anti-competitive effects of RPM. The primary rationale for a per se prohibition on RPM (as opposed to a competition-based test) is that RPM may facilitate manufacturer or retailer collusion. The ACCC notes that RPM can cause significant harm to the competitive process, including by:

- facilitating collusion between suppliers: RPM conduct may be used by suppliers to reduce or eliminate price competition between its customers ...
- facilitating collusion between retailers: a bottom up RPM occurs when one or more retailers compel a supplier to adopt RPM conduct to reduce or eliminate price competition at the retail level ...
- supplier exclusion: an incumbent supplier may use RPM conduct to guarantee margins for retailers to make them unwilling to carry the products of a rival or new entrant;
- retailer exclusion: RPM conduct can be used as a means to eliminate retail competition from discount or more efficient retailers. (submission 1, page 116)

RPM and digital retailing

Historically, RPM has been considered in the context of ‘bricks and mortar’ retailers. RPM is now emerging as an issue for new models of digital-based retailing. eBay states, based on annual surveys of its sellers, that around a quarter of sellers are instructed by their suppliers to sell at recommended retail prices. As eBay notes:

This clearly restricts the ability for eBay sellers to price their products at what they consider to be an appropriate price point and puts them at risk of adverse treatment by suppliers should they not comply with pricing instructions ... eBay remains concerned

326 As noted by Law Council of Australia, Business Law Section in their submission, page 61.

327 Competition Act (Canada), section 76.

328 For example, subsection 9(1) *Competition Act 1998* (UK), article 101(3) Treaty on the Functioning of the European Union (EU).

however about the widespread abuse of the prohibition on resale price maintenance in the context of ecommerce and the ability of small businesses in particular to maximise the opportunities available on market platforms such as eBay. (page 3)

RPM in digital markets also recently received significant international legal attention when Apple was found to have breached EU and US competition laws by fixing the prices of e-books in collaboration with five publishers. Law firm Norton Rose Fulbright states that, prior to the conduct, the publishers switched their distribution arrangements from an independent distributor arrangement to an agency agreement, possibly to avoid breaching the relevant RPM provisions.³²⁹

Avoiding RPM or gaining exemption

The prohibition against RPM does not apply when a manufacturer conducts business as a vertically integrated manufacturer/retailer. Under that business structure, the manufacturer is also the retailer and is free to set its own retail price (there is no resale by an independent retailer). A manufacturer may also choose to sell its products through an agency network. Under a genuine agency arrangement, the manufacturer sells its products directly to consumers and is therefore permitted to specify the retail price.

A general tenet of competition law is that companies within a corporate group are treated as single economic entity and are not considered to be competitors. For that reason the prohibitions in sections 45 and 47 do not apply to trading arrangements entered into between related companies.³³⁰ A similar principle ought to apply to RPM. Currently, there is no exemption for RPM between a manufacturer and a retailer that is a subsidiary of the manufacturer.

RPM can be authorised by the ACCC where it is found to result in a net public benefit. While authorisation exists, the Business Law Section of the Law Council of Australia notes that the use of authorisation for RPM, which has been available since 1995, is 'almost unheard of'. (page 62)

The absence of RPM authorisation applications contrasts with the number of authorisation applications lodged with the ACCC for other CCA provisions. This may be evidence that manufacturers do not believe that they can demonstrate sufficient public benefit in order to be granted authorisation. The Business Law Section of the Law Council of Australia posits an alternative explanation, stating:

There are few circumstances where a manufacturer that wished, for example, to specify minimum retail prices in launching a new product, would be prepared to place its launch on hold while the ACCC conducted a public inquiry into whether it would enhance economic efficiency. (page 62)

It is possible that the cost and delay of the authorisation process is a real deterrent to businesses seeking exemption for a retailing strategy involving RPM.

The alternative exemption process under the CCA, notification, is not available for RPM. Notification provides exemption for the notified conduct 14 days after the notification is given to the ACCC. It is therefore a less expensive and quicker means of obtaining exemption. The ACCC may withdraw the

329 While moving to an agency agreement could circumvent the prohibition on RPM, in this case the agreement was not merely bilaterally between each publisher and Apple as agent, but also through a degree of horizontal collusion between the publishers. Source: Coleman, M, Norton Rose Fullbright, *Australia: Technology: Lessons from the ebooks case*.

330 Subsections 45(8) and 47(12) of the *Competition and Consumer Act 2010*.

exemption if it forms the view that the anti-competitive harm of the notified conduct outweighs any public benefits.

Notification has not been available for RPM because of the traditional view that RPM is anti-competitive in the majority of circumstances. As discussed above, that view has been challenged in recent years. In contrast, notification is available for other forms of vertical restraint, including third line forcing.

The Panel considers that business should be permitted to seek exemption from the RPM prohibition more easily. This could be achieved through allowing RPM to be assessed through the notification process, which is quicker and less expensive for business than authorisation. This change would also have the advantage of allowing the ACCC to assess RPM trading strategies more frequently, and thereby provide better evidence as to the competitive effects of RPM in Australia.

The Panel's view

There is not a sufficient case for changing the prohibition of RPM from a per se prohibition to a competition-based test.

Nevertheless, the notification process should be extended to RPM, to provide a quicker and less expensive exemption process for business.

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.

17.5 LINER SHIPPING EXEMPTION UNDER PART X OF THE CCA

The Terms of Reference (3.3.5) ask the Review to consider whether existing exemptions from competition law and/or historic sector-specific arrangements are still warranted.

International liner shipping has historically enjoyed a degree of exemption from competition laws both in Australia and overseas. This allows shipping companies to form conferences (effectively a form of cartel) to service particular trade routes.

Part X of the CCA allows liner shipping operators to enter into agreements among themselves in relation to the freight rates to be charged, and the quantity and kinds of cargo to be carried, on particular trade routes and register those agreements with the Registrar of Shipping Lines (an office created under Part X). Registration confers an exemption from the cartel conduct prohibitions and sections 45 and 47.

The Registrar must register the agreement if it is satisfied of various matters. The most significant condition for registration is that the Registrar be satisfied that any provision of the agreement that would otherwise contravene the cartel conduct prohibitions, or sections 45 or 47, is necessary for the effective operation of the agreement and of overall benefit to Australian exporters (in the case of an outward conference agreement) or Australian importers (in the case of an inward conference agreement).

Subject to receiving a report from the ACCC, the Minister is empowered under Part X to direct the Registrar to cancel the registration of a conference agreement, in whole or in part. The Minister may exercise the power if he or she is satisfied of certain matters, including that provisions of the agreement are not of overall benefit to Australian exporters or Australian importers.

Part X also imposes obligations on liner shipping operators to negotiate (but not necessarily reach agreement) with peak shipper bodies around minimum service levels and to provide sufficient notification for changes to freight rates and surcharges.

Much of the liner shipping to and from Australia is organised along conference lines, though this is becoming less common.³³¹ Conference agreements allow for coordinated scheduling, pooling of revenues, fixing of prices, and agreements about capacity.

The historical argument for exempting liner shipping from competition law is that, without collaborative conduct between operators, the market would not deliver an efficient supply of liner cargo shipping services to Australia. The industry is characterised by lumpy investment, high fixed costs and low marginal costs. The premise underlying Part X is that, without cooperation among shipping companies, there would be excessive volatility in prices and service levels owing to cycles of entry and exit creating periods of excess and under capacity.

As Shipping Australia Limited states:

The fundamental issue is that international liner shipping has a set of characteristics that require a specialised regulatory regime that, in turn, provides some limited exemption for price setting. (page 10)

Peak shipper bodies have also tended to support exemptions for liner shipping in order to guarantee service levels.

331 ACCC Submission 1, page 49, Global Shippers Forum, page 3.

Box 17.2: Reviews of Part X

The most recent major review of Part X was conducted by the PC in 2005. It recommended that Part X be repealed and replaced with ACCC authorisation for liner shipping agreements.³³² The 2005 study contrasts with the PC's previous review in 1999, which concluded that, on balance, the regime served Australia's national interest at that time.³³³ The recommendation to repeal Part X was repeated in the 2012 joint Australian-New Zealand PC study *Strengthening Trans-Tasman Economic Relations*.³³⁴

In response to the 2005 Review, the then Australian Government did not fully accept the Commission's recommendations, but instead announced in mid-2006 its intention to introduce reforms to Part X.³³⁵ Amongst other things, the reforms were intended to clarify Part X's objectives and remove discussion agreements from scope.

These reforms were not implemented. Had these reforms been implemented, Part X's operation would have been more closely aligned with the more pro-competitive regulatory regimes operating out of Europe and the United States.

While the test for registration of a conference agreement under Part X involves an assessment of the 'overall benefit' to Australia of the agreement, it does not expressly require an assessment of the competitive effects of the agreement. Also, the test is not assessed by the primary competition regulator, the ACCC, but by the Registrar of Liner Shipping.

No other industry enjoys legislative exemption from Australia's competition laws. This is despite the fact that other industries have similar economic characteristics to the liner shipping industry, particularly the international airline industry. If participants in those industries wish to make agreements that would otherwise contravene the competition laws, they are required to seek authorisation from the ACCC. The authorisation process is designed to test, in a public and transparent manner, whether agreements between competitors are in the public interest, weighing the potential anti-competitive detriment against any public benefits that the agreements may generate. An authorisation is usually granted for a specified period of time (typically five to 10 years) to enable the net effects of an agreement to be re-assessed at regular intervals.

332 Productivity Commission 2005, *Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping*, page xxvi.

333 Productivity Commission 1999, *International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974*.

334 Australia and New Zealand Productivity Commissions 2012, Joint Study — *Strengthening Trans-Tasman Economic Relations*, recommendation 4.14, page 16.

335 Joint Media Statement by the Hon Peter Costello, Treasurer, and the Hon Warren Truss MP — Minister for Transport and Regional Services — [Media Release No. 081](#), 4 August 2006.

Box 17.3: Approaches to liner shipping regulation in other jurisdictions

The Panel notes that over the last two decades other jurisdictions have moved to more competitive regimes and this has not led to excessive instability or ‘destructive competition’.

The EU approach

Prior to 2006 the EU provided a form of block exemption for conference agreements modelled on the ‘revised Trans-Atlantic Conference Agreement’ decision. Conferences could not discriminate between ports or transport users and needed to apply a uniform or common rate for all goods carried. The block exemption only applied to agreements that did not allow individual service contracts (ISCs). Agreements which did not qualify generally required individual authorisation.

The European Commission also required that conferences not include:

- a prohibition on ISCs;
- restrictions, either binding or non-binding, on the contents of such contracts;
- a prohibition of independent action on joint service contracts; and
- that the terms of ISCs were to remain confidential, except where the shipper consented to such disclosure.

In 2006 the EU removed the block exemption for liner shipping. The industry is now subject to the general provisions of EU law and conference agreements must seek authorisation.

The US approach

The US provides exemptions to anti-trust laws for liner shipping under the *Shipping Act of 1984*. This was significantly modified by the *Ocean Shipping Reform Act of 1998*.

The US exemptions apply to agreements between carriers that discuss, fix or regulate freight rates, cargo space accommodation and other service conditions, pool revenues, earnings or losses, or restrict or regulate other aspects of service, such as cargoes to be carried and sailing schedules. Agreements must be filed with the Federal Maritime Commission (FMC).

Importantly carrier agreements cannot:

- prohibit member carriers from engaging in negotiations for ISCs with shippers;
- require members to disclose negotiations or make public terms and conditions of ISCs or adopt rules or requirements affecting the right of member carriers to enter into ISCs.

The effect of the requirements that carrier agreements cannot prohibit or limit confidential ISCs is that US shipping regulation still creates competition between shipping carriers, as agreements on pricing are effectively non-binding and terms of ISCs that deviate from the conference tariff are not observable.

The 2005 PC report in respect of liner shipping and Part X concluded that the evidence did not support continued special treatment of the liner shipping industry under Australia’s competition law. The Panel has not received any information to cast doubt on that conclusion.

If Part X were repealed, the authorisation procedure under the CCA would enable conference agreements to be assessed by the ACCC on a net public benefit basis. That would cause a greater focus on the competitive effects of conference agreements. Additionally, as discussed below, the Panel considers that it would be beneficial for the ACCC to be given power to issue block exemptions: these would exempt categories of conduct defined by the ACCC. If that power were to be introduced,

the ACCC would be able to develop a block exemption for liner shipping, in consultation with the liner shipping operators and shippers.

The Australian Peak Shippers Association ‘strongly recommends that all sections of Part X which support the negotiating position of Australian exporters/shippers should be maintained’ (page 6). If Part X were repealed, shippers would also be able to formulate collective negotiation arrangements under the existing mechanisms in the CCA.

If Part X were repealed, existing liner shipping agreements would face the full provisions of the CCA and may be in breach of them. Therefore, a transition would be required. The Panel considers a period of two years should be sufficient for the creation of a block exemption, identification of shipping agreements that qualify and for other agreements either to be authorised or modified to ensure compliance with the CCA.

The Panel’s view

Part X should be repealed and the liner shipping industry should be subject to the normal operation of the CCA.

The ACCC should be given power to grant block exemptions (see below). In consultation with the shipping industry, the ACCC should develop a block exemption for conference agreements that contain a minimum standard of pro-competitive features.

For example, conference agreements which coordinate scheduling and the exchange of capacity, while allowing confidential individual service contracts (ISCs) and not involving a common conference tariff and pooling of revenues and losses could be eligible for a block exemption. Other forms of agreement that do not meet a minimum standard of pro-competitive features should be subject to individual authorisation.

If a block exemption power is not introduced, it would be preferable to require conference agreements to seek authorisation by the ACCC on the basis of the normal net public benefit test.

The repeal of Part X would require transitional arrangements for existing agreements. The transition should be sufficiently long to allow for authorisations to be sought and to identify agreements that qualify for block exemption. The Panel considers a two year transition should be sufficient.

18 EMPLOYMENT-RELATED MATTERS

18.1 INTRODUCTION

The negotiation of employment terms and conditions has always been excluded from most of the competition law provisions of the CCA. This is achieved through section 51(2)(a) which provides:

In determining whether a contravention of a provision of [Part IV], other than section 45D, 45DA, 45DB, 45E, 45EA or 48, has been committed, regard shall not be had ... to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, **to the extent that the contract, arrangement or understanding, or the provision, relates to the remuneration, conditions of employment, hours of work or working conditions of employees.** (emphasis added)

The reason for that exclusion is that the negotiation and determination of employment terms and conditions is governed by a separate regulatory regime, currently contained in the *Fair Work Act 2009*. The policy rationale is that labour markets are not in all respects comparable to other product or service markets. As a general principle, the Panel concurs with that view.

However, there are two categories of employment-related conduct that are not within that general exclusion:

- secondary boycotts, which are prohibited by sections 45D, 45DA and 45DB; and
- trading restrictions in industrial agreements, which are prohibited by sections 45E and 45EA.

The Panel received submissions addressing each of those practices.

18.2 SECONDARY BOYCOTTS

The CCA prohibits certain types of secondary boycott conduct. Generally, a secondary boycott involves two or more persons, in concert with each other, engaging in conduct:

- that hinders or prevents a third person supplying goods or services to, or acquiring goods or services from, a fourth person (who is not an employer of the persons acting in concert), where the conduct is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person (section 45D);
- that hinders or prevents a third person supplying goods or services to, or acquiring goods and services from, a fourth person (who is not an employer of the persons acting in concert), where the conduct is engaged in for the purpose, and would or be likely to have the effect, of causing a substantially of lessening competition in any market in which the fourth person trades (section 45DA); or
- for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia (section 45DB).

The secondary boycott prohibitions are generally applicable to employees who are members of the same organisation of employees. Under section 45DC, an employee organisation may become liable for the secondary boycott activity of its members.

Secondary boycotts are harmful to trading freedom and therefore harmful to competition. Secondary boycott prohibitions, with effective enforcement capability, have been shown to have a significant deterrent effect on behaviour that would otherwise compromise the capacity of consumers to access goods and services in a competitive market.

The Swanson Committee observed:

[N]o section of the community should be entitled to be the judge in its own cause on matters directly aimed at interfering with the competitive process between firms. We make no exceptions to that position. If an organisation or group of persons for its own reasons deliberately interferes with the competitive process, then the community is entitled to have those reasons scrutinised by a body independent of the persons engaged in the dispute.³³⁶

The Panel considers this policy rationale, including its application to organisations of employees, to be as relevant today as it was when first formulated. The existence of such prohibitions and their enforcement by parties harmed by the conduct serves the public interest.

The secondary boycott provisions have been the subject of numerous amendments since their inception in 1977, particularly in relation to the types of conduct which should or should not be excluded from the operation of the laws.

There are presently two general exclusions (or defences) to the prohibitions.

- The first defence applies if the dominant purpose for which a person engages in the conduct is substantially related to the remuneration, conditions of employment, hours of work or working conditions of that person or a fellow employee (subsection 45DD(1)).
- The second defence applies if the dominant purpose for which a person engages in the conduct is substantially related to environmental protection or consumer protection and engaging in the conduct is not industrial action (subsection 45DD(3)).

The Panel received submissions in relation to each of those defences.

Employment exceptions

A number of submissions argue for or against the retention of the secondary boycott prohibition and the scope of the employment exception. The Australian Chamber of Commerce and Industry (ACCI) supports retention of the secondary boycott provisions and the employment exceptions.³³⁷ The ACTU seeks a widening of the employment exception applicable to secondary boycotts, arguing that it does not reflect Australia's international obligations (page 3).

The Panel does not consider that a case has been made to warrant any change to the secondary boycott provisions of the CCA or its employment exception. Conduct undertaken by employees or an organisation of employees that falls outside the current employment exception is likely to cause material harm to competition and has no apparent justification.

A number of submissions also raise concerns around whether or not the ACCC is taking sufficient steps to enforce the provisions. ACCI's submission (page 43) notes the importance of public

336 Trade Practices Act Review Committee 1976, *Report to the Minister for Business and Consumer Affairs*, page 85 paragraph 10.16.

337 See submission pages 43-44 and also the general discussion in relation to industrial boycotts, pages 26-29.

enforcement of the provisions, particularly for small business. Some submissions argue that information about enforcement decisions by the ACCC in relation to secondary boycotts lacks transparency. Other submissions note that the Cole Royal Commission had recommended that:

The Building and Construction Industry Improvement Act contain secondary boycott provisions mirroring ss45D–45E of the *Trade Practices Act 1974* (Cth), but limited in operation to the building and construction industry.³³⁸

It is argued in submissions that the specific circumstances and degree of concerns in the construction industry warrant shared jurisdiction of these matters between the ACCC and any Australian Building and Construction Commission (ABCC)-type body, should one be re-established.

In response to these concerns, the ACCC states that it carefully considers each and every complaint about secondary boycott conduct and that between 1 July 2012 and 30 June 2014 the Commission was contacted only nine times about secondary boycott concerns (ACCC Submission 3, page 6). Four of these cases related to employee organisations and all were investigated. The ACCC also notes that a number of features make enforcement challenging:

- difficulties in obtaining documentary evidence;
- lack of cooperation of witnesses; and
- potential overlaps between the ACCC and Fair Work Commission and Fair Work Building and Construction.

The Panel's expectation is that the ACCC will have sufficient capability both in culture and resources to enforce prohibitions on unlawful secondary boycotts in a timely way. As with all competition laws, the secondary boycott laws will only act as a deterrent to unlawful behaviour if the laws are enforced.

However, the Panel considers it is appropriate for the ACCC to establish protocols for enforcement and investigation where legislation confers a comparable enforcement jurisdiction on a specialist regulator to enforce such laws, such as has occurred in the building and construction industry.

The ACCC should not be required to report publicly on investigations where it has decided that no contravention has occurred. Persons who are the subject of any investigation by the ACCC are entitled to a reasonable degree of privacy concerning allegations that are investigated and the outcomes of the investigation, unless proceedings are instituted. However, it is useful for the ACCC to report generally about the number of complaints it receives about different parts of the CCA, including secondary boycotts, and the manner in which the complaints are resolved.

338 Recommendation 181, *Final Report of the Royal Commission into the Building and Construction Industry*, Volume 1 page 158.

Environmental and consumer protection exception

A number of submissions argue for or against the retention of the environmental and consumer exception. Consumer and environmental-based organisations argue for retention (or expansion) of the exception, while industry groups argue for its removal.³³⁹ The Tasmanian Government also proposes the repeal of the environmental exception.³⁴⁰

During consultations undertaken by the Panel, it appeared that the primary concern expressed on behalf of industry representatives is that environmental groups may damage a supplier in a market through a public campaign targeting the supplier that may be based on false or misleading information.

Insofar as a trading business is damaged by a public advocacy campaign, it may be questioned whether the secondary boycott provisions are, or are intended to be, applicable. A public advocacy campaign is unlikely to involve persons acting in concert and is unlikely to constitute hindering or preventing the supply or acquisition of goods or services — customers of the business will be free to make up their own minds about the merits of the campaign.

A question might arise whether a public advocacy campaign undertaken by an environmental or consumer organisation against a trading business, advocating that customers do not purchase products from the business, should be subject to the laws prohibiting false, misleading and deceptive conduct. Presently, those laws only apply insofar as a person is engaged in trade or commerce.

Expanding the laws concerning false, misleading or deceptive conduct to organisations involved in public advocacy campaigns directed at trading businesses raises complex issues. Many public advocacy campaigns directed at trading businesses concern health issues (e.g. tobacco, alcohol and fast food) or social issues (e.g. gambling). Consideration of the expansion of those laws in that context is beyond the Terms of Reference of this Review.

Conferring jurisdiction on state courts

Currently, the Federal Court has exclusive jurisdiction with respect to contraventions of sections 45D, 45DA, 45DB, 45E, and 45EA (subsection 4(4) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth)).

A contravention of these provisions may arise in connection with other common law disputes between employers and employee organisations. Common law disputes can be, and often are, determined within State courts. It is not apparent that there is a particular reason for the Federal Court to have exclusive jurisdiction over disputes arising under these provisions, particularly when state and territory courts have jurisdiction in respect of common law actions that often raise similar issues.

339 See for example Australian Conservation Foundation, pages 2-5, Australian Food and Grocery Council, page 28, Australian Forest Products Association, pages 3-5, Australian Lawyers for Human Rights, pages 1-2, Australian Network of Environmental Defender's Offices, pages 4-6, Consumers Health Forum of Australia, page 5, Greenpeace Australia, The Wilderness Society, OXFAM Australia, GetUp!, Voiceless, Friends of the Earth, AidWatch, pages 1-3, ITS Global, pages 1-5, National Farmers' Federation, page 15, RSPCA Australia, pages 1-2, Voiceless, page 3.

340 Tasmanian Government, page 1.

The Panel's view

Prohibitions on secondary boycotts serve the public interest. A sufficient case has not been made for changes to the secondary boycott provisions of the CCA.

There is a strong perception by organisations representing businesses in building, construction and mining that there is not enough public enforcement of the secondary boycott provisions of the CCA. Timely and effective enforcement serves as a deterrent to boycott activity, and needs to exist both in regulatory culture and capability. Where legislation confers a comparable enforcement jurisdiction on a specialist regulator in respect of secondary boycott laws, such as has occurred in the building and construction industry, it would be appropriate for the ACCC to establish protocols for enforcement and investigation. There would also be value in the ACCC including in its annual report the number of complaints made to it in respect of secondary boycott matters and the number of such matters investigated and resolved each financial year.

Consideration ought to be given to conferring jurisdiction on state and territory courts, in addition to the Federal Court, in respect of disputes arising under sections 45D, 45DA, 45DB, 45E, and 45EA.

18.3 TRADING RESTRICTIONS IN INDUSTRIAL AGREEMENTS

Section 45E of the CCA prohibits a person from making a contract, arrangement or understanding with an organisation of employees that contains a provision that has the purpose of:

- preventing or hindering the person from supplying or continuing to supply goods or services to a second person that the first person has been accustomed, or is under an obligation, to supply, or doing so subject to conditions; or
- preventing or hindering the person from acquiring or continuing to acquire goods or services from a second person that the first person has been accustomed, or is under an obligation, to acquire, or doing so subject to conditions.

Section 45EA prohibits a person from giving effect to such a provision.

Employer groups³⁴¹ in the building, construction and resources industries raise concerns about industrial agreements that restrict employers in relation to the acquisition of services from contractors and labour hire businesses. They argue that restrictions on the use of contractors are particularly acute in their industry because of the fact that the work tends to be project-based and the requirement for labour is not constant but dependent on the stage of a construction project. Reference is also made to terms of industrial agreements which regulate the supply of certain goods or non-labour services, such as superannuation or insurance products.

The concern expressed by employer groups arises from a possible conflict between the intended operation of sections 45E and 45EA and the regulation of awards and enterprise agreements under the Fair Work Act. In this regard, the Panel notes that amendments to the Fair Work Act have expanded the scope of conduct it regulates beyond the remuneration and conditions of employment of employees, and that this has occurred since sections 45E and 45EA were enacted.

This issue was brought into focus by the 2012 decision of the Full Court of the Federal Court, *Australian Industry Group v Fair Work Australia*. The case considered the question whether it was lawful for Fair Work Commission to approve an enterprise agreement under the Fair Work Act which

³⁴¹ See submissions from Ai Group, MBA, AMMA and Minerals Council of Australia.

contained a provision requiring the employer to only engage or deal with those contractors who applied wages and conditions no less favourable than those provided for in the agreement. The Full Court concluded that it was lawful for the Fair Work Commission to approve the agreement. Relevantly, the Full Court concluded that the enterprise agreement did not involve any contravention of section 45E because:

- it was not an agreement with an organisation of employees in the sense required by section 45E; and
- as the agreement had statutory force, it was not a contract, arrangement or understanding within the meaning of section 45E.

It appears that there may be a conflict between the purposes of the CCA, as reflected in sections 45E and EA, and industrial conduct that is permitted under the Fair Work Act. The apparent combined purpose of sections 51(2), 45E and 45EA of the CCA is to exempt from the CCA contracts governing the conditions of employment of employees, while prohibiting contracts between employers and employee organisations that otherwise hinder the trading freedom of the employer (in respect of the supply and acquisition of goods and services, which would include contractors). However, it appears to be lawful under the Fair Work Act to make awards and register enterprise agreements that place restrictions on the freedom of employers to engage contractors or source certain goods or non-labour services.

While the evidence suggests that these issues are more significant in some industries than others, it is desirable that the apparent conflict between the objective of sections 45E and 45EA and the operation of the Fair Work Act be resolved. The Panel favours competition over restrictions and believes that businesses should generally be free to supply and acquire goods and services, including contract labour if they choose.

The Panel is concerned that some anti-competitive conduct of a non-employment character may fall beyond the reach of the CCA by virtue of these developments. Nevertheless, the Panel recognises that these issues involve an intersection between competition and industrial policies, and might need to be addressed as part of the foreshadowed review of the Fair Work Act. Possible solutions to the apparent conflict include, but are not limited to:

- 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;
- an amendment to sections 45E and 45EA so that they expressly includes awards and enterprise agreements (as proposed by employer representatives);
- an amendment to sections 45E, 45EA and possibly paragraph 51(2)(a) to exempt workplace agreements approved under the Fair Work Act (as proposed by trade unions).

The Panel invites further submissions on these alternatives and the issue generally.

In the interim the Panel sees merit in an appropriate case or cases being put before the courts and a ruling made on the enforceability or legal status of provisions in industrial agreements made under the Fair Work Act which extend beyond the scope of the CCA exclusion of employment matters. This should not, however, be a substitute for policy remediation, if this is required.

Finally, the Panel observes that sections 45E and 45EA are presently framed in narrow terms. The prohibition only applies to restrictions affecting persons with whom the employer 'has been accustomed, or is under an obligation' to deal. As framed, the prohibition would not apply to a

restriction in relation to any contractor with whom the employer had not previously dealt. The policy rationale for limiting the scope of sections 45E and 45EA in those terms is not apparent.

The Panel's view

There is an apparent conflict between the object of sections 45E and 45EA and industrial conduct that is permitted under the Fair Work Act. It is desirable that the apparent conflict be resolved. The Panel favours competition over restrictions and believes that businesses should generally be free to supply and acquire goods and services, including contract labour, if they choose.

The Panel invites further submissions on this issue and possible solutions to the apparent conflict 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;
- amendments to sections 45E and 45EA so that they expressly include awards and enterprise agreements; and
- amendments to sections 45E, 45EA and possibly paragraph 51(2)(a) to exempt workplace agreements approved under the Fair Work Act.

The present limitation in sections 45E and 45EA, such that the prohibition only applies to restrictions affecting persons with whom an employer 'has been accustomed, or is under an obligation' to deal with, should be removed.

19 EXEMPTION PROCESSES

Competition is desirable not for its own sake, but because in most circumstances it improves the welfare of Australians by increasing choice, diversity and efficiency in the supply of goods and services. In other words, competition is a means to an end. In some circumstances arrangements that lessen competition may nonetheless produce benefits to the public that outweigh the detriment that results from the lessening of competition.

The CCA has various procedures by which businesses can apply to the ACCC for an exemption from the competition law for particular commercial arrangements on the basis that the arrangements generate a net public benefit. The CCA presently contains three separate processes that have different features.

The authorisation process is applicable to most types of business conduct. The ACCC may grant authorisation if it is satisfied that the conduct generates a net public benefit. Exemption from the competition laws does not commence until the ACCC has made a determination in respect of the application, which often takes many months. Presently, merger applications for authorisation are treated differently to other applications. Merger applications must be made to the Tribunal and are subject to a time limit for determination. As discussed earlier in the context of mergers, the Panel's view is that merger authorisations applications should also be made to the ACCC in the first instance, with the Tribunal exercising a power of review (see [Chapter 15](#)).

A notification may be given to the ACCC in respect of exclusive dealing conduct (prohibited under section 47), collective bargaining conduct (prohibited under the cartel provisions and section 45) and price signalling (prohibited under Division 1A). The advantage of the notification process in comparison to the authorisation process is that a notification provides the relevant exemption from the law 14 days after filing the notification. The ACCC may withdraw the exemption if it subsequently forms the view that the notified conduct does not give rise to a net public benefit. As discussed earlier in the context of RPM, the Panel considers that the notification procedure should be extended to RPM conduct (see [Section 17.4](#)).

As discussed earlier in the context of mergers, there is also a procedure to apply for a formal clearance of a merger transaction. Like authorisations, the clearance procedure only provides exemption from the merger law after the ACCC has made a determination on the application. The ACCC may grant clearance if it is satisfied that the merger is not likely to substantially lessen competition (see [Chapter 15](#)).

A number of submissions comment on these exemption processes. In addition to issues concerning the merger exemption processes (discussed at [Section 15.1](#)), submissions raised three matters for consideration:

- whether the authorisation and notification processes could be simplified;
- whether the notification process for collective bargaining is fulfilling its potential; and
- whether the ACCC should be granted a general power to issue block exemptions.

19.1 SIMPLIFICATION OF THE AUTHORISATION AND NOTIFICATION PROCEDURES

Like much of the CCA, the authorisation and notification procedures have unnecessary complexity which imposes costs on business. Wherever possible, it is desirable to remove unnecessary complexity.

One aspect of the unnecessary complexity is that the authorisation procedure is focused upon the specific provisions of the CCA that might be contravened by the proposed business conduct. As a consequence, separate application forms may be required to be prepared and filed in respect of a single commercial arrangement depending upon the number of provisions of the CCA that apply to the arrangement.

Another aspect of the unnecessary complexity is that the authorisation and notification procedures do not empower the ACCC to grant exemption if the ACCC is satisfied that the proposed business conduct is unlikely to substantially lessen competition. In order to grant the exemption, the ACCC is required to assess the net public benefit of the proposed conduct. In respect of mergers, the formal clearance process enables the ACCC to exempt a merger if it is satisfied that the merger is unlikely to substantially lessen competition. However, no such procedure exists for other business transactions. As a consequence, if a business wishes to obtain assurance that the ACCC will not regard a proposed transaction as contravening the competition law, it can only seek an informal clearance from the ACCC (that is, an indication from the ACCC that it would not challenge the proposed arrangement).

Significant steps can be taken to simplify the authorisation and notification procedures. Firstly, in respect of authorisation, it should be permissible to apply for authorisation of a business arrangement through a single application and without regard to the specific provisions of the CCA that might be contravened by the proposed conduct. Secondly, for both authorisation and notification, the ACCC should be empowered to grant the 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. Each of those changes would assist in focusing the exemption process on the issues of substance and away from technicalities.

19.2 COLLECTIVE BARGAINING

Businesses, and particularly small businesses, are able to seek an exemption for collective bargaining in certain circumstances by filing a notification with the ACCC.

Collective bargaining is an arrangement by which two or more competing businesses come together to negotiate with a supplier or a business customer over terms, conditions and prices. In the absence of an exemption, collective bargaining will usually contravene the cartel prohibitions because the underlying arrangement will usually lead to the competing businesses agreeing to pay or receive the same price for goods or services or agreeing not to deal with a particular supplier or business customer.

Ordinarily, collective bargaining undertaken by competing businesses would be harmful to competition. However, small businesses dealing with large businesses often face an imbalance in bargaining power. That imbalance can result in commercial outcomes that are inefficient or unfair. Permitting small business to bargain collectively in certain circumstances can redress the imbalance in power and result in more efficient market outcomes. It was for this reason that the notification process was introduced. As noted above, the ACCC can withdraw the exemption provided by the notification if it forms the view that the conduct is resulting in a net public detriment.

There is broad support for the collective bargaining notification process. However, the provisions are not being used frequently. In consultations with small business, the Panel discovered a low level of awareness of how the provisions could be of benefit to small businesses.

A number of submissions propose changes to the law concerning collective bargaining to increase its availability and effectiveness for small business. Those suggestions include:

- increased timeliness and/or decreased costs of the notification process (Australian Newsagents Federation, page 11);
- increased flexibility and simplification, for example:
 - an increased role for peak bodies in filing applications which would enable changes to the participants to the arrangements over time; and
 - broadening the scope of parties covered by an arrangement;³⁴² and
- changes to facilitate authorisation of boycott conduct.³⁴³

The ACCC also makes recommendations for reforms to the collective bargaining provisions aimed at allowing increased use of collective bargaining by small business (ACCC Submission 1, pages 108-111).

The collective bargaining notification process has the potential to address a number of the concerns raised by small businesses that supply goods and services to larger businesses. There appears to be a need to enhance small business awareness of the notification process. There is also potential for introducing greater flexibility into the notification process. 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).

19.3 BLOCK EXEMPTIONS

Competition law regimes in some other countries provide a mechanism by which defined categories of conduct are granted a 'safe harbour' exemption from competition law. The block exemption removes the need for individual applications for exemption to be made. The exemption is granted if the competition regulator considers that certain conditions are satisfied: either that the category of conduct is unlikely to damage competition; or that the conduct is likely to generate economic benefits.

³⁴² See discussions in submissions from Australian Chicken Growers' Council Limited, page 7; Australian Dairy Farmers Limited, page 11.

³⁴³ Australian Chicken Growers' Council Limited, pages 5-7; Australian Dairy Farmers Limited, page 11; AgForce Queensland, page 2.

Box 19.1: International examples of block exemptions

UK

The Secretary of State may make a block exemption order exempting agreements from the prohibition against certain horizontal conduct.³⁴⁴ These agreements must contribute to improving production or distribution, or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit. The agreements must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or afford the undertakings concerned the possibility of eliminating competition.

EU

The European Commission may grant exemptions for certain agreements and practices if those agreements and practices are assessed as having significant countervailing benefits. This may be done on an agreement-by-agreement basis or through the application of block exemptions for categories of conduct.

Singapore

Under section 36 of the *Competition Act 2004* (Singapore) the Competition Commission of Singapore may recommend to the Minister that a particular category of agreement be exempted from the prohibition on anti-competitive agreements.

The CCA does not empower the ACCC to grant block exemptions. By way of comparison, the *Corporations Act 2001* empowers the Australian Securities and Investments Commission to grant block exemptions (or class exemptions) in respect of many parts of the *Corporations Act 2001*.

A block exemption power under the CCA may be an efficient way to deal with certain types of business conduct that are unlikely to raise competition concerns, either because of the parties engaged in the conduct or the nature of the conduct itself. This would provide an efficient means to provide certainty for businesses in respect of conduct that is unlikely to raise significant competition problems. It may also play a role in educating and informing business about the types of conduct that do not raise competition concerns and those that do.

³⁴⁴ Section 6, *Competition Act 1998* (UK).

The Panel's view

There is broad support for the regime of exemptions under the CCA.

The authorisation and notification procedures can be simplified by:

- ensuring that only a single authorisation application is required for a single business transaction or arrangement; and
- empowering 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 collective bargaining notification process is of potential benefit to, and could be more widely used by, small business. The regime could be simplified in respect of the businesses covered by a notification. The regime could also better facilitate any efficiency-enhancing collective boycott activity.

Exemption powers based on the block exemption framework in the UK and EU should be introduced to the CCA to supplement the authorisation and notification frameworks. Such a power would be helpful in establishing 'safe harbours' for business, reducing compliance costs and providing further certainty about the application of the CCA.

20 ENFORCEMENT AND REMEDIES

The CCA confers both public and private enforcement rights to take action under the competition laws.

Public enforcement is undertaken by the ACCC. The ACCC is empowered to investigate possible contraventions of the competition law and to institute proceedings in the Federal Court seeking fines, penalties and other remedies depending on the contravention. The ACCC is also empowered under section 155 of the CCA to compel individuals to appear before it to answer questions about a potential contravention, and to compel corporations and individuals to provide information and to produce documents to it.

Individuals may also bring proceedings in the Federal Court to seek redress for contraventions of the competition laws.

Submissions received by the Panel raise a number of concerns about the scope of public and private enforcement rights under the CCA and about the use by the ACCC of its powers under section 155 of the CCA.

20.1 PUBLIC ENFORCEMENT

In proceedings commenced by the ACCC, the Federal Court may impose various sanctions or grant various categories of relief in respect of a contravention of the competition laws, including:

- in the case of cartel conduct, a term of imprisonment for up to 10 years on an individual who has knowingly participated in the contravention (or a fine of up to 2,000 penalty units, currently \$340,000, or both) and, in respect of a contravening corporation, a fine in an amount not exceeding the greater of \$10 million, three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the corporation's annual turnover;
- in the case of a contravention by a corporation of all other competition laws (except sections 45D, 45DB, 45E, or 45EA), a civil penalty in an amount not exceeding the greater of \$10 million, three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the corporation's annual turnover;
- in the case of a contravention by a corporation of sections 45D, 45DB, 45E, or 45EA, a civil penalty not exceeding \$750,000;
- an injunction to prevent the continuation of the contravening conduct;
- a range of probationary and community service-type orders;
- orders publicising the contravention;
- orders for compensation on behalf of other identified persons; and
- in the case of a merger that has been completed, an order that the acquiring corporation divests the business that was acquired.

Only a few submissions address the adequacy of the sanctions and remedies that may be imposed for contraventions of the competition law. In general, there appears to be general approval of the severity of the sanctions.

The ACCC states that the current sanction for a corporation failing to comply with a section 155 notice is too low. The present sanction is 20 penalty units for an individual (or 12 months

imprisonment, or both), which, when applied to a corporation, is a fine of \$17,000.³⁴⁵ In contrast, a person failing to comply with a notice issued by the Australian Securities and Investments Commission faces a sanction of 100 penalty units or two years imprisonment, or both,³⁴⁶ which translates to a fine of \$85,000 for a corporation. Given the importance of compliance with section 155 notices to the administration of competition laws, the Panel agrees that the current sanction for a corporation failing to comply is inadequate.

The Panel received some comments, particularly from AMMA (page 7), in relation to the adequacy of the pecuniary penalties for contravention of the secondary boycott provisions. The Panel has not heard sufficient argument on this issue to determine whether the current level of penalty is sufficient to achieve the objective of deterrence. The Panel invites further comment on this question.

A few submissions propose that a divestiture remedy should be available for contraventions of section 46 (in addition to mergers). This issue is discussed above in the context of section 46. The Panel does not support such a proposal.

The Panel's view

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

Further comment is invited on whether the current sanctions for contravention of sections 45D, 45DB, 45E, and 45EA are adequate.

20.2 PRIVATE ENFORCEMENT

Consumers or businesses harmed by a contravention of the competition law can seek relief from the Federal Court, most commonly damages (compensation) or injunctions to prevent and restrain the contravening conduct.

The Panel received a number of submissions commenting on the difficulties confronting many consumers and small businesses that wish to bring private actions in the Federal Court in respect of competition law. Beaton-Wells and Fisse argue that private parties face a range of difficulties in pursuing private action, including:

- uncertainty as to when the limitations period commences;
- difficulties in obtaining access to information generally and information from the ACCC;
- the apparent inability to rely on admissions made in ACCC proceedings, owing to the uncertain scope of s 83 of the CCA;
- challenges in proving and quantifying loss; and
- requirements imposed by s 5 of the CCA to seek ministerial consent in relation to proceedings involving extraterritorial conduct. (pages 29-30)

It is also clear to the Panel from submissions and consultations with small business that there are significant barriers to the ability of small business to take private action to enforce the competition

³⁴⁵ See sections 4AA (level of penalty units) and 4B (penalties for corporations five times that of individuals) of the *Crimes Act 1914*.

³⁴⁶ Section 63 of the *Australian Securities and Investments Commission Act 2001*.

laws. For many small businesses a private action would be beyond their means. In some cases a small business might not wish to bring a proceeding for fear of damaging a necessary trading relationship.

These issues are considered below.

Section 83 of the CCA

The CCA does provide one mechanism intended to reduce the costs associated with private enforcement proceedings. Section 83 of the CCA is intended to facilitate private actions by enabling findings of fact made against a corporation in one proceeding (typically a proceeding brought by the ACCC) to be used as prima facie evidence against the corporation in another proceeding (typically a proceeding brought by a private litigant).

However, a significant potential deficiency has emerged in respect of the scope of section 83. Many ACCC proceedings are resolved by the corporate defendant making admissions of fact that establish the contravention, but it is uncertain whether section 83 applies to such admissions. A number of decisions of the Federal Court suggest that section 83 is confined to findings of fact made by the court after a contested hearing.³⁴⁷

The effectiveness of section 83 as a means of reducing the costs of private actions would be enhanced if the section were amended to apply to admissions of fact made by a corporation in another proceeding, in addition to findings of fact.

Cost of litigation and access to justice

Smaller businesses frequently seek assistance from the ACCC in respect of competition law concerns. The ACCC plays a very important role in seeking to enforce the law on behalf of businesses that are unable to do so themselves. Nevertheless, the ACCC is unable to take proceedings in respect of all complaints brought to it. Understandably, it seeks to prioritise the cases that it will pursue within its budgetary constraints. This can lead to some dissatisfaction among small businesses when the ACCC does not pursue their complaints. In part, this is due to the absence of an effective alternative option they can pursue themselves.

In general, the dispute resolution processes currently available to smaller businesses for competition law-related disputes do not meet their expectations. The Panel has sympathy with their frustrations and considers that development of alternative dispute resolution processes could go some way to addressing small business concerns with the competition landscape they operate in daily.

A number of possible alternative dispute resolution options are put forward by small business. The Office of the Small Business Commissioner states:

Access to justice is another key component of a competitive marketplace. A small business focuses on plying its trade or profession. Disputes will arise from time to time, but small businesses will often not have the skills and resources on hand to deal with these incidents that arise in the course of business but are not a part of the *ordinary* course of that business. These types of business disruption are not easily catered for by small business and, depending on the particular dispute, can impact small business disproportionately, particularly where there is unequal bargaining power. (page 4)

347 ACCC v Apollo Optical (Aust) Pty Ltd [2001] FCA 1456 at [24]; ACCC v ABB Transmission and Distribution Limited (No. 2) (2002) 190 ALR 169 at [51]; ACCC v Leahy Petroleum Pty Ltd (No 3) (2005) ALR 301 at [118]; ACCC v Dataline.net.au Pty Ltd (2006) 236 ALR 665 at [107].

The Australian Chamber of Commerce and Industry considers that ‘alternative dispute resolution services that provide quality information quickly, informally and at low cost is essential to improving both competition and productivity for small and medium businesses’ (submission, page 13).

The Australian Small Business Commissioner is an Australian Government initiative designed to act as an advocate for small businesses. However, the Australian Small Business Commissioner does not directly provide mediation or arbitration services.

The Panel notes that some States and Territories have introduced their own small business commissioners, which can provide dispute resolution services.

Both the South Australian Small Business Commissioner and the NSW Small Business Commissioner have some capacity to consider complaints falling within the remit of the CCA. The South Australian Small Business Commissioner is able to assist with businesses that are treated unfairly in their commercial dealings with other businesses in the marketplace and in franchising disputes.³⁴⁸ The NSW Small Business Commissioner lists a range of disputes that can be considered through its mediation service including those involving suppliers, wholesalers and purchasers, service providers, franchises and unfair contracts.³⁴⁹ The Western Australian Small Business Development Corporation states (page 6) that it provides Western Australian small businesses with access to speedy, low-cost, non-litigious process to resolve disputes with other businesses.

These services are in addition to any court or tribunal-based dispute resolution services, which are often available for consumer law matters.

In addition, dispute resolution processes are available under industry codes and through industry ombudsmen, for example, the Telecommunications Industry Ombudsman.

While some submissions argue ‘no costs’ orders for small businesses would be of assistance,³⁵⁰ such changes could have unintended consequences — for example, encouraging frivolous or vexatious actions.

The Panel notes that the PC’s Access to Justice Arrangements inquiry is ongoing, and the proposal for a Small Business and Family Enterprise Ombudsman is in the process of being implemented, along with the proposal to extend unfair contract terms laws to small business contracts.

Against that background, the Panel has not made specific recommendations around the nature of any new dispute resolution framework. It considers, however, that the ACCC should focus upon its response to small business complaints concerning competition laws. If the ACCC determines that it is unable to pursue a particular complaint on behalf of a small business, it is important that the ACCC communicate clearly and promptly its reasons for not acting and direct the business to available dispute resolution procedures.

The Panel seeks views on whether there should be a specific low-cost dispute resolution scheme dealing with matters covered by the competition laws.

348 See www.sasbc.sa.gov.au/dispute_resolution/overview.

349 See www.smallbusiness.nsw.gov.au/solving-problems/commercial-dispute-resolution.

350 For example, Master Grocers Australia, page 58; Independent Supermarket Retailers Guild of South Australia, page 6.

Private actions involving overseas conduct

Conduct that contravenes Australia's competition law may take place overseas. From time to time multinational corporations have entered into cartel arrangements that apply to many parts of the world, including Australia. Recent examples that have been the subject of ACCC proceedings include international cartels concerning vitamins, international air freight and the supply of marine hoses.

Currently, there are two regulatory impediments to seeking compensation under Australian competition law in respect of contravening conduct that occurs overseas.

First, the overseas conduct will only be subject to Australian law if it is engaged in by a corporation incorporated in, or carrying on business within, Australia (subsection 5(1)). The effect of that provision is that, in respect of contravening conduct that occurs overseas, a foreign corporation will only be subject to Australian competition law if it otherwise carries on business in Australia.

The Panel considers that the application of the law to a foreign corporation should not depend on whether the corporation otherwise carries on business in Australia.³⁵¹ Australian competition law is generally limited in its scope (and should be so limited) to conduct that harms competition in an Australian market. If a foreign corporation engages in conduct that harms competition in an Australian market, it should be subject to Australian law.

Secondly, if a person wishes to seek damages or other compensatory orders in relation to contravening conduct that occurred overseas, he or she must obtain the consent of the Minister (subsections 5(3) and (4)). The Minister is required to grant consent unless the conduct was required or specifically authorised by a foreign law and the Minister is of the view that it is not in the public interest to grant consent (subsection 5(5)).³⁵²

This requirement was put in place in 1986, at a time when there was concern over the extra-territorial reach of some competition laws. The concern originated out of litigation commenced in the US by Westinghouse in respect of an overseas uranium cartel. Australian uranium producers became defendants to the US litigation.³⁵³ This resulted in the Australian Government enacting legislation to prevent the enforcement of the US judgment in Australia.³⁵⁴ Also, at that time, many other jurisdictions, particularly developing countries, did not have competition laws. As a result, there was potential for diplomatic issues to arise if proceedings were brought in Australia for contravention of Australia's competition law in respect of overseas conduct that was authorised or permitted by the laws of the jurisdiction in which the conduct occurred.

Since that time many countries have enacted competition laws. Further, a greater uniformity has emerged concerning the extra-territorial reach of competition laws in comparable jurisdictions. In

351 The Commonwealth has power under section 51(xx) of the Constitution to make laws with respect to trading or financial corporations formed within the limits of the Commonwealth and foreign corporations. There is no additional requirement that foreign corporations have any particular connection with Australia.

352 Similar requirements exist for the consumer protection provisions of the *Australian Securities and Investments Commission Act 2001* (section 12AC).

353 A convenient summary of the litigation arising from the uranium cartel, and the political responses to the litigation, is contained in Senz and Charlesworth, *Building Blocks: Australia's Response to Foreign Extraterritorial Legislation*, (2001) Melbourne Journal of International Law.

354 *Foreign Antitrust Judgment (Restriction of Enforcement) Act 1979*, which was subsequently incorporated into the *Foreign Proceedings (Excess of Jurisdiction) Act 1984*.

general, competition laws of comparable countries apply to overseas conduct if the conduct has a direct effect on domestic markets or trade.³⁵⁵

In comparable overseas jurisdictions such as the US, Canada, UK, EU, and New Zealand, there is no requirement to seek governmental consent in order to take proceedings in respect of contravening conduct that occurs overseas.

The requirement for ministerial consent imposes a material hurdle for private plaintiffs seeking redress for breaches of competition law, and can give rise to substantial additional costs in the litigation. The ministerial consideration of the issue also takes time. Further, a defendant to a proceeding can seek judicial review of the Minister's decision which may cause delay in the principal proceeding.³⁵⁶

The ministerial consent requirements apply to the ACL as well as the competition laws. While the Panel is not reviewing the ACL generally, the Terms of Reference do ask the Review to consider it to the extent it extends to protections for small business. This requirement could be relevant to small businesses privately enforcing the laws concerning unconscionable conduct.

Proving loss and damage

A matter raised in some submissions is the inclusion of a power to seek orders, in the nature of cy-pres orders, for breach of the competition law. A cy-pres order is used in the administration of estates or trusts where the original bequest or trust object fails for some reason. A cy-pres scheme may be ordered by the court to direct the application of funds toward a similar objective as the original gift or trust.

In the context of competition law, it has been proposed that orders of that kind might be used when it can be shown that contravening conduct has caused quantifiable detriment, but it is not possible to identify the persons damaged by the conduct. The suggestion is that the court would order that an amount of compensation or damages be paid into a trust fund to be spent in a manner directed by the court.

This proposal was previously considered (and rejected) by the Dawson Review. The Panel agrees with the conclusion of the Dawson Review:

Such orders would involve the payment of compensation or damages into a trust fund to be directed toward purposes that are identified by the Court. For example, money from the trust might be used for the promotion of consumer or other affected interests. Acceptance of such a proposal would be to invite the Court, which is concerned with the administration of the Act, to become inappropriately involved in matters of policy in an area where the Act offers no guidance.³⁵⁷

355 In the US, see *F. Hoffman La Roche Ltd v Empagran SA* (2004) 542 US 174. In the EU, see *A. Ahlstrom OY v EC Commission* [1988] 4 CMLR 901 (known as the Wood Pulp case).

356 In 2008, Cathay Pacific unsuccessfully challenged the Minister's decision to grant consent: *Cathay Pacific v Assistant Treasurer* (2010) 186 FCR 168.

357 Trade Practices Act Review Committee 2003, *Review of the Competition Provisions of the Trade Practices Act*, page 163.

The Panel's view

Private enforcement of competition laws is an important right. However, there are many regulatory and practical impediments to the exercise of this right. It is important to find ways to reduce those impediments.

The effectiveness of section 83 as a means of reducing the costs of private actions would be enhanced if the section were amended to apply to admissions of fact made by a corporation in another proceeding, in addition to findings of fact.

There are significant practical difficulties in small businesses exercising rights of private enforcement. Understandably, the ACCC is not able to take proceedings in respect of all complaints that are brought to it. It is important, though, that the ACCC place some priority upon its response to small business complaints concerning competition laws. If the ACCC determines that it is unable to pursue a particular complaint on behalf of a small business, it is important that the ACCC communicate clearly and promptly its reasons for not acting and direct the business to available dispute resolution procedures.

Small business would be assisted by an effective dispute resolution system in respect of competition law issues. Such a system would support the operation and effectiveness of competitive markets, which in turn foster a diversity of businesses that provide consumer choice. While some small business dispute resolution services exist at the state, territory and Commonwealth levels, it is clear small businesses feel that laws are difficult to enforce.

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

In respect of contravening conduct that occurs overseas, a foreign corporation should be subject to Australian competition law regardless of whether it carries on business in Australia. Given that competition laws and policies are now commonplace around the world, there is no reason why private parties should have to seek ministerial consent before launching a proceeding that involves overseas conduct.

20.3 ACCC'S INVESTIGATIVE POWERS

The ACCC's primary investigative power is contained in section 155 of the CCA. Section 155 gives the ACCC power to compel individuals to appear before it to answer questions about a potential contravention, and to compel corporations and individuals to provide information and to produce documents to it, if the ACCC has reason to believe that the person or corporation is capable of giving evidence, furnishing information or producing documents relating to a possible contravention of the CCA. It is not necessary for the ACCC to have reasonable grounds to believe that a contravention has occurred before exercising those powers.

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.

The ACCC outlines ways to strengthen its investigative powers under section 155 (ACCC Submission 1, pages 97-101). The ACCC proposes that the section 155 powers be able to be used in a wider range of circumstances — for example, after seeking injunctive relief, during multi-party litigation and in relation to subject matters such as designated telecommunication matters not currently open to section 155 notices.

Conversely, 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.³⁵⁸ Comment is also made on the use of section 155 powers in the context of applications for merger clearance.³⁵⁹

There is a need to achieve an appropriate balance with respect to coercive powers. The Panel considers that the ability to compel business to provide evidence, information and documents relating to a potential contravention of the competition law is crucial to the ACCC's administration of the CCA.

However, the Panel does not support the ACCC's proposal that the powers be available for use after the ACCC has commenced proceedings in respect of an alleged contravention. The use of the powers at that time is likely to cause conflict with the court's overall supervision of the proceedings. The court's discovery and subpoena powers can be exercised to require production of additional documents.

The Panel understands the concerns expressed by business over the cost of compliance with section 155 notices that require the production of documents. In the digital age businesses retain many more documents, such as emails, than was the case 20 years ago. As a consequence compliance with a section 155 notice may require electronic searches of tens of thousands of documents, which can occasion very large expense.

The cost of documentary searches has been recognised by the courts and, over the last 10 years, rights of discovery have been modified. For example, the Federal Court Rules 2011 (20.14) now require a party to undertake a reasonable search for documents. In determining what is a reasonable search, the party may take into account factors such as the number of documents involved and the ease and cost of retrieving the document.

The ACCC's published guideline on section 155³⁶⁰ acknowledges the burden that section 155 notices may impose on a recipient and accepts that the ACCC should take the burden into account. The Panel considers that this is an important responsibility for the ACCC, which should be exercised on each occasion that a notice is issued. The ACCC should accept a responsibility to frame a section 155 notice in the narrowest form possible, consistent with the scope of the matter being investigated.

There may also be scope to recognise, in the CCA or in a guideline, a principle equivalent to that recognised in the Federal Court Rules: that in a digital age, the obligation to search for documents should be subject to a requirement of reasonableness, having regard to factors such as the number of documents involved and the ease and cost of retrieving the document.

358 For example, Arnold Block Leibler, pages 6-7; Telstra, pages 12-13.

359 For example, Arnold Bloch Leibler, page 7; Foxtel, pages 7-8.

360 ACCC 2008, *A guide to the Australian Competition and Consumer Commission's power to obtain information, documents and evidence under s 155 of the Trade Practices Act 1974*, page 11.

The Panel's view

Compulsory evidence gathering powers are important to the ACCC's ability to enforce the CCA, but can impose a regulatory burden on recipients of compulsory notices.

The ACCC should accept a responsibility to frame section 155 notices in the narrowest form possible, consistent with the scope of the matter being investigated. In complying with a section 155 notice, the recipient should be required to undertake a reasonable search. That requirement could be introduced into the CCA or recognised in a guideline issued by the ACCC.

21 NATIONAL ACCESS REGIME

Competition in some markets depends on access to infrastructure facilities that occupy strategic positions in an industry (so-called 'essential' or 'bottleneck' facilities).

The National Access Regime (the Regime) in Part IIIA of the CCA provides a legal framework by which third parties can seek and obtain access to such facilities in order to compete, or compete more effectively, in upstream and downstream markets.

The two objectives of the Regime, as stated in the objects clause of Part IIIA, are:

To promote the economically efficient operation of, use of, and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and

To provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.³⁶¹

Generally, to gain access to bottleneck infrastructure under the Regime, two steps must be taken.³⁶²

First, an application must be made to the National Competition Council (NCC) to recommend declaration of the infrastructure service, and the relevant Minister must then accept the recommendation and declare the service. To recommend declaration of an infrastructure service and declare the service, the NCC and the Minister respectively must be satisfied of specified criteria concerning the service (see Box 21.1). Declaration activates the arbitration processes under the Regime.

Second, the person seeking access must request access from the infrastructure owner. If negotiations fail, terms and conditions of access can be arbitrated by the ACCC.

The Panel has recommended combining the roles of the NCC and the ACCC under the Regime in the proposed access and pricing regulator. See [Chapter 24](#) for further discussion of these issues.

³⁶¹ *Competition and Consumer Act 2010* section 44AA.

³⁶² National Competition Council 2011, *Access to Monopoly Infrastructure in Australia*, page 4.

Box 21.1: Declaration criteria in the CCA (sections 44G and 44H)

The NCC cannot recommend that a service be declared, and the Minister cannot declare a service, unless they are satisfied of all of the following matters:

- a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;
- b) that it would be uneconomical for anyone to develop another facility to provide the service;
- c) that the facility is of national significance, having regard to:
 - (i) the size of the facility; or
 - (ii) the importance of the facility to constitutional trade or commerce; or
 - (iii) the importance of the facility to the national economy;
- e) that access to the service:³⁶³
 - (i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or
 - (ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the NCC believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement;
- f) that access (or increased access) to the service would not be contrary to the public interest.

There are four regulatory processes by which an infrastructure service may be exempted from declaration under Part IIIA.

- Prior to the construction of a new facility, the operator of the proposed facility may apply to the NCC for a recommendation to the relevant Minister that the facility be ineligible for declaration. The facility will become ineligible if the Minister makes that decision. The Minister may only make that decision if the Minister is satisfied that one of the declaration criteria will not be fulfilled.
- A State or Territory may³⁶⁴ apply to the NCC for a recommendation to the relevant Commonwealth Minister that an access regime for a particular infrastructure service in that State or Territory is 'effective'. The infrastructure service will be exempted from declaration if the Commonwealth Minister makes that decision. The criteria to be applied for that decision are set out in the Competition Principles Agreement.³⁶⁵
- The Commonwealth or a State or Territory may apply to the ACCC for approval of a competitive tender process for the construction and operation of an infrastructure facility that is to be publicly owned. The facility will be exempted from declaration if the ACCC makes that decision. The ACCC may only approve the tender process if it is satisfied that reasonable terms and conditions of access to the facility will be the result of the tender process.

³⁶³ Criterion (d) has been repealed.

³⁶⁴ In the 2006 [Competition and Infrastructure Reform Agreement](#), States and Territories agreed to submit their access regimes for certification (page 41).

³⁶⁵ Council of Australian Governments 1995 (as amended to 13 April 2007) [Competition Principles Agreement](#), pages 6-9.

- Operators of monopoly infrastructure may offer an undertaking to the ACCC setting out the terms and conditions on which the operator will offer services using the infrastructure. The ACCC is empowered to accept or reject the undertaking. If the undertaking is accepted, the service cannot be declared.

The National Access Regime was recently reviewed by the Productivity Commission (PC).³⁶⁶ The PC recommended the retention of the Regime, but also recommended that the declaration criteria be revised. The Review's Terms of Reference require the Panel to consider whether the Regime is adequate (taking into account the PC's inquiry).

A number of submissions comment on the Regime. The primary issues raised include:

- whether it is in the public interest to retain the Regime;
- whether the PC's recommendations concerning the declaration criteria should be implemented; and
- whether there should be broader rights of review of access declarations and arbitrations before the Tribunal.

21.1 COSTS AND BENEFITS OF THE NATIONAL ACCESS REGIME

Australia is unique among comparable countries in having a general access regime that may potentially apply to any privately owned infrastructure facility that exists within a supply chain.³⁶⁷

The Regime facilitates intrusive economic regulation of infrastructure assets. It overrides private property rights, mandating that the operator of an infrastructure facility make that facility available for use by a third-party on terms and conditions (including price) determined by a regulatory body (the ACCC). By that process, the economic return that the operator of the facility is able to earn on its investment in the facility will be subject to regulation.

Economic regulation of privately owned assets is likely to impose costs on the economy. In recommending the introduction of the Regime, the Hilmer Review was conscious of the economic costs that might be imposed:

The Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment. Nevertheless, there are some industries where there is a strong public interest in ensuring that effective competition can take place ...³⁶⁸

The PC also noted the costs that are created by economic regulation:

Access regulation also imposes costs, in particular where it adversely affects incentives for investment in markets for infrastructure services. There are costs associated with errors in setting access prices. For example, when prices are set too low, this can lead to delayed investment in infrastructure, or the non-provision of some infrastructure services.

³⁶⁶ Productivity Commission 2013, [National Access Regime](#).

³⁶⁷ Aurizon, page 64; BHP Billiton, page 28; BCA Main Report, page 79.

³⁶⁸ Report by the National Competition Policy Review 1993, [National Competition Policy](#), page 248.

Regulated third party access can also impose costs on infrastructure service providers from coordinating multiple users of their facilities.³⁶⁹

Given the economic costs that are likely to be caused by this form of regulation, it is important to examine carefully the benefits of the Regime and to ask whether those benefits can be achieved by a less intrusive form of regulation.

Original objective of the regime

The Regime was introduced in 1995 on the recommendation of the Hilmer Review.

One of the major recommendations of the Hilmer Review was the introduction of competition into various industries that, at that time, remained largely in public ownership. Those industries included electricity, gas, rail, airports, ports and telecommunications. A feature of each of those industries was that they consisted of potentially contestable commercial activities which required the use of 'bottleneck' infrastructure facilities.

The Hilmer Review recommended the introduction of competition into those industries by separating them into their contestable and natural monopoly elements. As the contestable elements required access to the natural monopoly elements, the Hilmer Review recommended the introduction of a single national access regime to regulate that access.

Part IIIA of the CCA was originally enacted to provide a common framework for access to infrastructure within each of those industries. However, it soon became clear that each industry had distinct physical, technical and economic characteristics and that it was preferable to address access issues on an industry-by-industry basis. Distinct access regimes have subsequently emerged (see Box 21.2).

³⁶⁹ Productivity Commission 2013, [National Access Regime](#), pages 7-8.

Box 21.2: Existing access regimes

In the electricity industry, generators and retailers require access to the transmission and distribution wires. Access is governed by an industry-specific regime established by the National Electricity Law.

In the gas industry, producers and retailers require access to transmission and distribution pipelines. Access is governed by an industry-specific regime established by the National Gas Law.

In the telecommunications industry, providers of residential fixed line telephony and data services require access to fixed line infrastructure (historically copper wire, but which is in the process of being replaced by the optical fibre and wireless services). Access to fixed line infrastructure is governed by an industry specific access regime, established under Part XIC of the CCA.

The interstate rail track network is the subject of an access undertaking given by the operator of the rail track, Australian Rail Track Corporation, to the ACCC under Part IIIA. Intrastate rail track networks are subject to access regimes established in the State or Territory in which the railway is located.

Ports throughout Australia are subject to various regulatory frameworks established in the State or Territory in which the port is located.

Airport facilities are not regulated by an industry specific access regime and are potentially subject to declaration under Part IIIA. Currently, no airport services are the subject of declaration.

What is the role of Part IIIA today?

Currently, only two services are declared under Part IIIA:

- the Tasmanian railway network was declared in 2007; and
- the Goldsworthy iron ore railway in the Pilbara owned by BHP Billiton was declared in 2008.

No one has sought access to the Goldsworthy railway since it was declared.³⁷⁰

Access to the Australian Rail Track Corporation interstate³⁷¹ and Hunter Valley³⁷² rail networks, as well as the Co-operative Bulk Holdings bulk wheat port terminals in Western Australia³⁷³ are governed by access undertakings accepted by the ACCC under Part IIIA.

Since Part IIIA was enacted in 1995, four other services have been declared:

- airport services at Melbourne Airport were declared in 1997 and the declaration expired in 1998;
- airport services at Sydney International Airport were declared in 2000 and the declaration expired in 2005;
- airport services at Sydney Airport were declared in 2005 and the declaration expired in 2010; and

370 BHP Billiton, page 23.

371 [ARTC Interstate Rail access undertaking 2008](#).

372 [ARTC Hunter Valley access undertaking 2011](#).

373 ACCC Submission 1, page 133.

- sewage transmission services on Sydney Water's sewage reticulation network were declared in 2005 but the access seeker did not pursue access. The declaration was revoked in October 2009 following the enactment of a separate NSW access regime under the *Water Industry Competition Act 2006* (NSW).

Thus, very few infrastructure assets are currently regulated under Part IIIA. For the most part, the bottleneck infrastructure assets that were cited by the Hilmer Review as requiring access regulation have been regulated by industry-specific access regimes. Those regimes are either established under a co-operative legislative scheme of the States and Territories (e.g. the National Electricity Law and the National Gas Law) or schemes established by individual States and Territories (e.g. port regulation).

What is the anticipated role of Part IIIA into the future?

At the time of the Hilmer Review, the infrastructure facilities that were the object of the proposed Regime were identified: electricity wires, gas pipelines, telecommunication lines, freight rail networks, airports and ports. The Hilmer Review concluded that economic gains would be achieved by regulating third-party access to those facilities. To the extent that it was required, access regimes for those facilities have been developed.

The question that arises today is: what is the anticipated role of Part IIIA into the future? More directly, what are the infrastructure facilities for which access regulation will be required under Part IIIA in the future? Unless it is possible to identify those facilities or categories of facilities, 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.

Part IIIA can continue to play a role in potential access regulation of certain of the infrastructure assets cited by the Hilmer Review. The interstate and intrastate freight rail networks are either governed by the Regime or could be transferred from state access regimes to Part IIIA. There is also some potential for airports and ports to become the subject of access regulation under Part IIIA in the future.

However, the regulatory issue that arises in respect of airports and ports is generally monopoly pricing rather than access. 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.

Submissions to the Panel in respect of Part IIIA generally comment on its potential future application to the mining industry.

Different points of view were raised. Anglo American Metallurgical Coal argues that the Regime is an important policy to enable the mining sector to deal with new developments in the market:

Without government regulation, access to critical export infrastructure could be restricted or prevented and drastically affect the ability of Australian miners to remain competitive in the dynamic global industry. (page 2)

BHP Billiton expresses a contrary view. It argues:

Mandating access to nationally significant single user infrastructure can impose substantial operational costs, particularly when the infrastructure is already intensively used. Those costs include:

- significant capacity losses and other operational inefficiencies caused by moving from single user to multi-user operations; and
- delays to expansions, technological innovation and operational improvements. (page 26)

The Panel considers this a very important debate. The mineral resources produced by Australia's mining industry are largely traded in global markets. The global competitiveness of Australian resources depends on the efficiency of the mining sector. A question to be considered is whether the National Access Regime is likely to increase or decrease efficiency within that sector.

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; or
- whether Part IIIA should be confined in its scope to the categories of bottleneck infrastructure cited by the Hilmer Review.

Conclusions of the Productivity Commission

In its recent inquiry the PC considered whether Part IIIA should be retained. It undertook a qualitative cost-benefit analysis. While the PC acknowledged that an economy-wide quantitative cost-benefit analysis would be preferable, it considered that quantifying the economic effect of the National Access Regime was not practical.³⁷⁴

The PC considered that the Regime results in a range of potential benefits. These are:

- improvements to economic efficiency where the Regime reduces monopoly pricing, increases competition in dependent markets, or results in more efficient investment;
- benefits from greater consistency in access regulation across the economy; and
- administrative and compliance cost savings and more effective and efficient infrastructure regulation if the Regime supplants other less effective policy responses, or if its role as an overarching access regime improves other access regimes.³⁷⁵

However, the PC also recognised that the Regime imposes costs:

- access regulation may result in economic distortions including adverse effects on investment in markets for infrastructure services;
- administrative and compliance costs can be substantial; and
- where access regulation is applied, there might be production costs incurred by the infrastructure service provider from coordinating multiple users of its facility.³⁷⁶

The PC concluded that:

Based on a qualitative assessment of the available data, the Commission has determined that the Regime is likely to generate net benefits to the community. The Commission considers that the Regime should be retained, and its scope confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in

³⁷⁴ Productivity Commission 2013, [National Access Regime](#), pages 220-221.

³⁷⁵ Productivity Commission 2013, [National Access Regime](#), pages 215.

³⁷⁶ Productivity Commission 2013, [National Access Regime](#), pages 215-216, 237-240.

dependent markets are likely to outweigh the costs of regulated third party access. Renewed emphasis should be given to ensuring that the Regime better targets the economic problem to reduce the risk of imposing unnecessary costs on the community and deterring investment in markets for infrastructure services for little gain.³⁷⁷

The Panel's view

The National Access Regime in Part IIIA of the CCA was originally established to enable third-party access to identified bottleneck infrastructure where it was apparent that economic efficiency would be enhanced by promoting competition in markets that were dependent upon access to that infrastructure.

The bottleneck infrastructure cited by the Hilmer Review is now subject to a range of access regimes. Those regimes appear to be achieving the original policy goals identified by the Hilmer Review. Today, Part IIIA has only a limited role in the regulation of that bottleneck infrastructure.

The question that arises today is: what are the infrastructure facilities for which access regulation will be required under Part IIIA in the future? Unless it is possible to identify those facilities or categories of facilities, 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.

The recent PC inquiry concluded that the Regime is likely to generate net benefits to the community, but that its scope should be confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third-party access.

The Panel agrees that the scope of the Regime should be confined because of the potential costs of regulation.

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; or**
- **whether Part IIIA should be confined in its scope to the categories of bottleneck infrastructure cited by the Hilmer Review.**

21.2 THE DECLARATION CRITERIA

The PC recommended the following changes to the declaration criteria in Part IIIA:

- that criterion (a) will be satisfied if access to an infrastructure service on reasonable terms and conditions through declaration (rather than access per se) would promote a material increase in competition in a dependent market;
- that criterion (b) will be satisfied where total foreseeable market demand for the infrastructure service over the declaration period could be met at least cost by the facility;
- as an alternative recommendation, that criterion (b) will be satisfied where it would be uneconomical for anyone (other than the service provider) to develop another facility to provide the service; and

³⁷⁷ Productivity Commission 2013, [National Access Regime](#), page 10.

- that criterion (f) will be satisfied if access on reasonable terms and conditions through declaration would promote the public interest.³⁷⁸

No submissions oppose the proposed change to criterion (a) and the change does not appear to be controversial.

A number of submissions address the proposed changes to criteria (b) and (f).

Criterion (b)

As outlined in Box 21.1, declaration criterion (b) is ‘that it would be uneconomical for anyone to develop another facility to provide the service’.

Until the High Court decision in the Pilbara rail access case,³⁷⁹ the NCC and the Tribunal had interpreted criterion (b) as a ‘natural monopoly’ test. Under that test, it would be uneconomical to develop another facility if the facility in question could provide society’s reasonably foreseeable demand for the service at a lower total cost than if it were to be met by two or more facilities.

In the Pilbara rail access case, the High Court rejected that interpretation of criterion (b) in favour of a ‘private profitability’ test:

[r]equiring the decision maker to be satisfied that there is not anyone for whom it would be profitable to develop another facility.³⁸⁰

The High Court explained the economic intuition underlying that test:

If criterion (b) is read as a privately profitable test, there may be cases where there would be a duplication of a natural monopoly. But duplication would occur only if it were profitable for another to develop an alternative facility to provide the service (despite the fact that total market output could be supplied at lowest cost by one facility). It *would* be profitable for another to develop an alternative facility if the new facility is more efficient than the existing facility, for example, because of some form of cost or technological advantage. And if the new facility is *not* more efficient than the existing facility, it is to be doubted that development of the new facility in competition with a natural monopoly would be profitable.³⁸¹

In its recent inquiry the PC concluded that neither the ‘private profitability’ test approved by the High Court nor the ‘natural monopoly’ test previously applied by the NCC was apt. The PC was concerned that the private profitability test might be difficult to assess in practice and give rise to disputes (as argued by the ACCC and the NCC in their submissions to the PC inquiry). On the other hand, the natural monopoly test as traditionally applied was narrowly focused on demand for the service supplied by the relevant infrastructure, rather than total market demand.

The PC concluded that a new test was preferable:

The Commission’s preferred approach to criterion (b) accounts for both the total demand in the market in which the infrastructure service is supplied, and the production costs

378 Productivity Commission 2013, [National Access Regime](#), pages 249-252.

379 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379.

380 *Ibid*, at [77].

381 *Ibid*, at [102].

incurred by infrastructure service providers from coordinating multiple users of infrastructure.

Criterion (b) should be satisfied where total foreseeable market demand for the infrastructure service over the declaration period could be met at least cost by the facility.³⁸²

The PC also concluded that, if the test were to remain as a ‘private profitability’ test, criterion (b) should be amended to exclude any consideration of whether the operator of the infrastructure service was able to duplicate the facility:

If criterion (b) continues to be applied as a private profitability test, the Commission considers that the term ‘anyone’ should not include the incumbent infrastructure service provider. This is because an incumbent service provider would avoid access regulation if it successfully argued that it could profitably duplicate its own facilities (although it would not be required to do so). All else equal, having the incumbent duplicate, or say it will duplicate, its facility would do little to nothing to promote competition.³⁸³

The NCC (page 10), Fortescue (page 1), Anglo American (page 5) and Glencore Coal (page 8) support the PC’s proposed change to criterion (b).

BHP Billiton (page 34) and Rio Tinto Iron Ore (page 2) do not support the PC’s proposal and support instead the ‘private profitability’ test. BHP Billiton states:

[The PC’s] recommendations, if implemented, would introduce further uncertainty regarding the application of Part IIIA declaration regime ... the prevailing ‘private profitability’ interpretation of criterion (b) is strongly preferable ... both as a matter of principle and practice. (pages 33-34)

In weighing up the ‘private profitability’ test against the PC’s recommendation, Professor Hilmer remarked last year that:

The PC approach may do better on public benefit, while the High Court approach may do better on certainty and speed of resolution. Either could work, with the proviso that there be a further review after say 5 years ...³⁸⁴

The Panel agrees with Professor Hilmer’s view. On balance, it considers that the existing ‘private profitability’ test is preferable because it is likely to be easier to assess in practice in comparison to the reformulated natural monopoly test, which would require predictions of total market demand over the proposed period of declaration and an assessment of production costs rising from third-party access to the facility.

The Panel considers it preferable to make the alternative revision suggested by the PC (to exclude the service provider from the assessment of feasible duplication by anyone), and otherwise not to amend criterion (b). The practical operation of the criterion should then be reassessed after a suitable interval of five to 10 years.

382 Productivity Commission 2013, [National Access Regime](#), page 19.

383 Productivity Commission 2013, [National Access Regime](#), page 20.

384 Professor F J Hilmer, 2013 *National Competition Policy: Coming of Age*, Annual Baxt Lecture on Competition Policy page 22.

Criterion (f)

The PC recommended criterion (f) be amended to strengthen the public interest test. It observed:

Given the costs associated with access regulation, it is appropriate that a service can only be declared where the decision maker is satisfied that declaration is likely to generate overall gains to the community. To support this, criterion (f) would be better drafted as an affirmative test that requires the public interest to be *promoted* (as opposed to access being ‘not contrary to’ the public interest). This approach is consistent with the focus of the National Competition Policy reforms and the guiding principle that competition will promote community welfare by increasing national income through encouraging improvements in efficiency.

...

Assessments under criterion (f) should specifically include any effects on investment (positive and negative) in markets for infrastructure services and dependent markets, and the administrative and compliance costs that would arise due to declaration. This change would also require criterion (f) to be framed as a test that assesses factors that affect the public interest with and without declaration — comparable to the access–declaration distinction associated with criterion (a) discussed above.³⁸⁵

Rio Tinto Iron Ore (page 9), the Law Council of Australia (page 47) and the BCA (BCA Main Report, page 78) support the PC’s proposed changes to criterion (f). Rio Tinto Iron Ore says:

[Rio Tinto Iron Ore] agrees with the Productivity Commission’s finding that the current test, which is satisfied if access is not contrary to the public interest, sets too low a hurdle ... Introducing an affirmative public interest test as the Commission recommends will assist to ensure that access regulation is applied only where it is likely to generate net benefits to the community. (page 9)

The NCC (pages 10-11) and AngloAmerican (pages 5-6) do not support the PC’s proposal. The NCC argues that:

There is a genuine risk that raising the hurdle higher will render declaration impossible and as a result nullify any effective threat from declaration as a means of encouraging private settlements of access disputes. (page 11)

A foundational principle of competition policy is that regulatory intervention into markets should only occur where the public interest is promoted. While criterion (a) and (b) are important considerations in assessing whether an infrastructure facility should be declared, they do not exhaust the considerations that may bear upon the public interest in a given case.

In particular, as observed by the PC,³⁸⁶ third-party access may cause inefficiencies in dependent markets (access may negatively affect the ability of the infrastructure owner to coordinate its supply chain in the most efficient manner and may lead to the need to undertake additional capital investment in dependent markets, e.g. larger stockpiles or other facilities). All factors that bear upon the overall public interest should be taken into account in the declaration decision.

385 Productivity Commission 2013, [National Access Regime](#), pages 20-21

386 Productivity Commission 2013, [National Access Regime](#), pages 100-105.

The Panel's View

The declaration criteria in Part IIIA should be targeted to ensure that third-party access is only 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.

21.3 REVIEW OF ACCESS DECISIONS BY THE AUSTRALIAN COMPETITION TRIBUNAL

The NCC must make a decision whether or not to recommend declaration of an infrastructure service within 180 days of receiving the application. The Minister must make a decision whether or not to declare the service within 60 days of receiving the recommendation from the NCC.

The decision of the Minister to declare or not to declare a service is subject to review by the Tribunal. Arbitration decisions by the ACCC in respect of a declared service are also subject to review by the Tribunal.

Since Australia enacted the Trade Practices Act in 1974, the Australian Competition Tribunal (formerly the Trade Practices Tribunal) has fulfilled an important role in both the development and the administration of the law. While the Tribunal is given a number of functions under the CCA, its primary function is as a body of review. It is empowered to undertake merits reviews of various decisions of the ACCC, including authorisations and access arbitrations. Its particular strength lies in its composition. For the purposes of hearing and determining a matter that comes before it, the Tribunal is constituted by a presidential member (who is a Federal Court judge) and two other members who have qualifications in industry, commerce, economics, law or public administration.

In the past few years the role of the Tribunal in reviewing declaration decisions of the Minister and arbitration decisions of the ACCC has been narrowed. By amendments to the CCA made in 2010, the Tribunal's review is largely confined to examining the information taken into account by the NCC (in making a recommendation) or the ACCC (in making an arbitration decision), as the case may be, subject to the ability to request additional information the Tribunal considers reasonable and appropriate.³⁸⁷ Additionally, in the Pilbara rail access case, the High Court ruled that a 'reconsideration' of the Minister's decision to declare or not declare a service was different to the Tribunal's usual functions in a re-hearing and involved 'reviewing what the original decision maker decided and doing that by reference to the material that was placed before the original decision maker'.³⁸⁸

³⁸⁷ *Competition and Consumer Act 2010* sections 44ZZOAAA and 44ZZOAA.

³⁸⁸ *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at [60].

Rio Tinto Iron Ore submits that:

The great strength of the Tribunal process prior to the amendments was that primary evidence ... was tested through cross-examination ... This allowed a much more rigorous examination than is possible before the NCC or Minister and is therefore much more likely to arrive at the correct result. (page 10)

The amendments that were made to the CCA in 2010 were intended to speed up declaration and arbitration decisions, including review by the Tribunal. At that time, the determination of the Pilbara rail access applications had taken many years. It is desirable that access decisions be made in a timely manner.

Equally, though, decisions to declare a service under Part IIIA or determine terms and conditions of access are very significant regulatory decisions. The Hilmer Review expected that such decisions would be infrequent. As noted above, that is also the view of the PC which restated that the scope of Part IIIA should be 'confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third-party access'.³⁸⁹

In circumstances where access declarations and arbitrations are expected to be rare, and the costs of getting the decision wrong are likely to be high, there is much to be said for facilitating a thorough examination of the costs and benefits of the decision while avoiding unnecessary delays in decision-making. An appropriate balance can be achieved between empowering the Tribunal to undertake merits reviews of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, while maintaining suitable statutory time limits for the review process.

The Panel's view

The Australian Competition Tribunal fulfils an important role in both the development and the administration of Australia's competition law.

Decisions to declare a service under Part IIIA, or determine terms and conditions of access, are very significant economic decisions where the costs of getting the decision wrong are likely to be high.

The Panel favours empowering the Tribunal to undertake merits review of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, while maintaining suitable statutory time limits for ess.

389 Productivity Commission 2013, [National Access Regime](#), page 2.

PART 5 — Competition institutions

This Part asks whether our current competition institutions are fit for purpose to operate in the long-term interests of consumers. We also examine the best institutional structure to take forward future reforms to competition policy.

The institutions which oversee the competition framework undertake four broad functions.



At the Commonwealth level, competition policy is implemented through the Australian Competition and Consumer Commission (ACCC), the National Competition Council (NCC), the Australian Competition Tribunal and the Federal Court of Australia. In addition, state and territory regulators such as the NSW Independent Pricing and Regulatory Tribunal (IPART) implement aspects of competition policy.

Under National Competition Policy (NCP), a range of new regulatory institutions were created. For example, the Australian Energy Regulator (AER) and the Australian Energy Market Commission (AEMC) perform functions under a legislative framework focused on the long-term interests of consumers.

The Panel has also considered the institutional arrangements that will be needed to implement the reform agenda coming out of this Review. We identify key factors for the success of a future competition institution, including the need for a national approach, with 'buy in' from all Australian governments, and the ability of the institution to provide independent advice on competition policy.

22 INSTITUTIONAL STRUCTURES FOR FUTURE COMPETITION POLICY

22.1 LESSONS FROM NCP

The NCP reforms adopted by the Commonwealth and state and territory governments in 1995 went beyond amendments to the *Competition and Consumer Act 2010* (CCA) (then the *Trade Practices Act 1974* (TPA)) and included:

- reforms to public monopolies and other government businesses, including structural reforms and competitive neutrality requirements;
- a national access regime to provide third-party access to essential infrastructure; and
- a legislation review program to assess whether regulatory restrictions on competition are in the public interest.

This required an economy-wide reform agenda with a national focus. It also required action from Commonwealth and state and territory governments, at times in concert (for example, the creation of a national energy market) but more frequently required individual governments to make or amend their own laws (for example, the legislation review program and structural reforms to public monopolies).

To reflect this national, economy-wide focus, the intergovernmental agreements between the Commonwealth and the state and territory governments that underpinned NCP contained a number of governance arrangements including:

- the agreement to a set of competition elements, with each jurisdiction determining its own priorities and undertaking its own legislation review program;
- the establishment of the NCC that prepared public assessments of the performance of all governments in meeting their NCP commitments and provided advice to the Commonwealth Treasurer on competition payments to the States and Territories. The NCC also provides recommendations to Commonwealth and state and territory ministers in relation to third-party access to infrastructure; and
- competition payments from the Commonwealth to the States and Territories in recognition that the Commonwealth would gain more revenue than the States and Territories from the reforms.³⁹⁰

As the PC noted in its 2005 Review of National Competition Policy Reforms:

Distinguishing features of NCP were its national focus, extensive agenda, agreed framework of reform principles, commitments to timeframes, with contingent financial payments from the Australian Government to the States and Territories.³⁹¹

390 The last competition payments to the States and Territories were made in 2005-06. Since then, the role of the NCC has been limited to making recommendations on third-party access to infrastructure.

391 Productivity Commission 2005, *Review of National Competition Policy Reforms*, page 127.

A number of submissions state that an explicit institutional framework will again be necessary to progress the competition policy agenda (for example, BCA Summary Report, page 26 and NSW Government, page 10).

The Panel agrees that establishing institutional arrangements to implement the reform agenda coming out of this Review will be crucial to reinvigorating competition policy. The views put to the Panel are in general agreement that the lessons from NCP demonstrate the importance of an institutional framework to deliver competition policy reform.

22.2 A NATIONAL APPROACH TO COMPETITION POLICY

A national approach

Submissions from businesses, consumers and government argue that the national, intergovernmental approach adopted under NCP must be reinvigorated and that this requires an institutional competition policy adviser.

But the national approach under NCP was importantly accompanied by flexibility provided to each jurisdiction to determine its priorities consistent with the agreed competition policy principles.

The issues that have been highlighted in this Draft Report fall under the responsibility of all three levels of government — Commonwealth, state and territory and local government. There are also a number of areas that will require a cross-jurisdictional approach.

But the ‘starting point’ for reform varies across jurisdictions. Reflecting the different structural features of the state and territory economies and different cultural and social priorities, progress under NCP varied across the jurisdictions. This is reflected both in the issues that the jurisdictions sought to prioritise and their level of success in achieving outcomes. These differences will also affect the priorities that the jurisdictions seek to pursue going forward.

Successful competition policy reform will require commitment and effort from all three levels of government. While there may be a leadership role for the Commonwealth in addition to taking action in its own sphere, leadership will also be required from the States and Territories and local government.

Independent competition policy advice

The independence of the NCC was seen as an important contributor to the success of NCP and identified as an equally important component of any institutional arrangements put in place to drive future competition policy.

There are arguments put in submissions for a broad role to be performed by such a body. The NSW Government sets out a number of roles for an independent body:

- independent monitoring of progress in implementing reforms;
- periodically identifying areas for competition reform across all levels of government;
- making recommendations to governments on areas of reform; and
- playing an advocacy role. (pages 10-11)

All submissions made on this issue stress the need for independence — that the functions which could also be performed by existing bodies or by a specially created one be separate from the policy and/or regulatory bodies that would be carrying out or regulating the specific reforms.

The Panel also considers that transparency will be as important as independence. Transparency ensures that decisions and processes are open to public scrutiny. The PC discusses some of the benefits of a transparent process, including that it can aid public understanding of the benefits of reform:

A properly constructed, transparent review process can generate stakeholder engagement and promote public awareness and acceptance of the need for reform, the issues and trade-offs associated with different policy approaches, and the resultant community wide benefits. (page 10)

Drawing on its past experience in implementing NCP, the NCC notes that assessment and accountability processes, including transparency, were one of three key elements behind the success of NCP (page 7).

Given the wide-ranging potential impacts of competition policy on both consumers and businesses, both advocacy and education, and independent and transparent oversight of implementation will be important in helping governments meet targets, encouraging public understanding and engagement, and guarding against bias.

The NCC, as a national body, played a vital role as part of NCP. However, as noted in [Chapter 8](#), the review and reform of legislation which may impede competition has stalled following the conclusion of the NCC's role in reviewing legislation. The NCC now retains only a limited role in relation to advising ministers on infrastructure and gas access matters. It has not maintained the capacity to readily step into a broader role again.

Competition payments

A significant feature of NCP was competition payments made by the Commonwealth to the state and territory governments to recognise that the Commonwealth received a disproportionate share of increased revenue from the larger national income resulting from NCP. This was highlighted in an analysis of NCP undertaken by the PC (then the Industries Commission) that estimated the potential gains from NCP and how it would be reflected in revenue at the Commonwealth, state and territory levels.³⁹² The payments were made, or withheld, by the Commonwealth Treasurer following advice from the NCC.

The NSW Government comments that:

[vertical fiscal imbalance] means that the Commonwealth would receive the largest revenue benefit from the economic growth arising from competition-enhancing reforms (via the increase in tax revenue), though for many types of reform, the expense associated with undertaking reform is largely borne by State governments. (page 12)

Over the course of the NCP from 1997-98 to 2005-06, a total of \$5.3 billion was paid to the States and Territories and \$200 million was withheld.

The Panel met with representatives of the States and Territories which all argued that competition payments contributed positively to their ability to implement reform. While the quantum of the payments was not large compared to total state and territory revenues, it was consistently argued that the payments provided an additional argument that could be used to support reform. In

³⁹² Industry Commission 1995, *The Growth and Revenue Implications of Hilmer and Related Reforms: A report by the Industry Commission to the Council of Australian Governments*.

particular, it was put to the Panel that the possibility of payments being withheld was important to maintain support in the face of opposition to reform.

The NCC's assessment of competition payments is that they:

[i]n several cases stiffened governments' resolve to undertake reform. Fiscal penalties, in particular, focused attention on failed or excessively delayed reforms. (page 8)

The message from all those making submissions to the Panel on the issue of competition payments is that they assisted governments in delivering on their reform agendas. However, their effectiveness across the NCP agenda was limited by not applying to the Commonwealth and not consistently being applied to local government.

They also at times distorted the public message around the need for reform, creating a focus on withholding payments rather than the benefits that would flow from reform. This appears to underlie the position of many stakeholders that progress with competition policy reform waned when the competition payments ceased. Discerning whether this is the case is complicated by the introduction of the Seamless National Economy reform agreement that followed NCP. While this also included incentive payments, it was overshadowed by the much larger changes in funding for human services.

There have been a number of calls for competition payments to be a feature of any institutional framework going forward in order to recognise the potentially uneven distribution of reform effort and reward.

The NSW Government recommends that:

The provision of financial incentives from the Commonwealth to the States would help lock in reforms and share the economic growth and revenue benefits (which would largely be captured by the Commonwealth tax bases) in a way that is proportionate with reform effort and outcomes. (page 17)

The BCA also argues that:

A proposed new incentive model is for a new intergovernmental agreement to be structured essentially as a joint venture where all jurisdictions contribute to the cost of reforms but all share more evenly in the fiscal benefits through productivity payments. (BCA Main Report, page 106)

It is the focus on sharing the benefits which is a crucial feature of the NCP payments and that should be reinstated in any future arrangements. The payments should not be represented as an 'incentive' or a 'bribe' for the states and territories to undertake reform. Such an approach has the potential to direct the focus away from the benefits of reform.

However, as with the NCP reforms, there is a likelihood that the benefits of reform will not necessarily flow in proportion to the effort put into pursuing and implementing reform. It is therefore reasonable to facilitate a process to re-balance any such revenue effects.

The argument put by the PC (page 24) that any effects of vertical fiscal imbalance are better addressed directly than remediated through a competition policy payments process is laudable. However, the Panel wants to avoid vertical fiscal imbalance acting as a barrier to a set of reforms that have the potential to significantly enhance the long-term interests of consumers.

Market studies

While the competition laws serve an important purpose in discouraging anti-competitive behaviour, there are occasions where competition concerns arise within a market that do not fall within the bounds of the law. In these cases, a comprehensive review of the market can help policymakers better understand the competitive landscape, and determine whether policy changes are needed.

A market study is one means through which policymakers can delve deeper into the workings of a market in an effort to identify changes that would lead to more competitive outcomes. In its guidance on market studies, the former UK Office of Fair Trading noted that market studies are:

[E]xaminations into the causes of why particular markets are not working well for consumers, leading to proposals as to how they might be made to work better. They take an overview of regulatory and other economic drivers in a market and patterns of consumer and business behaviour.

As well as taking a look at particular markets, market studies can relate to practices across a range of goods and services, for example, doorstep selling.³⁹³

In addition to observing businesses operating in a market, market studies can play a very important role in examining the role of government. The former UK Office of Fair Trading also noted:

As well as investigating adverse effects on competition caused by business and consumer behaviour, market studies can also examine restrictions on competition that can arise through Government regulation or public policy.

...

As government regulation and policy are not typically susceptible to enforcement action, market studies can be the best response to concerns regarding markets where public restrictions may be distorting a market or chilling competition.³⁹⁴

The lack of a formal market studies power in Australia is generally in contrast with other comparable economies. When looking at overseas comparisons, it is possible to make some generalisations:

- market studies are most often undertaken by the competition regulator, as a complement to its broader competition enforcement and education priorities;
- most market studies bodies possess mandatory information-gathering powers — there will usually be policies about how the information collected as part of a market study will be used;
- most market studies are published, allowing for a broader public discussion of the policy and recommendations relating to the market in question; and
- a common outcome of market studies is recommendations for changes to legislation or government policies — as is the case with PC inquiry recommendations and state and territory regulator recommendations.

Reflecting overseas experience, the ACCC notes that it would like the ability to initiate market studies for various reasons:

393 Office of Fair Trading 2010, [Market Studies: Guidance on the OFT Approach](#), page 2

394 Ibid, pages 2-4.

- as a lead-in to competition or consumer protection enforcement action when anti-competitive behaviour is suspected in a sector but the exact nature and source of the problem is unknown;
- to identify a systemic market failure (instead of ad hoc compliance action against individual firms) and to better target a response (whether, for example, through enforcement action or compliance education);
- to identify market problems where affected parties are disadvantaged and either have difficulty making a complaint to the ACCC or accessing the legal system to take private action;
- to address public interest or concern about markets not functioning in a competitive way; the market study could either confirm such concerns, and propose some solutions, or reveal them to be unfounded; or
- to fact-find to enhance the ACCC's knowledge of a specific market or sector, particularly where a market is rapidly changing, and raises issues across the ACCC's functions. (ACCC Submission 1, page 138)

While international experience favours embedding a market studies function within the competition regulator, this approach may lead to conflicts between policy and regulation/enforcement functions. As the Monash Business Policy Forum states, 'separation of policy design and implementation is key to effective regulatory agencies ... regulators should be explicitly excluded from policy development'. (pages 13 and 17)

Typically, a market study will seek to understand the workings of a market with a view to identifying any factors that prevent or distort competition, efficiency, or consumer welfare.

The Panel favours an approach to market studies that is clearly separate from the enforcement function. The market studies function would therefore be separate from the necessarily adversarial nature of enforcement under the CCA. It would seek instead to focus on understanding the range of factors — government or otherwise — that shape the level of competition in a market.

A market study should consider the framework, structure and rules which govern a market. Recommendations could be made to implement changes in any of these areas, either through changes to regulation that directly determine the shape of the market, or to regulation that has the unintended consequence of reducing competition in the market, for example, by affecting entry into or exit from the market.

A market study is not necessarily conduct-based and therefore is not a precursor to enforcement action. Rather, where there are conduct concerns, the market studies body could refer its concerns to the ACCC for appropriate investigation.

In Australia, there is no dedicated market studies body to examine the competitive dynamics of particular markets in a systematic way. Currently, inquiries into these issues are conducted on an ad hoc basis by, for example, the ACCC, the PC or state and territory regulators.

The ACCC's submission notes its role in market studies:

The ACCC currently has some scope to conduct market studies. Under section 28 of the CCA, the ACCC has functions in relation to dissemination of information, law reform and research although the information gathering powers set out in the CCA do not apply to this section. Under Part VIIA of the CCA, the Minister may require the ACCC or another

body to hold a price inquiry. The ACCC may also hold such inquiries with the Minister's approval. (ACCC Submission 1, page 139)

While the ACCC, the PC and state and territory regulators have each conducted studies into particular markets, none of these bodies is specifically designed to conduct market studies. Having the ACCC conduct market studies could encourage the perception that they are a precursor to enforcement action.

The usefulness of a market study will depend on the information acquired. Most market studies bodies in other countries have mandatory information-gathering powers. The rationale for mandatory powers is that they help to ensure that a market study builds an accurate picture of the market.

However, mandatory information-gathering powers are a significant legal imposition and there is a presumption that they should be used sparingly.

The PC has information-gathering powers in relation to its inquiries under section 48 of the *Productivity Commission Act 1998* (Cth) but generally chooses not to use them, relying instead on information voluntarily submitted by interested parties. That said, the ability of the PC to draw upon these powers if required may act as an incentive for parties to provide information voluntarily.

On balance, the use of mandatory information-gathering powers in market studies may create an adversarial environment, where participants show reluctance to cooperate and share information with the body. The approach adopted by the PC — inviting interested parties to comment on issues and undertaking independent research, while having the power to compel production of information — appears to achieve desired outcomes without the need to invoke mandatory legal powers.

Outcomes of studies

The former UK Office of Fair Trading paper notes that options available at the conclusion of their market studies include:

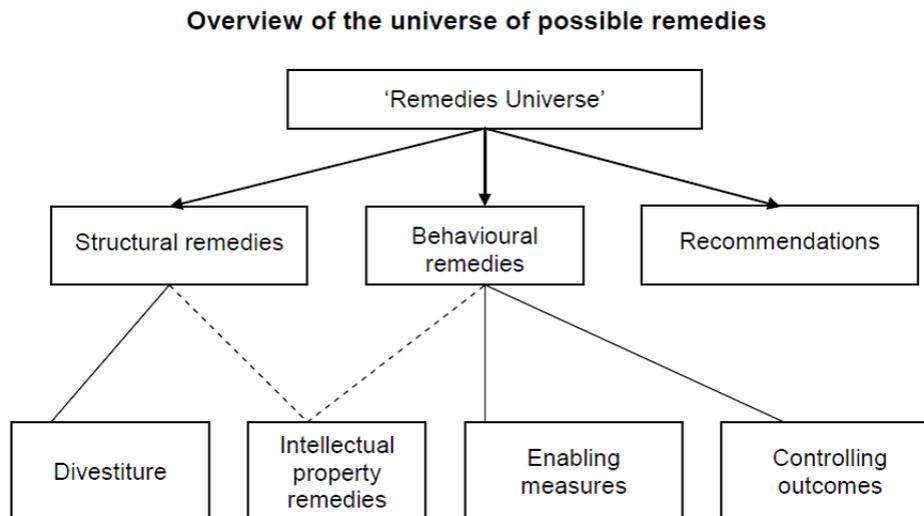
- improving the quality and accessibility of information for consumers
- encouraging businesses in the market to self-regulate
- making recommendations to the Government to change regulations or public policy
- taking competition or consumer enforcement action, or
- making a market investigation reference to the [relevant authority].³⁹⁵

Importantly, findings and recommendations presented to government allow the market studies body to dispel myths about the market and determine the effects on consumers without limiting the reform options for government. Ultimately, this provides government with valuable information about the nature and extent of any problems but leaves maximum flexibility for policy responses.

The Panel notes an important distinction between market studies and market investigations as undertaken in the UK. While market studies will generally result in recommendations and/or findings, market investigations go a step further by allowing the market investigation body to impose a wide range of legally enforceable remedies.

³⁹⁵ Office of Fair Trading 2010, [Market Studies: Guidance on the OFT Approach](#), page 3.

The former UK Competition Commission guidelines provide an overview of the possible outcomes from a market investigation:³⁹⁶



While CHOICE’s submission supports an additional market investigations function (page 56), the ACCC disagrees, noting that it does not support the ability of a market investigations body to impose legally enforceable remedies (ACCC Submission 1, page 139). The ACCC view is preferable as it is consistent with Australia’s legal landscape which gives Parliament the power to make laws and the judiciary the power to impose remedies.

22.3 A NEW COMPETITION POLICY INSTITUTION

The Panel believes that reinvigorating competition policy reform requires leadership from an institution specifically constituted for the purpose. Leadership encompasses advocacy for competition policy, driving implementation of the decisions made and conducting independent, transparent reviews of progress.

The NCC, which oversaw the NCP, now has a considerably diminished role. It has been put to the Panel that the NCC no longer has the capacity to provide leadership in this domain. [Draft Recommendation 46](#) proposes that the remaining functions of the NCC, associated with the National Access Regime, be transferred to a new national access and pricing regulator. The NCC could then be dissolved.

The PC is the only existing body with the necessary credibility and expertise to undertake this function, given its role as an independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. But the PC’s work is driven by the Commonwealth and, if it were to have the competition policy function as well, its legislation and governance would need significant change.

The AEMC is an example of an independent, national organisation, operating in an area of state government responsibility that has a governance structure supported by both the Commonwealth and the States and Territories.

³⁹⁶ Competition Commission 2013, [Guidelines for market investigations: Their role, procedures, assessment and remedies](#), page 79.

The Panel considers that a new national competition body, the Australian Council for Competition Policy (ACCP), should be established with a mandate to provide leadership and drive implementation of the evolving competition policy agenda.

The establishment of governance arrangements to implement reforms must be undertaken in the context of Australia's federal structure. Many of the competition policy reforms outlined in this Draft Report are overseen by state and territory governments. All Australian governments must have confidence in the governance arrangements for a reinvigorated round of competition policy reform to succeed.

The ACCP cannot be accountable to just one jurisdiction but must be accountable to them all. This suggests an intergovernmental agreement and oversight by a specific Ministerial council. Given the economy-wide nature of competition issues, this responsibility should be assigned to Treasurers.

An intergovernmental agreement would set out the functions of the ACCP and the process of appointing its members. While there should be scope for members to be nominated and appointed by state and territory governments, their role would not be to represent jurisdictional interests, but rather to view competition policy from a national perspective.

The secretariat should be independent of any one government and there may be merit in rotating the right to nominate the Chair.

Functions of the ACCP

The proposed ACCP should have a broad role. In particular, the ACCP should advise governments on how to adapt competition policy to changing circumstances facing consumers and business. The ACCP should therefore develop an understanding of the state of competition across the Australian economy and report on it regularly.

There needs to be a clear advocate for competition policy in Australia's institutional structure. Too often this has fallen by default to the ACCC, which can be an uneasy role for a regulator to fulfil. The Panel sees advocacy for competition as a central function of the ACCP.

The ACCP should also act as an independent assessor of progress on reform, holding governments at all levels to account. Priority areas for reform identified in this Draft Report could form an initial program of work for the ACCP.

ACCP — market studies

The effectiveness of the ACCP could be strengthened by assigning it a market studies function which would create a convenient, consistent, effective and independent way for governments to seek advice and recommendations on recurrent and emerging competition policy issues.

Given the potential for conflicts between the ACCC's investigation and enforcement responsibilities and the scope of a market studies function, the Panel believes it is appropriate to vest such a power with the ACCP rather than the ACCC.

The market studies function would have a competition policy focus and complement but not duplicate the work of other bodies such as the PC. For example, States and Territories could call upon the ACCP to undertake market studies of the provision of human services in their jurisdiction as part of implementing principles of choice and diversity of providers.

The use of mandatory information-gathering powers can help to ensure that a market study builds an accurate picture of the market but, on the other hand, may create an adversarial environment where participants show reluctance to cooperate and share information with the market studies body. The approach adopted by the PC — inviting interested parties to comment on issues and undertaking independent research — appears to achieve desired outcomes without the need to invoke mandatory legal powers.

A principle recognised in the NCP was that there were different circumstances in different jurisdictions that could lead to different approaches to either the scope or timing of reform. The Panel, in agreeing with this principle, considers that the ACCP should be able to receive referrals from jurisdictions collectively as well as individually.

This would ensure that each jurisdiction has the freedom to identify its own concerns, while allowing the ACCP the flexibility to consider whether those concerns have broader or cross-jurisdictional impacts.

In addition, the Panel considers that all market participants, including small business and regulators, should have the opportunity to raise issues they would like to see become the subject of market studies. Funding could be set aside in the ACCP budget to undertake studies in addition to those referred by the Ministerial Council. The decision would rest with the ACCP as to which of these outside requests it might take up, and it would not be obliged to agree to all requests.

The Ministerial Council would need to oversee priorities and resourcing so that the ACCP has the capacity to focus on the priorities of governments and market participants.

The competition policy environment is not static. New technologies can raise new issues and resolve older ones. The Panel considers that governments would benefit from an annual analysis of developments in the competition policy environment.

This would include more detail on the specific priority issues or markets that should receive greater attention, and could include recommending review mechanisms, particularly for more heavily regulated markets, to ensure more burdensome or intrusive regulatory frameworks remain fit for purpose.

Commenting on best practice and international developments would provide opportunities for governments to consider whether the outcomes of different approaches to reform in other jurisdictions apply within their own.

ACCP — competition payments

There is widespread support for competition payments that were made by the Commonwealth to state and territory governments to recognise that the Commonwealth received a disproportionate share of the increased revenue flowing from the NCP reforms.

While the quantum of the payments was not large compared to total state and territory revenues, the Panel consistently heard that their existence provided an additional argument that could be used to support reform. The Panel was also told, however, that their effectiveness was limited by not being applied to the Commonwealth and not consistently being applied to local government.

On the other hand, as noted by the PC, a focus on payments and penalties ‘has from time to time almost certainly misled the community as to the main rationale for the reform ...’³⁹⁷ This appears to underlie the observation made by many stakeholders that progress with competition policy reform waned once competition payments ceased.

That said, there is a case to be made that the benefits of reform, including any fiscal dividend, should be commensurate with the reform effort made. The differing revenue bases of the Commonwealth and the States and Territories mean that revenue may not flow in proportion to reform effort.

The PC 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. The ACCP could then assess whether reforms had been undertaken to a sufficient standard to warrant compensation payments. That assessment would be based on actual implementation of reforms, not on the basis of undertaking reviews or other processes.

397 Productivity Commission 2005, *Review of National Competition Policy Reforms*, page 152.

The Panel's view

The Panel believes that reinvigorating competition policy reform requires leadership from an institution specifically constituted for the purpose and therefore proposes establishing the Australian Council for Competition Policy (ACCP) with a mandate to provide leadership and drive implementation of the evolving competition policy agenda. The establishment of governance arrangements to implement reforms must be undertaken in the context of Australia's federal structure.

The Panel sees advocacy for competition as a central function of the ACCP, and that it should act as an independent assessor of progress on reform.

The effectiveness of the ACCP could be strengthened by assigning it a market studies function which would create a convenient, consistent, effective and independent way for governments to seek advice and recommendations on recurrent and emerging competition policy issues.

The competition policy environment is not static. New technologies can raise new issues and resolve older ones. The Panel considers that governments would benefit from an annual analysis of developments in the competition policy environment, which could be undertaken by the ACCP.

There is a case to be made that the benefits of reform, including any fiscal dividend, should be commensurate with the reform effort made. The differing revenue bases of the Commonwealth and the States and Territories mean that revenue may not flow in proportion to reform effort.

The PC 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. The ACCP could then assess whether reforms had been undertaken to a sufficient standard to warrant compensation payments. That assessment would be based on actual implementation of reforms, not on the basis of undertaking reviews or other processes.

23 ENFORCEMENT OF COMPETITION LAW

Enforcement of competition law is crucial to consumers, and therefore to the performance of the economy.

The primary enforcement body is the ACCC, which was created in 1995 by merging the Prices Surveillance Authority and the Trade Practices Commission, with some functions from the telecommunications regulator Austel. The ACCC retained the Trade Practice Commissions' Commonwealth consumer protection enforcement functions. It has also added the AER as a constituent component.

Many submissions comment on the role, structure and effectiveness of the ACCC as the central regulatory body for competition law. The issues that submissions raise include:

- whether the ACCC should be responsible for enforcement of both competition law and consumer protection law or whether those responsibilities should be separated;
- whether the ACCC decision making would be improved by changes to its governance structure; and
- whether the ACCC uses the media responsibly.

Submissions also address whether access and pricing regulatory functions should be undertaken by a body separate to the ACCC.

23.1 COMPETITION AND CONSUMER PROTECTION FUNCTIONS

The ACCC argues that one of the core strengths of Australian competition policy is that competition enforcement, consumer protection and economic regulation are combined within a single, economy-wide body with the objective of making markets work to enhance the welfare of Australians (ACCC Submission 1, page 130). Having a single body fosters a pro-market culture, facilitates co-ordination and depth across the functions, ensures small businesses do not fall between the cracks, provides a source of consistent information to business and consumers about their rights, and provides administrative savings and skill enhancement through the pooling of information, skills and expertise (ACCC Submission 1, page 131).

The link between competition and consumer functions has been described as competition law keeping the options open, while consumer protection laws protect the ability of consumers to make informed choices among those options.³⁹⁸

However, the Monash Business Policy Forum argues that the competition and consumer functions should be separate.

[C]ombining competition and consumer protection in a single regulatory agency is inconsistent with best practice design of regulatory institutions. (page 33)

Competition regulation is argued to be 'neutral' with the regulator an umpire in day-to-day market activities, while consumer protection rebalances the market towards consumers. In particular the Monash Business Policy Forum notes that consumer protection matters can be used to raise the

398 Netherlands Competition Authority 2010, *Competition Enforcement and Consumer Welfare: Setting the Agenda* Preamble, page 3.

agency's public profile to the detriment of competition enforcement and that there are likely to be internal divisions of culture. They quote Bill Kovacic, a former Chairman and Commissioner of the US Federal Trade Commission:

During the [Federal Trade Commission's] deliberations over Google's merger, some Commission officials and staff advocated that the agency use the merger review process to exact concessions from the merging parties concerning their privacy policies and data protection practices. (page 33)

The Panel acknowledges that there are synergies in having competition and consumer functions in the one institution. Within the current structure of the ACCC, the market investigation skills of staff are relevant to a range of the organisation's roles and functions, from the general competition and consumer protection, compliance and enforcement roles to specific competition functions such as mergers, authorisations and notifications. This facilitates staff movement across the agency, the building up of expertise and a common approach to issues.

The OECD identifies three major advantages of retaining the competition and consumer functions in one institution:

- gains from treating competition and consumer policy as instruments that can be flexibly combined and more generally managed within a single portfolio of policy instruments;
- gains from developing and sharing expertise across these two areas; and
- gains in terms of the wider visibility to the community, and understanding in the community, of competition and consumer issues.³⁹⁹

Retaining a combined competition and consumer body is supported by a range of consumer groups that focus on the ACCC's record of being an active competition and consumer regulator.

The Australian Communications Consumer Action Network submits that it sees the competition and consumer protection roles of the ACCC as complementary and those roles 'as inextricably linked and important to maintain within the same organisation.' (page 9) CHOICE notes one of the benefits of having a combined competition and consumer regulator is avoiding regulatory over-capture. (page 55)

The question for the Panel is whether the claimed cultural benefits of separate regulators outweigh the synergy benefits from combining competition and consumer functions. The Panel is not satisfied, on balance, that there would be an overall benefit in separating the competition and consumer functions. Small businesses, in particular, which sometimes have the characteristics of businesses and at other times of consumers, could 'fall through the cracks'.

For example, currently the ACCC can assess a complaint of anti-competitive behaviour against the misuse of market power provisions, the business unconscionable conduct provisions, or the operation of a relevant code. Having these considerations split across different agencies could lead to additional administrative complexity or, far worse, to duplicate prosecutions of the same conduct under separate parts of the CCA by separate agencies.

399 OECD Policy Roundtables 2008, *The Interface between Competition and Consumer Policies*.

The Panel's view

The Panel considers that the ACCC should continue to combine competition and consumer regulation.

There are synergies from having the competition and consumer functions within the one regulator. For example, fair trading issues may raise concerns about misuse of market power, unconscionable conduct or unfair contract terms. Having one regulator overseeing all of these functions allows the different courses of action to be considered simultaneously. It also encourages the building of expertise.

We recognise that with these synergies come tensions, and note that the ACCC should continue to carefully balance its competition-related regulatory tasks with its consumer protection role.

23.2 ACCC ACCOUNTABILITY AND GOVERNANCE

The ACCC is established under the CCA as a statutory corporation. It is governed by a chairperson and other persons appointed as members of the Commission (usually called commissioners). Decisions are made by the chairperson and commissioners meeting together (or as a division of the Commission), save where a power has been delegated to a member of the Commission. The Commission is assisted by its staff. In practice, the chairperson and commissioners are appointed on a full-time basis; in other words, they perform an executive role.

The ACCC is subject to external parliamentary scrutiny through the Senate Economics References Committee, which examines the operations and performance of all Treasury portfolio agencies as part of the Senate Estimates process that occurs up to three times each year. The ACCC's annual report is also tabled in parliament.

Other bodies reviewing the activities of the ACCC include tribunals and courts and the Commonwealth Ombudsman. The ACCC and its staff must also comply with a range of other general rules and guidance such as the *Public Governance, Performance and Accountability Act 2013*, Legal Services Directions,⁴⁰⁰ Commonwealth freedom of information framework⁴⁰¹ and general obligations on public service employees.⁴⁰²

The ACCC, like other executive institutions, is issued with a statement of expectations from the Government, most recently in 2014.⁴⁰³ This sets out the Government's expectations about the role and responsibilities of the ACCC, its relationship with the Government, issues of transparency and accountability and operational matters. The ACCC has responded with its statement of intent.⁴⁰⁴

The ACCC was constituted in 1995 following the implementation of the Hilmer Review. Since that time the ACCC has had three Chairs and a number of commissioners. Over that period the economy has become increasingly complex and the ACCC's role has expanded significantly. While the ACCC has been a successful agency, the question for the Panel is whether there are enhancements that can be made to its governance structure to ensure it continues to perform well into the future.

400 [Legal Services Directions 2005](#).

401 *Freedom of Information Act 1982*.

402 *Public Service Act 1999*.

403 See www.accc.gov.au/system/files/ACCC_Statement_of_expectations.pdf.

404 See www.accc.gov.au/system/files/ACCC%20Statement%20of%20Intent%20-%202026%20June%202014.pdf.

The Review's remit includes considering the governance structure of the ACCC and whether improvements may be made to strengthen decision making. Given the fundamental role that 'checks and balances' play in good governance structures it is appropriate to consider whether the current checks and balances are sufficient.

Mr John Dahlsen notes:

Governance arrangements could clearly be improved to establish a chain of accountability superior to what currently exists. It is possible that the strong, independent and non-conflicting influence of directors with clearly mandated powers could improve the situation.⁴⁰⁵ (page 131)

The Panel notes there are other governance structures available for government bodies. The Panel has had particular regard to the Reserve Bank of Australia (RBA) given that it is a body that is independent and has a reputation for using its independence. It is trusted in the way that it undertakes its responsibilities and its decisions are seen to be taken in the interests of Australia, even though any individual decision will have 'winners and losers'.

The RBA has its own source of revenue that can bolster its independence. That cannot be replicated for the ACCC. But there are other features that could be applied to the ACCC. The Governor of the RBA is generally appointed from within the agency, which provides cultural continuity. The Governor is also asked to appear before a House of Representatives Committee twice each year for a broad-ranging discussion of the RBA's approach to implementing its responsibilities.

The RBA also has a Board with independent, non-executive directors. The Board brings business and academic experience to the governance of the RBA. It also provides an alternative source of advice and oversight from that generated within the RBA, and so can provide a check against 'group think'.

Adding a Board to the ACCC could strengthen the checks and balances on the ACCC's internal decision-making by bringing external perspectives to bear, and could also strengthen the accountability of the ACCC executive to the broader community as represented by external members of the Board.

The Panel has contemplated two options to introduce this diversity of views into the decision-making of the ACCC.

The first is to replace the current Commission with a Board, comprising a number of members akin to the current commissioners, who would work full-time in the operations of the ACCC, and a number of independent non-executive members with business, consumer and academic expertise, who would not be involved in the day-to-day functions of the ACCC. This option would strengthen accountability of the ACCC to the broader community as represented by the non-executive members of the Board.

The Panel has no strong view on whether the Board should be chaired by an executive or non-executive member.

An alternative means of adding to the diversity of views may be through retaining the current Commission structure but adding an Advisory Board without decision-making powers. The Advisory Board would comprise independent non-executive directors with business, consumer and academic

405 Mr John Dahlsen provided a confidential submission to the Review, but gave his permission for his submission to be quoted in this Draft Report.

expertise and would advise the Commission on operational and administrative policies. The Advisory Board would be chaired by the Chair of the Commission, with other commissioners also potentially serving as members.

The Panel considers that, whichever option may be adopted, a fundamental requirement is the appointment of non-executive members who would not have other roles in the ACCC or its committees and who would be independent of the day-to-day operations of the agency.

The ACCC could also report regularly to a broadly-based committee of the Parliament, such as the House of Representatives Standing Committee on Economics, to build profile and credibility for the agency as well as to subject it to additional accountability to the Parliament.

The Panel's view

ACCC decision-making is sound, but the Panel considers there are benefits from considering options to further strengthen governance and accountability.

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 Panel is also of the view that the ACCC should not undertake competition policy advocacy and education, as this may compromise stakeholder perceptions of impartiality.

23.3 ACCC AND THE MEDIA

The ACCC has a long history of using the media to raise awareness of competition issues. However, this important educative role can cross over into advocacy of particular policy positions. An advocacy role can compromise stakeholders' perceptions about the impartiality of the ACCC in its enforcement of the law. This is reflected in the comment from the BCA that:

[B]usiness remains concerned about the potential of investigations being prejudiced by the media conduct of interested parties, including the ACCC. (BCA Summary Report, page 24)

As discussed previously, there is a role for competition policy advocacy and education. The Panel considers it desirable that this function not be undertaken by the ACCC. The ACCC undertaking such an advocacy role can compromise stakeholders' perceptions about the impartiality of the agency in its administration and enforcement of the competition law.

However, the ACCC would continue to have a role in communicating to the public through the media, including explaining enforcement priorities, educating business about compliance, and publishing enforcement outcomes.

The Dawson Inquiry recommended that the ACCC develop a media code of conduct and the Panel notes a reference in the Dawson report that '[t]he ACCC was conscious of the concerns expressed and supported the introduction of such a code in order to address them'.⁴⁰⁶ The Panel understands that this recommendation has not been adopted.

The Panel believes that the ACCC should establish, publish and report against a Media Code of Conduct. This should counter the perception of partiality on the part of the ACCC, especially in enforcement actions.

The Panel's view

The Dawson Inquiry's recommendation that the ACCC develop a media code of conduct remains appropriate to strengthen the perception of the ACCC's impartiality in enforcing the law.

406 Trade Practices Act Review Committee 2003, *Review of the Competition Provisions of the Trade Practices Act*, Recommendations 12.1 and 12.2, page 182.

24 ACCESS AND PRICING REGULATION

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.⁴⁰⁷

Economic regulatory functions are currently undertaken by the ACCC and by state and territory regulators.

The ACCC regulates access to and pricing of national infrastructure services such as telecommunications, energy (through the AER which is a separate but constituent part of the ACCC) and bulk water, and monitors pricing in other infrastructure markets where there is limited competition.

24.1 STATE AND TERRITORY REGULATORS

Each State and Territory has an access and pricing regulator. These regulators perform various functions, such as determining regulated prices for retail energy, water and transport services and access to essential services or infrastructure, that are not undertaken by the ACCC or AER. Some of these regulators also provide economic policy advice to governments. For example, the Western Australian Economic Regulation Authority recently completed its Microeconomic Reform Inquiry.⁴⁰⁸

State or Territory	Regulator
New South Wales	Independent Pricing and Regulatory Tribunal
Victoria	Essential Services Commission
Queensland	Queensland Competition Authority
Western Australia	Economic Regulation Authority
South Australia	Essential Services Commission
Tasmania	Office of the Tasmanian Economic Regulator
Australian Capital Territory	Independent Competition and Regulatory Commission
Northern Territory	The Utilities Commission of the Northern Territory

Submissions note that, when state access and pricing regulators are added in, Australia has 11 separate competition-related regulators (BCA Main Report, page 20). Australia's seven water regulators serve a population of 23 million, while, by comparison, the UK's single water regulator (OFWAT) serves more than 60 million people.

⁴⁰⁷ See www.accc.gov.au/regulated-infrastructure/about-regulated-infrastructure/acccs-role-in-regulated-infrastructure.

⁴⁰⁸ Economic Regulation Authority 2014, *Inquiry into Microeconomic Reform in Western Australia: Final Report*.

The multiplicity of regulators results in fragmented regulatory oversight. For example, IPART identifies that:

- IPART regulates 3 valleys for State Water. The Murray-Darling basin is regulated by the ACCC.
- IPART regulates around 21km of the Hunter Valley Coal rail network. The ACCC regulates the remaining 650km of track. (IPART, page 30)

A multiplicity of regulators can also be administratively costly, and lead to gaps and overlaps in regulatory responsibility. Business may have to engage with more than one regulator.

The Panel notes these concerns but believes that States and Territories should continue to have responsibility for those sectors with which they are, by geography and institutional arrangements, better placed to deal. For example, regulation of public transport fares is better dealt with at a State and Territory level.

That said, some of the gaps and overlaps arise because activities that can be regulated nationally are still undertaken at a State and Territory level. The Panel's view is that a national approach to regulation should be adopted in these cases. For example, as discussed in [Section 9.1](#), the Panel recommends a national approach to water regulation.

24.2 A SEPARATE NATIONAL ACCESS AND PRICING REGULATOR

The Panel sees benefit in focusing the ACCC on its competition and consumer functions and separating out its access and pricing functions into a separate, dedicated regulator. Amalgamating all price regulatory functions into a single body will sharpen focus and strengthen analytical capacity in this important area of regulation.

The ACCC argues that there are benefits in having access and pricing regulation undertaken by the competition and consumer regulator. The Panel's view, however, is that, while there are synergies between the competition and consumer functions, there are fewer synergies between the functions of competition enforcement and access and pricing regulation.

The culture and analytical approach required to regulate an industry differs from those typically characteristic of a competition law enforcement agency. For example, the former is required to have an ongoing and collaborative relationship with the industry it regulates; the latter is more likely to involve adversarial interactions.

There is also a risk that the views of an industry regulator about the structure of a particular market could influence a merger decision. The latter is required to be based on the likelihood of a particular transaction resulting in a substantial lessening of competition, not on a view of what a particular market structure should be.

The Monash Business Policy Forum proposes the creation of an 'Australian Essential Services Commission' to bring all pricing and access regulation into one agency. The body would 'bring together the current regulatory functions of the ACCC, ACMA, the regulatory functions of the Murray-Darling Basin Authority, and groups such as the Australian Energy Regulator (AER)'. (page 36)

The Monash Business Policy Forum stresses the importance of co-locating functions by similarity of analytical approach rather than by industry:

Colocation by industry increases the likelihood of capture. It creates regulatory inflexibility as 'industry specialists' rather than 'analytical generalists' dominate regulators. It risks the

creation of a regulatory culture that views the particular industry that is the focus of regulation as ‘special’ and ‘separate’ from broader economic and social considerations. (page 17)

States and Territories have called for the AER to be separated out of the ACCC. The 1 May 2014 COAG Energy Council meeting communique notes that ‘state and territory Ministers reiterated their support for separation of the AER from the Australian Competition and Consumer Commission. The Chair agreed to communicate these views to the Australian Government’.

The Energy Networks Association argues that:

[T]he separation of the AER into a stand-alone independent industry-specific regulatory body would assist it in having the flexibility to further develop its specialist expertise in the energy sector, provide greater autonomy and give better scope for development of an organisation culture focused on providing appropriate, predictable and credible long-term signals for efficient investment ... (page 6)

The ACCC, on the other hand, advocates that the AER should be retained within the current structure of the Commission, arguing that there are efficiencies in locating the AER within the ACCC, particularly in relation to the sharing of corporate functions such as legal resources.

The Consumer Action Law Centre supports this view, submitting that:

[T]here are significant benefits from keeping the ACCC and AER together. Not only are there operational efficiencies in the AER and the ACCC sharing resources (the two regulators share many functions and it means that the AER is able to be represented in a number of state capital cities), it is also our view that regulators that focus narrowly on one industry are at significant risk of becoming ‘captured’ by industry interests. (page 27)

Other submissions, without speaking directly to the issue of separating the AER, note the need for greater clarity in respect of the AER’s role within the ACCC.

The Panel considers that access and pricing regulatory functions would be best performed by a single national independent agency. The benefits of a single national independent agency include:

- 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 (the agency losing necessary independence from the regulated industry); and
- a single agency will reduce the costs associated with multiple regulators and regulatory frameworks and promote consistency in regulatory approaches.

The Panel’s proposal would see regulatory functions currently undertaken by the ACCC in energy (through the AER), water and telecommunications, and functions currently undertaken by the NCC in relation to the National Access Regime and the National Gas Law, transferred to the national access and pricing regulator. Consumer protection and competition functions associated with regulatory functions would remain with the ACCC, however.

Including the NCC’s functions under the National Access Regime and the National Gas Law within the access and pricing regulator would allow the NCC to be dissolved. This would result in the access and pricing regulator undertaking both the declaration functions under the National Access Regime and the National Gas Law and the current ACCC role in arbitrating the terms and conditions where a facility is declared, but where terms and conditions are not able to be commercially negotiated. The

Panel notes concerns⁴⁰⁹ expressed by the PC about a single body undertaking these functions but does not foresee any conflict in a single regulator performing both functions and anticipates there may be benefits. Under the current telecommunications access regime (in Part XIC of the CCA), the ACCC performs both the declaration and arbitration functions.

The national access and pricing regulator could, over time, assume responsibility for other functions if and when they were elevated into a national framework. One function that could be transferred from States and Territories is national regulation of urban and rural water should a national framework be agreed.

Australia's telecommunications industry is subject to specific access and pricing regulation administered by the ACCC. The Panel proposes that these functions would transfer to the new access and pricing regulator.

The Panel's view

The Panel supports a continuing role for state and territory economic regulators. However, a move to national regulation as circumstances permit should be encouraged, including, for example, in the case of water.

The Panel proposes the creation of a separate access and pricing regulator to oversee all industries currently regulated by the Commonwealth.

The following regulatory functions would be transferred from the ACCC and the NCC and be undertaken within the 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; and
- price regulation and related advisory roles under the *Water Act 2007* (Cth).

Consumer protection and competition functions would remain with the ACCC.

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

409 Productivity Commission 2013, *National Access Regime*, page 291

25 REVIEW OF COMPETITION AND REGULATORY DECISIONS

Federal Court of Australia

Australia's competition law is enforced through proceedings in the Federal Court of Australia. Proceedings may be brought by the ACCC or by a person harmed by contraventions of the law.

The Federal Court has exclusive jurisdiction to determine whether a contravention of the competition law has occurred, save in respect of section 46. The Federal Circuit Court also has jurisdiction to determine matters arising under section 46.

Competition law proceedings frequently involve disputes about the dimensions and attributes of markets within which particular businesses trade and the nature and extent of the sources of competition within those markets. It is often relevant for the court to hear from expert economic witnesses about those issues. For that reason, it is appropriate that competition law proceedings are determined in courts that, over time, can develop expertise in the types of issues that must be resolved. This supports the conferral of exclusive jurisdiction on the Federal Court.

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.**

The Australian Competition Tribunal

The Australian Competition Tribunal (the Tribunal) is created by Part III of the CCA. Various powers have been conferred on it to review competition and economic decisions including:

- decisions of the ACCC under the CCA to grant authorisations or withdraw notifications;
- decisions of the Minister to declare or not to declare an infrastructure service under Part IIIA of the CCA;
- decisions of the ACCC to arbitrate terms and conditions of services declared under Part IIIA; and
- pricing regulatory decisions of the AER made under the National Energy Law and the National Gas Law.

Accordingly, the Tribunal performs a very significant role in Australia's competition and regulatory framework.

The particular strength of the Tribunal lies in its composition. For the purpose of hearing and determining a matter before it, the Tribunal must be constituted by a presidential member (who is a Federal Court judge) and two members who are not presidential members. A person appointed as a member of the Tribunal must be qualified by virtue of his or her knowledge of, or experience in, industry, commerce, economics, law or public administration. In practice, the Tribunal is usually constituted with at least one member who is an economist.

In its first submission the ACCC recognises the important role of the Tribunal:

The ACCC supports the OECD assessment that: ‘The Australian Competition Tribunal plays an important role as a merits review body, and the economic content in its determinations has made a significant contribution to both the legislative and judicial development of the law’. (ACCC Submission 1, page 139)

The Tribunal currently has a role as a first-instance decision maker in authorising mergers, in addition to its review functions. The first-instance decision making requires an investigative role that the Tribunal, with its predominant review function, is not well placed to deliver. The Panel considers that the Tribunal would be more effective if it were constituted solely as a review body. This is discussed further in [Chapter 15](#).

The nature and scope of the review function performed by the Tribunal varies and is dependent upon the powers granted to it in respect of different review tasks. In respect of the review of authorisation decisions of the ACCC, the Tribunal is able to hear directly from any business people concerned in the application and expert economists. In respect of the review of access pricing decisions, however, the Tribunal’s powers are often confined to considering the materials before the original decision-maker, and the Tribunal is unable to hear from the business people and expert economists who authored those materials. While these restrictions enable reviews to be conducted more quickly, they also reduce the depth of the review able to be undertaken by the Tribunal.

The Panel’s View

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.

APPENDIX A — TERMS OF REFERENCE

Overview

An effective competition framework is a vital element of a strong economy that drives continued growth in productivity and living standards. It promotes a strong and innovative business sector and better outcomes for consumers.

The Government has commissioned an independent ‘root and branch’ review of Australia’s competition laws and policy in recognition of the fact that the Australian economy has changed markedly since the last major review of competition policy in 1993.

The key areas of focus for the review are to:

- identify regulations and other impediments across the economy that restrict competition and reduce productivity, which are not in the broader public interest;
- examine the competition provisions of the *Competition and Consumer Act 2010 (CCA)* to ensure that they are driving efficient, competitive and durable outcomes, particularly in light of changes to the Australian economy in recent decades and its increased integration into global markets;
- examine the competition provisions and the special protections for small business in the CCA to ensure that efficient businesses, both big and small, can compete effectively and have incentives to invest and innovate for the future;
- consider whether the structure and powers of the competition institutions remain appropriate, in light of ongoing changes in the economy and the desire to reduce the regulatory impost on business; and
- review government involvement in markets through government business enterprises, direct ownership of assets and the competitive neutrality policy, with a view to reducing government involvement where there is no longer a clear public interest need.

Scope of the review

1. The Review Panel is to inquire into and make recommendations on appropriate reforms to improve the Australian economy and the welfare of Australians, not limited to the legislation governing Australia’s competition policy, in regard to achieving competitive and productive markets throughout the economy, by identifying and removing impediments to competition that are not in the long-term interest of consumers or the public interest, having regard to the following principles and the policy priorities:
 - 1.1. no participant in the market should be able to engage in anti-competitive conduct against the public interest within that market and its broader value chain;
 - 1.2. productivity boosting microeconomic reform should be identified, centred on the realisation of fair, transparent and open competition that drives productivity, stronger real wage growth and higher standards of living;
 - 1.3. government should not be a substitute for the private sector where markets are, or can, function effectively or where contestability can be realised; and
 - 1.4. the need to be mindful of removing wherever possible, the regulatory burden on business when assessing the costs and benefits of competition regulation.

2. The Review Panel should also consider and make recommendations where appropriate, aimed at ensuring Australia's competition regulation, policy, and regulatory agencies are effective in protecting and facilitating competition, provide incentives for innovation and creativity in business, and meet world's best practice.
3. The Review Panel should also consider whether the CCA and regulatory agencies are operating effectively, having regard to the regulatory balance between the Commonwealth and the States and Territories, increasing globalisation and developments in international markets, changing market and social structures, technological change, and the need to minimise business compliance costs, including:
 - 3.1. considering whether Australia's highly codified competition law is responsive, effective and certain in its support of its economic policy objectives;
 - 3.2. examining whether the operations and processes of regulatory agencies are transparent, efficient, subject to appropriate external scrutiny and provide reasonable regulatory certainty;
 - 3.3. ensuring that the CCA appropriately protects the competitive process and facilitates competition, including by (but not limited to):
 - 3.3.1. examining whether current legislative provisions are functioning as intended in light of actual experience and precedent;
 - 3.3.2. considering whether the misuse of market power provisions effectively prohibit anti-competitive conduct and are sufficient to: address the breadth of matters expected of them; capture all behaviours of concern; and support the growth of efficient businesses regardless of their size;
 - 3.3.3. considering whether areas that are currently uncertain or rarely used in Australian law could be framed and administered more effectively;
 - 3.3.4. considering whether the framework for industry codes of conduct (with reference to State and Territory codes where relevant) and protections against unfair and unconscionable conduct, provide an adequate mechanism to encourage reasonable business dealings across the economy—particularly in relation to small business;
 - 3.3.5. whether existing exemptions from competition law and/or historic sector-specific arrangements (e.g. conditional offers between related businesses and immunities for providers of liner shipping services) are still warranted; and
 - 3.3.6. considering whether the National Access Regime contained in Part IIIA of the CCA (taking into account the Productivity Commission's recent inquiry) is adequate; and,
 - 3.4. whether competition regulations, enforcement arrangements and appeal mechanisms are in line with international best practice, and:
 - 3.4.1. foster a productive and cost-minimising interface between the Australian Competition and Consumer Commission (ACCC) and industry (for instance, through applications for immunity or merger clearances) that is simple, effective and well designed;
 - 3.4.2. provide appropriate mechanisms for enforcement and seeking redress including:
 - whether administration and enforcement of competition laws is being carried out in an effective, transparent and consistent way;

- whether enforcement and redress mechanisms can be effectively used by people to enforce their rights—by small businesses in particular; and
 - the extent to which new enforcement powers, remedies or enhanced penalties might be necessary and appropriate to prohibit anti-competitive conduct, and
- 3.4.3. can adequately address competition issues in emerging markets and across new technologies, particularly e-commerce environments, to promote entrepreneurship and innovation.
4. The Review Panel should inquire into and advise on appropriate changes to legislation, institutional arrangements and other measures in relation to the matters below, having regard to the impact on long-term consumer benefits in relation to value, innovation, choice and access to goods and services, and the capacity of Australian business to compete both domestically and internationally. In particular, the Review Panel should:
- 4.1. examine the structure and behaviour of markets with natural monopoly characteristics with a view to determining whether the existing regulatory frameworks are leading to efficient outcomes and whether there are opportunities to increase competition;
 - 4.2. examine whether key markets — including, but not limited to, groceries, utilities and automotive fuel — are competitive and whether changes to the scope of the CCA and related laws are necessary to enhance consumer, producer, supplier and retailer opportunities in those markets and their broader value chains;
 - 4.3. consider alternative means for addressing anti-competitive market structure, composition and behaviour currently outside the scope of the CCA;
 - 4.4. consider the impact of concentration and vertical integration in key Australian markets on the welfare of Australians ensuring that any changes to the coverage and nature of competition policy is consistent with national economic policy objectives;
 - 4.5. identify opportunities for removing unnecessary and inefficient barriers to entry and competition, reducing complexity and eliminating administrative duplication; and
 - 4.6. consider ways to ensure Australians can access goods and services at internationally competitive prices, including examining any remaining parallel import restrictions and international price discrimination.
5. The Review Panel should also examine whether government business activities and services providers serve the public interest and promote competition and productivity, including consideration of separating government funding of services from service provision, privatisation, corporatisation, price regulation that improves price signals in non-competitive segments, and competitive neutrality policy.
6. The Review Panel should consider and make recommendations on the most appropriate ways to enhance competition, by removing regulation and by working with stakeholders to put in place economic devices that ensure a fair balance between regulatory expectations of the community and self-regulation, free markets and the promotion of competition.

The Review Panel should consider overseas experience insofar as it may be useful for the review.

The Review Panel may, where appropriate, draw on (but should not duplicate or re-visit) the work of other recent or current comprehensive reviews, such as the Commission of Audit and the Cost-Benefit Analysis and Regulatory Review for the National Broadband Network.

The Review Panel should only consider the Australian Consumer Law (Schedule 2 of the CCA) and corresponding provisions in Part 2, Division 2 of the *Australian Securities and Investments Commission Act 2001*, to the extent they relate to protections (such as from unfair and unconscionable conduct) for small businesses.

Process

The Review Panel is to ensure thorough engagement with all interested stakeholders. At a minimum, the Review Panel should publish an issues paper, hold public hearings and receive written submissions from all interested parties.

The Review Panel should subsequently publish a draft report and hold further public consultations, before providing a final report to the Government within 12 months.

APPENDIX B — LIST OF NON-CONFIDENTIAL SUBMISSIONS

All 318 non-confidential submissions can be accessed at:
www.competitionpolicyreview.gov.au/issues-paper/submissions.

ABB Australia	Accountants and More	ADJ Consultancy Services
Agforce QLD	AIMIA Digital Policy Group	ALDI Stores
American Bar Association	AMMA Workplace Consultancy	Anglo American Metallurgical Coal
Anonomous, P	Anonymous childcare	Anonymous retailer
Appco Group Australia	Applied Medical	Arblaster, M
Arnold Bloch Leibler	Asciano	ASX
Aurizon Holdings Limited	AURL (FoodWorks)	AusBiotech
Australasian Association of Convenience Stores	Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners' Society	Australia Marketing Pty Ltd
Australian Airports Association	Australian Automobile Association	Australian Automobile Association (updated submission)
Australian Automotive Dealer Association	Australian Chamber of Commerce and Industry	Australian Chicken Growers' Council Limited
Australian Clinical Psychologists	Australian College of Theology	Australian Communications Consumer Action Network
Australian Competition and Consumer Commission	Australian Competition and Consumer Commission (Submission 2)	Australian Competition and Consumer Commission (Submission 3)
Australian Competition and Consumer Commission (Submission 4)	Australian Conservation Foundation	Australian Copyright Council
Australian Corporate Lawyers Association	Australian Council of Trade Unions	Australian Dairy Farmers Limited
Australian Dental Association Inc.	Australian Dental Industry Association	Australian Diagnostic Imaging Association
Australian Digital Alliance and Australian Libraries Copyright Committee	Australian Education Union	Australian Energy Market Commission
Australian Energy Regulator	Australian Food and Grocery Council	Australian Forest Products Association
Australian Friendly Societies Pharmacies Association	Australian Healthcare and Hospitals Association	Australian Hotels Association
Australian Industry Group	Australian Information Industry Association	Australian Institute of Petroleum
Australian International Movers Association	Australian Lawyers for Human Rights	Australian Liquor Stores Association
Australian Motor Industry Federation	Australian National Retailers Association	Australian Network of Environmental Defender's Offices
Australian Newsagents' Federation	Australian Organisation for Quality	Australian Payments Clearing Association

Australian Peak Shippers Association Inc.	Australian Petroleum Production and Exploration Association	Australian Physiotherapy Association
Australian Pipeline Industry Association	Australian Prawn Farmers Association	Australian Private Hospitals Association
Australian Recording Industry Association	Australian Retailers Association	Australian Society of Authors
Australian Subscription Television and Radio Association	Australian Taxi Industry Association	Baker and McKenzie
Baxt, Bob	Beadman, B	Beaton-Wells, C
Beaton-Wells, C and Fisse, B	Beck, K R	Bendigo and Adelaide Bank, BOQ, ME Bank and Suncorp Bank
BHP Billiton — updated submission	Birve, A	Board of Airline Representatives of Australia
Bond University	Border, A	Brewers Association of Australia and New Zealand Inc.
Bright, S	Bus Industry Confederation	Business Council of Australia
Business Council of Australia (Submission 2)	Business Council of Cooperatives and Mutuals	Business SA
Cabfare	Callaghan, J	Caltex Australia Limited
Canegrowers	CBH Group	Cement Concrete and Aggregates Australia
Cement Industry Federation	Chamber of Commerce and Industry Queensland	Chamber of Commerce and Industry (WA)
Chemist Warehouse	Chi-X Australia	CHOICE
Cider Australia	City of Whittlesea	Clarke, G
Clean Energy Council	Coles Group Limited	Collins, C
Combined Small Business Alliance of WA	Community and Public Sector Union	Community Employers WA
Complementary Healthcare Council of Australia	Construction Material Processors Association	Consult Australia
Consumer Action Law Centre	Consumers Health Forum of Australia	Consumers Health Forum of Australia — Supplementary
Consumers SA	Consumers SA (updated submission)	Consumers' Federation of Australia
Copyright Agency	Council of Private Higher Education Inc.	Council of Small Business Organisations of Australia
CPA Australia	Credit Ombudsman Service Limited	CSR Limited
Customer Owned Banking Association	Direct Selling Association of Australia	Discover Murray River
Drakes Supermarkets	Duke, A	eBay
Edge, P	EnergyAustralia	Energy Networks Association
Energy Retailers Association of Australia	Energy Supply Association of Australia	Eqalex Underwriting Pty Ltd
Federal Chamber of Automotive Industries	Federation of National Associations of Ship Brokers and Agents	Fels, Professor Allan AO
Fels AO, A, Taylor, N J and Smith, P J	Fletcher, M	Forest Industries Federation (WA)

Fortescue Metals Group Limited	Foundation for Alcohol Research and Education	Foxtel
Fraser, B	Friends of Hawker Village	Gale, N
Glencore Coal Australia	Global Shippers' Forum	Google Australia
Government of South Australia	GrainGrowers	Greenpeace Australia, Wilderness Society, OXFAM Australia, GetUp!, Voiceless, Friends of the Earth, AidWatch
Griffith and District Citrus Growers' Association	Griggs, L & Nielsen, J	Hawkins, M
Herbert Smith Freehills in tempore Advisory	Housing Industry Association	Hutchison Ports Australia
Institute of Chartered Accountants Australia	Independent Supermarket Retailers Guild of SA	Industry Super Australia
Insurance Australia Group	Institute of Public Accountants	Institute of Public Accountants (submission 2)
International Chamber of Shipping	Insurance Council of Australia — updated submission	International Bar Association (Antitrust Committee)
ITS Global	International Container Lines Committee (NZ)	IPART
Jones Day	Jedlickova, B	Jewellers Association of Australia
Kelly, V	Jones Day (Submission 2)	Kagome Australia
Large Format Retail Association	Kemp, K	Kudis, R
Law Council of Australia, Intellectual Property Committee	Laskowska, M	Law Council of Australia, Business Law Section
Lawson, C	Law Council of Australia — Small and Medium Enterprise Committee of the Business Law Section	Law Council of Australia — Small and Medium Enterprise Committee of the Business Law Section (Submission 2)
Lottery Agents Association of Tasmania	LCH.Clearnet	Lloyd, J
Master Builders Australia	Mair, P	Margetts, D
Master Grocers Australia	Master Builders Australia (Submission 2)	Master Builders Australia (Submission 3)
Merger Streamlining Group	McCusker Centre for Action on Alcohol and Youth	Medibank Private
Minerals Council of Australia	Metcash Limited	Miller, I
Monash Business Policy Forum	Minter Ellison	Momentum Energy
Narulla, H	MTA Queensland	Municipal Association of Victoria
National Competition Council	National Alliance for Action on Alcohol	National Australia Bank
National Farmers' Federation	National Disability Services	National Electrical and Communications Association
National Seniors Australia	National Insurance Brokers Association of Australia	National Roads and Motorists Association
Nelson, D	NBN Co	Nehme, M and Laman, J
NSW Business Chamber	News Corp	NPS MedicineWise
	NSW Government	NSW Taxi Council

O'Donnell, C	Office of the Small Business Commissioner	Optometry Australia
Origin Energy Limited	Palermo, V A	Papworth, A
Pharmacy Guild of Australia	Paramedical Services Pty Ltd	Pharmaceutical Society of Australia
Phonographic Performance Company of Australia	Planning Institute of Australia	Plastics and Chemicals Industries Association
Priestley, C	Priestley, C (submission 2)	Printing Industries Association of Australia
Productivity Commission	Proud, K	QBE
Queensland Competition Authority	Queensland Dairyfarmers Organisation	Queensland Farmers' Federation
Queensland Law Society	Raitt, G	RBB Economics
Recruitment and Consulting Services Association	Restaurant & Catering Australia	Retail Guild of Australia
Rhydderch, A	Rio Tinto	Ron Finemore Transport
Rosenwald, A	Routledge, J	RSPCA Australia
Runacres, S	Seddon, N	Shipping Australia Ltd
Shop Distributive and Allied Employees Association	Shopping Centre Council of Australia	Sigma Pharmaceuticals Limited
SingTel Optus Pty Ltd	Slavery Links Australia	Small Business Development Corporation, WA
SP AusNet	Spalding, N	SPAR Australia Limited
Spier Consulting	Spier Consulting (second submission)	Standards Australia
Stanley, M B	Stern, S	Stewart, I
Summerfield, M	Suncorp Group	Sydney Airport Corporation Limited
Symbion Pharmacy Services	Tasmanian Farmers and Graziers Association	Tasmanian Government
Tasmanian Small Business Council	Telstra Corporation Limited	Terceiro Legal Consulting
The Australia Institute	The Co-Op	The Industry Group
The Infrastructure Group	Truman Hoyle	United Energy and Multinet Gas
United States Federal Trade Commission	Uniting Church in Australia	Urban Development Institute of Australia
Urban Taskforce Australia	Victorian Branch of the Australian Dental Association	Vodafone Hutchison Australia
Voiceless	WA Independent Grocers Association	Walker, M
Water Services Association of Australia	Wesfarmers Limited	Wildlife Tourism Australia
White's Grocers	Wills-Johnson, N	Wishart, D
Woodward L & Rubinstein M	Woolworths Ltd	Zoo and Aquarium Association