

COMPETITION POLICY REVIEW

Issues Paper
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MESSAGE FROM THE PANEL

We are privileged to be asked by the Australian Government to undertake this comprehensive review of competition laws and policy—the first in more than 20 years.

The deliberately wide Terms of Reference for this Review give us the opportunity to make broad-ranging recommendations to promote competition across the Australian economy and to deliver benefits to Australians. The Terms of Reference are set out in full in *Appendix B*.

Competition is a key source of productivity and efficiency in markets—it can drive more competitive prices, deliver better choices for consumers, and raise living standards for all Australians.

The original National Competition Policy Review¹ (the Hilmer Review) of 1993 underpinned the development of the National Competition Policy—a cooperative initiative of the federal, state and territory governments. The National Competition Policy contributed to a surge in productivity, lowered prices in some important consumer product and service markets, and stimulated business innovation.

There has been considerable change in the Australian economy since the time of the last review and it is now time for ‘Hilmer Mark II’. We will be examining the broader competition framework, to make sure that it can contribute to the Australian economy for the next 20 years. We will also be examining our competition policies and laws, to evaluate whether they continue to be ‘fit for purpose’ for Australia’s current and emerging economy.

We are keen to engage with all interested stakeholders. Extensive consultation will be held following the release of both this Issues Paper and the Draft Report, including public forums, written submissions and feedback from interested parties, and a conference following the release of the Draft Report. Further advice on the Review and its progress, including consultations, will be posted regularly on the Review website: www.competitionpolicyreview.gov.au.

This Issues Paper provides guidance on making a submission. There is a set of high-level questions that seeks views on the overall direction for the Review on page 7, as well as questions on particular issues throughout the document that you may use to focus your submissions. It is not expected that all submissions will cover all issues—the Issues Paper has been written to allow you to focus on the areas of particular interest to you. Nor should your submission be limited by the issues or questions contained in this Issues Paper. We are keen to hear from all interested parties on any issues that affect the competitive process in the Australian economy.

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

1 Report by the Independent Committee of Inquiry 1993, [National Competition Policy](#).

If you do not wish to make a formal submission, a set of questions is provided at www.competitionpolicyreview.gov.au/submissions/ to allow you to respond directly to the questions of most interest to you.

Submissions in response to the Issues Paper are requested by **Tuesday, 10 June 2014**.

This Issues Paper will be followed by a Draft Report, with a Final Report to be provided to the Australian Government within 12 months.

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



Professor Ian Harper
Chair, Competition Policy Review Panel



Peter Anderson
Panel Member



Su McCluskey
Panel Member



Michael O'Bryan SC
Panel Member

INTRODUCTION

The overarching objective of this Review is to identify competition-enhancing microeconomic reforms to drive ongoing productivity growth and improvements in the living standards of all Australians.

With the terms of trade expected to fall over the next decade, and workforce participation falling as a result of population ageing, Australia faces a decade or more where growth in living standards may stagnate, or even fall, if productivity growth does not improve.

Competition is the process by which rival businesses strive to meet customer needs by developing and offering desirable goods and services on the most favourable terms. Competition spurs ongoing productivity growth.

For the most part, more competitive markets lead to greater efficiencies in the use of scarce resources. The benefits of competitive markets include lower resource costs and overall prices, better services and more choice for consumers and businesses, stronger discipline on businesses to keep costs down, faster innovation and deployment of new technology, and better information allowing more informed consumer choices. Competitive markets are dynamic and innovative, which can benefit Australians both now and into the future.

Competition policy seeks to protect, enhance and extend competition. In 1992, the federal, state and territory governments commissioned the review of National Competition Policy (the Hilmer Review). A new competition framework was accepted by all governments in 1995, drawing heavily on the work of the Hilmer Review.

The current Review provides an opportunity to address competition policy issues that may be viewed as unfinished business. Importantly, the Review has also been asked to consider extending competition reform into new areas. Competition policy reform is not just examining the laws that protect and encourage competitive behaviour in key markets—that is crucial—but also removing regulations and restrictions that may impede competition, as well as reforming government businesses and leveraging market-based benefits in goods and services provided by government.

The Review has been asked to examine competition policy and make recommendations to ensure the framework is responsive to today's economy and resilient to any changes that may emerge. The Review provides an opportunity to test the various claims concerning key markets and ensure any policy changes that flow are well considered and support efficient businesses — both big and small — to compete, invest and innovate.

Many of Australia's key markets are relatively concentrated—that is, they have few participants with large market shares. This is due partly to Australia's small population, distance between and to key markets, and also reflects our history of national development.

An effective competition law is necessary to promote efficient outcomes in concentrated markets. It should also provide a high quality, enabling environment for business.

Australia's industrial and retail structure and key infrastructure have also changed markedly since the last review of competition policy reported in 1993, and will continue to change into the future.

At that time, productivity was spurred by financial deregulation and the lowering of tariff and other trade restrictions, which increasingly exposed many sectors of the economy to international competition. This, in turn, sharpened the focus on how to improve the competitive performance of our non-traded sectors—particularly where government regulations limited competition or where governments operated businesses through large, vertically integrated monopolies.

There is now a new set of challenges for the economy that a further boost in competition will help Australia to meet. These challenges include, among other things, increasing globalisation, disruptive innovation,² demographic changes and the different educational and skill needs of tomorrow's workforce.

Increasing globalisation will expose more parts of the economy to international competition, putting pressure on local firms to be more competitive. The rapidly expanding and wealthy markets in Asia will also increase demand for Australia to export a growing variety of goods and services. In particular, there has been substantial growth in services sectors since the Hilmer Review.

A modern competition policy should provide a framework with the right incentives and enabling provisions that fosters vigorous and healthy competitive processes, allowing Australia to take advantage of the opportunities an increasingly global marketplace provides. In particular, this requires a sharp focus on identifying and removing unwarranted barriers and impediments to competition, and a recognition of the evolving marketplace, where increasing trade-exposure has expanded the scope and depth of the markets in which our businesses and consumers participate.

For instance, the spread and penetration of new digital technologies means that new products and markets have emerged, often expanding beyond conventional geographic boundaries, which have increased choice for consumers and allowed small, agile and often distant firms to compete with large, local incumbents. Increased adoption of e-commerce by consumers and businesses and the emergence of innovative digital products have allowed competition to arise from unexpected sources.

Conversely, digitisation can create network effects, where we can see competition among systems as well as individual products. A network effect arises when the value of a system (for example, a computer operating system, or online music format) increases as more and more other users join the system or use the platform. The positive feedback effect can see dominant systems emerge, which can have positive and negative implications for competition.

Further, the rise of digital products and distribution systems means that producers can more easily control the distribution channels of products to end consumers, facilitating practices that may affect the prices paid by Australian consumers (for example, charging more for software if it is downloaded by Australians).

² Innovations that help to create a new market, eventually disrupting an existing market and displacing earlier technology. For example, smartphones and tablets have disrupted the market for personal computers.

There is a need to examine current laws, policies and the structure of regulators to ensure that they remain relevant now and into the future, taking into account the ways industry and business models are changing due to digital technology.

Demographic changes due to ageing and the differing educational needs of tomorrow's workers mean that the human services sector, where government remains a dominant provider, should be examined to ensure that the provision of health, education and other human services is innovative, cost efficient and responsive to consumers.

The institutional framework within which competition policy is administered can be as important as the policy itself. Strong institutions can deliver certainty to business and ensure timely and well considered application of the *Competition and Consumer Act 2010*—including access to remedies. More broadly, getting the institutional structure right can create a self-sustaining process for the continual reform and reassessment that drives ongoing benefits for all Australians.

The Review provides an opportunity to test whether the current institutional framework is delivering efficient outcomes for business and consumers, and raises the question of how it can serve as a catalyst for ongoing reform.

THE SCOPE OF THE REVIEW

Under the Terms of Reference, the key areas of focus for the Review include: identifying regulations and other impediments to competition across the economy; examining the competition provisions of the *Competition and Consumer Act 2010* (CCA) and the special protections for small business in the CCA; considering whether the structure and powers of the competition institutions remain appropriate; and reviewing government involvement in markets.

The Terms of Reference also identify areas where the Panel may consider developments and the findings of other reviews where appropriate, such as the National Commission of Audit and National Broadband Network reviews.

Other comprehensive reviews will potentially cover aspects of competition at a sectoral level, such as the Financial System Inquiry.³

This Review will canvass competition policy principles and issues that apply across the economy, allowing other reviews to recommend more detailed sector-specific proposals. The Panel will work collaboratively with the other reviews as required, to ensure that there is no duplication, and so that we can benefit from the analysis they undertake and add the most value to this Review.

The Terms of Reference also note that the Review should only consider the Australian Consumer Law⁴ to the extent that it relates to protections for small businesses.

The breadth of issues to be covered in this Review will require the Panel to prioritise its analysis and recommendations. In general, more detailed proposals for change will be made where the issues at stake have previously been tested and debated, or in areas where specific suggestions will help advance the debate.

In other cases, a principles-based approach can allow subsequent application to a wide range of sectors of the economy and provide greater flexibility at the implementation stage. This is particularly important where recommendations may apply to all States and Territories and there is a need to allow for unique circumstances in certain jurisdictions.

Where analysis of key markets is required, including by the Terms of Reference, submissions should be of sufficient detail to enable the Panel to test propositions properly. However, the nature of any recommendations from this Review will not require analysis at a level comparable to, for example, an Australian Competition and Consumer Commission (ACCC) prices surveillance inquiry (such as those recently on groceries and petrol).

It is important to note that the Review is looking at competition policy, not the competitiveness of individual firms or sectors of the economy. Competitiveness reflects a wide range of factors affecting the cost of doing business, such as taxation and workplace relations, that are not within the scope of this Review.

³ See www.fsi.gov.au.

⁴ Schedule 2 to the CCA.

STAKEHOLDER GUIDE — RESPONDING TO THE ISSUES PAPER

The breadth of the Terms of Reference for the Review allows the Panel to seek feedback on a wide range of issues that affect the level of competition in the Australian economy. They are not limited to the current competition laws and institutions, but extend to include any law, regulation or practice that can affect competition.

Casting a wide net allows us to consider competition across the entire economy. We therefore seek the views of as wide a range of stakeholders as possible and in sufficient detail to inform our judgments.

Some of you will have specific sector-based issues you wish to explore, while others may have interests and views that span a broader set of issues. This Issues Paper has been structured to allow you to focus only on those aspects of competition that are relevant to you. You need not read the whole document. It asks high-level questions that can be answered in broad terms or to whatever level of detail you wish.

As a guide to stakeholders, this section outlines the broad structure of the Issues Paper, and provides an indicative sense of the stakeholder issues that might be anticipated. The structure of the document proceeds with questions relating to:

- overarching or guiding competition principles (Chapter 1);
- regulatory impediments that affect competition but are not covered by the competition laws (Chapter 2);
- additional reforms in government sectors previously subject to full or partial competition reforms, including competitive neutrality (Chapter 3);
- new pro-competition reforms that might be possible in the delivery of certain goods and services where government is a significant supplier (Chapter 4);
- the effectiveness of Australia’s competition laws (Chapter 5); and
- the institutional arrangements through which competition laws are implemented and competition reforms sustained over time (Chapter 6).

Chapter 1
Competition Policy Principles

You might be interested in this chapter if you have views on:
*priorities for a competition policy reform agenda
*competition policy principles relevant to the current and emerging economy

Chapter 2

Regulatory Impediments to Competition

You might be interested in this chapter if you have views on:

- *rules or regulations that can weaken competition in the provision of goods (e.g. design standards) or services (e.g. occupational licences)
- *planning, zoning or other land use restrictions which might have adverse impacts on competition
- *intellectual property laws and/or international price discrimination that affect competition

Chapter 3

Government-Provided Goods and Services and Competitive Neutrality

You might be interested in this chapter if you have views on:

- *'unfinished business' from previous competition reforms in infrastructure and utilities, e.g. transport and water
- *whether you face disadvantages when competing with government businesses
- *whether the competitive neutrality regime is effective

Chapter 4

Potential Reforms in Other Sectors

You might be interested in this chapter if you have views on:

- *new pro-competitive reforms in sectors with significant government participation, such as education, health and aged care
- *opportunities for businesses or organisations to compete in these areas
- *consumer implications for choice and quality of service
- *government regulation that can foster competitive markets and the implications for the cost of service delivery

Chapter 5

Competition Laws

You might be interested in this chapter if you have views on:

- *the overall operation of the *Competition and Consumer Act 2010* (CCA)
- *the effectiveness of any of the provisions of the CCA, including for small businesses
- *provisions that you think should be removed, altered or added to the CCA
- *access to infrastructure under the National Access Regime
- *the availability of remedies under the CCA
- *the level of competition in key markets, including groceries, petrol and utilities

Chapter 6

Administration of Competition Policy

You might be interested in this chapter if you have views on:

- *how effective the ACCC and other competition regulators are
- *the types of institutional structures that can support the development and implementation of successful competition policies over time

KEY QUESTIONS FOR THE REVIEW TO CONSIDER

A number of key questions arise from the Terms of Reference:

- What should be the priorities for a competition policy reform agenda to ensure that efficient businesses, large or small, can compete effectively and drive growth in productivity and living standards?
- Are there unwarranted regulatory impediments to competition in any sector in Australia that should be removed or altered?
- Are government-provided goods and services delivered in a manner conducive to competition, while meeting other policy objectives?
- Is there a need for further competition-related reform in infrastructure sectors with a history of heavy government involvement (such as the water, energy and transport sectors)?
- Would there be a public benefit in encouraging greater competition and choice in sectors with substantial government participation (including education, health and disability care and support)?
- Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change?
- Are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?
- What institutional arrangements would best support a self-sustaining process for continual competition policy reform and review?

1. COMPETITION POLICY

WHY COMPETITION MATTERS

1.1 Competition is the process by which rival businesses strive to maximise their profits by developing and offering desirable goods and services to consumers on the most favourable terms.

1.2 More competitive markets can lead to:

- lower resource costs and overall prices;
- better services and more choice for consumers and businesses;
- stronger discipline on businesses to keep costs down;
- faster innovation and deployment of new technology; and
- better information, allowing more informed choices by consumers.

These are all ways in which the economy delivers more value added for every hour worked—in other words, higher productivity—and this is the source of sustainable rises in Australian living standards.

1.3 Competitive markets are characterised by various forms of price and non-price competition between businesses seeking to provide what consumers want. Price competition occurs when businesses selling the same or very similar goods seek to increase sales by offering low prices.

1.4 Non-price competition involves businesses seeking to gain an advantage over rivals by differentiating the goods, services and terms they offer to make them more attractive to buyers—a key mechanism for small and medium-sized businesses to compete with large businesses.

1.5 Poorly designed regulatory impediments to competition—for example, restrictions on who can be in the market or how they can trade—can deliver less competitive outcomes and narrow consumer choice. Governments may need to intervene in a market in some cases—for example, where there are natural monopolies, or to ensure the provision of social welfare services. In these cases, market and institutional design is very important in fostering competitive outcomes.

1.6 Vigorous competition can be tough and firms that misjudge the market or have a higher cost structure may lose market share and end up exiting the market. However, in doing so, they free up labour, land and capital for the expansion of other businesses better able to meet the needs of consumers.

Box 1: Competition and Productivity

Competition reforms can boost productivity growth. Productivity refers to the quantity and quality of goods and services that can be produced from available resources. By market participants competing among themselves to provide the goods and services that consumers want at the lowest possible cost, resources are used more efficiently, adding to productivity.

Growth in productivity is the key driver of growth in our living standards.

Competition reforms under National Competition Policy (NCP) contributed to the pick-up in Australia's productivity growth in the 1990s. Following a period of below-average growth during the 1980s, when labour productivity grew by an average of only 1.2 per cent per year, in the 1990s the rate of productivity growth accelerated to 2.1 per cent per year.

However, over the past 13 years, productivity growth has again slowed, with labour productivity only growing by an average of 1.4 per cent per year.⁵

While incomes and living standards were supported by a large boost in the terms of trade in recent years, the terms of trade are expected to fall over the next decade. Exacerbating this, we have also entered a period when population ageing will reduce participation in the workforce. Because of these factors, we must expect lower growth in living standards if we cannot lift productivity growth. A new round of competition policy reform is a key way to achieve this goal.

WHY WE NEED A COMPETITION POLICY

- 1.7 Competition policy is a set of policies and laws that protects, enhances and extends competition.
- 1.8 Competition works best when there is a stable, certain and well understood legislative framework and effective design principles underpinning certain markets (for example, utilities markets).
- 1.9 In Australia, competition policy has been important in ensuring that our markets—many of which have been relatively concentrated, reflecting our small and spread out population—operate as efficiently as possible to the benefit of consumers and businesses.
- 1.10 Concentrated markets are not a concern if market participants are operating in a way that delivers durable and competitive outcomes; that is, trying to win business by offering consumers better products at more attractive prices than rivals.
- 1.11 However, in the absence of effective laws and institutions to protect the competitive process, market participants (including businesses, shareholders, employees, professions and governments) in concentrated markets may try to increase prices and profits by either unilateral or collusive action aimed at lessening the competition they face.
- 1.12 There are also regulations or policies that can have the effect of limiting competition, even though their purpose is to achieve another policy objective. For example, some types of work are restricted to individuals with certain qualifications on health and safety grounds, or to

5 Australian Bureau of Statistics Cat. No. 5204.0.

ensure a minimum level of quality or reliability. These can act as barriers to entry, inhibiting competitors from entering the market. In these cases, regular assessments can ensure that the overall public benefit continues to be enhanced by these regulations or policies, and not diminished.

- 1.13 In some markets there may be very few businesses—perhaps only one—operating in an environment with little competitive pressure (for example, utility networks, ports and airports). Where these markets are sufficiently important and the lack of competition is likely to persist, governments may regulate in the public interest to constrain the exercise of market power, limiting adverse impacts on consumers.
- 1.14 Further, governments may also operate businesses and supply goods and services to consumers. However, the rationale for government involvement in a market may change over time, and consumers may benefit from lower barriers to entry or fostering greater competition in the supply of various elements of government services.
- 1.15 An effective competition policy aims to deal with all these issues.

COMPETITION PRINCIPLES

The Terms of Reference

Parts 1, 2 and 4 of the Terms of Reference provide broad direction to consider competition policy as a means of delivering competitive markets and enhancing the welfare of Australians.

- 1.16 An effective competition policy framework aims to address a wide range of behaviours by market participants in an ever-evolving economic environment. With this in mind, governments have often established competition policy frameworks built upon a set of overarching principles.
- 1.17 Box 2 below outlines the key elements underpinning the agreed National Competition Policy (NCP) framework that followed the Hilmer Review.

Box 2: Elements of National Competition Policy

The fundamental elements of Australia's competition policy can be summarised as:

1. Limiting the anti-competitive conduct of firms.
2. Legislation⁶ should not restrict competition unless it can be demonstrated that:
 - a. the benefits of the restriction to the community as a whole outweigh the costs, and
 - b. the objectives of the legislation can only be achieved by restricting competition.
3. Structural reform of government monopolies to facilitate competition.
4. Providing for third-party access to significant infrastructure facilities that are essential for competition.
5. Independent prices oversight of government business enterprises.
6. Fostering competitive neutrality to ensure that government businesses do not enjoy a competitive advantage simply as a result of their public sector ownership.

1.18 Since the commencement of NCP, many areas of Australia's economy have been further opened up to competition, including:

- reforms to increase competition in industries with heavy government involvement such as the electricity, gas, water and road transport sectors;
- the review and removal of regulatory restrictions that were adversely affecting competition in areas as diverse as the professions and occupations, statutory marketing of agricultural products, fishing and forestry, retail trading, transport, communications, insurance and superannuation, child care, gambling, and planning and development services; and
- privatisation of government assets, especially in the areas of financial services, electricity, transport and communications.

1.19 NCP has contributed significantly to improving Australia's welfare over the past two decades. However, over this time the economy has changed significantly, and it is timely to examine whether the earlier NCP elements continue to be 'fit for purpose' for the current and emerging economy.

Key question:

What should be the priorities for a competition policy reform agenda to ensure that efficient businesses, large or small, can compete effectively and drive growth in productivity and living standards?

6 'Legislation' includes Acts, enactments, ordinances or regulations.

2. REGULATORY IMPEDIMENTS TO COMPETITION

The Terms of Reference

Parts 4.5 and 4.6 of the Terms of Reference focus on barriers to competition and ensuring access to markets, including global markets.

- 2.1 Competition may be affected by restrictions that are not designed for competition purposes but for some other public policy objective. These regulations are not contained in the competition law, but in a multitude of federal, state and territory and local government instruments. In many cases different regulations apply to the same activity in different jurisdictions. Even where national regulations are in place, individual jurisdictions may choose to vary the regulatory framework, which can also affect competition.
- 2.2 These regulatory restrictions generally have the effect of limiting who is in the market, or what they can do, or the standard of the product they can provide. Restrictions can take many forms, including:
- import restrictions, such as bans, tariffs and ‘anti-dumping’ measures;
 - ‘single desk’ arrangements for the export of goods;
 - restrictions on where certain products can be sold (licensing);
 - restrictions on who can provide certain products or services (occupational licensing);
 - standards that goods must meet (design, safety, labelling, etc.);
 - restrictions arising from the granting of intellectual property rights; and
 - restrictions on land sale and use (planning, zoning and development laws).
- 2.3 The Competition Principles Agreement⁷ includes the principle that legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:
- (a) the benefits of the restriction to the community as a whole outweigh the costs; and
 - (b) the objectives of the legislation can only be achieved by restricting competition.

Key question:

Are there unwarranted regulatory impediments to competition in any sector in Australia that should be removed or altered?

7 Council of Australian Governments 1995, [Competition Principles Agreement](#).

REGULATORY RESTRICTIONS IN GOODS MARKETS

- 2.4 The supply of goods into the Australian market from overseas may be limited by various import restrictions, bans or tariffs.
- 2.5 Policy rationales for import restrictions may include public health concerns (for example, bans on agricultural imports for quarantine reasons) and the protection of local producers (for example, tariffs on imported clothing).

Question:

Are there import restrictions, bans, tariffs or similar measures that, on balance, are adversely affecting Australians?

Further reading:

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

- 2.6 A further issue in relation to imports is international price discrimination. International price discrimination occurs when sellers charge different prices in different countries and those prices are not based on the different costs of doing business in each country. A recent parliamentary inquiry⁸ found that Australian consumers and businesses must often pay much more for their IT products than their counterparts in comparable economies, in some cases paying 50 to 100 per cent more for the same product.
- 2.7 Australian competition laws do not specifically prohibit price discrimination, though anti-competitive conduct relating to price discrimination may be prohibited by the other provisions of the *Competition and Consumer Act 2010* (CCA). The Canadian Government has recently announced that it plans to introduce legislation to address country-specific price discrimination against Canadian consumers.

Questions:

Is there a case to regulate international price discrimination? If so, how could it be regulated effectively while not limiting choice for consumers or introducing other adverse consequences?

8 Parliament of Australia, House Standing Committee on Infrastructure and Communications 2013, [Inquiry into IT Pricing](#).

Further reading:

Parliament of Australia, House Standing Committee on Infrastructure and Communications 2013, [Inquiry into IT Pricing](#).

Productivity Commission 2011, [Economic Structure and Performance of the Australian Retail Industry](#), (see Chapter 6).

- 2.8 Consumers and businesses may try to find ways around international price discrimination, including by parallel importation. A parallel import is a non-counterfeit product imported from another country without the permission of the intellectual property owner.
- 2.9 Parallel importation may be restricted in some circumstances, for example, the *Copyright Act 1968* places restrictions on the parallel importation of books authored by Australians.

Question:

Should any current restrictions on parallel importation be removed or altered in order to increase competition?

Further reading:

Productivity Commission 2009, [Restrictions on the Parallel Importation of Books](#).

- 2.10 Public health and safety concerns may lead to regulatory restrictions on the sale of various goods within Australia. Restrictions or licences can apply to the seller of the good (training or qualifications based), or the terms under which the good might be sold, such as its handling (for example, chemicals) or dispensing (for example, human or veterinary drugs).
- 2.11 Restraints may also be imposed on the geographical location or trading hours for the sale of various goods (for example, liquor). Manufacturing and design standards may be imposed in order to ensure a certain level of quality and consistency of product (for example, smoke alarm standards).
- 2.12 Ecological sustainability concerns may also lead to regulatory restrictions on the exploitation of specified resources (for example, forestry, fishing or agricultural commodities).

Question:

Are there regulations governing the sale of goods for health and safety or environmental reasons whose purpose could be achieved in a manner more conducive to competition?

- 2.13 There are also restrictions in certain Australian export markets around the advertising, promotion and marketing of goods (for example, rice export marketing and promotion). The restrictions often have an historical basis, and were generally implemented to attempt to maximise prices received by Australian producers.

Question:

Are there any restrictions on the export of goods from Australia which should be removed or altered in order to increase competition for exporters and producers, and choice for consumers?

REGULATORY RESTRICTIONS IN SERVICES MARKETS

- 2.14 There are many and varied regulatory restrictions on the sale or provision of services within the Australian economy. One form of restriction is occupational licensing, which is any regulation that restricts entry to an occupation to people who meet certain requirements. Requirements may vary between the States and Territories, as well as internationally.
- 2.15 Occupational licensing can be based on a concern for ensuring certain public health and safety standards (for example, health service providers), or with issues of quality and reliability standards (for example, legal professional services, architects, builders, real estate agents).
- 2.16 Beyond occupational-based restrictions, restrictions may be imposed on the provision of the service itself, principally through a supply-based constraint (for example, taxi transport services, pharmacy advice/dispensing services). The supply constraint can sometimes be quota-based, such as the issuing of licences to operate taxi services or route monopolies to regional aviation transport providers.
- 2.17 Other regulatory restrictions on the provision of retail services, such as those relating to hours of operation or the intensity of competition within a geographic boundary, can have implications for competitive outcomes and consumer welfare.

Questions:

Are there occupational-based restrictions, or restrictions on when and how services can be provided, that have an unduly adverse impact on competition? Can the objectives of these restrictions be achieved in a manner more conducive to competition?

Further reading:

Fels AO, A 2012, [Victorian Taxi Industry Inquiry Final Report: Customers First: Service, Safety, Choice](#).

Productivity Commission 2011, [Economic Structure and Performance of the Australian Retail Industry](#).

INTELLECTUAL PROPERTY

- 2.18 The underlying rationale for governments to grant intellectual property (IP) rights (such as patents, trademarks and copyrights) is that creations and ideas, once known, may otherwise be copied at little cost, leading to under-investment in intellectual goods and services. However, providing too much protection for IP can deter competition and limit choice for consumers.

Questions:

Are there restrictions arising from IP laws that have an unduly adverse impact on competition? Can the objectives of these IP laws be achieved in a manner more conducive to competition?

Further reading:

Productivity Commission 2013, [Trade & Assistance Review 2011-12](#), (see Chapter 4).

REGULATORY RESTRICTIONS ON LAND USE

- 2.19 Land use restrictions may take many forms, including planning restrictions, zoning laws and development assessment procedures. Various policy rationales are offered to justify why unfettered development of land is not permitted. These include environmental considerations and the need to coordinate community services and facilities.
- 2.20 However, inflexible restrictions on land use or complex and costly approvals procedures may create significant barriers to business entry or expansion, and may result in land not being allocated to its highest-valued use. In addition, some policy rationales may be anti-competitive in essence—for example, rejecting a planning application because it may have an adverse impact on existing businesses.

Questions:

Are there planning, zoning or other land development regulatory restrictions that exert an adverse impact on competition? Can the objectives of these restrictions be achieved in a manner more conducive to competition?

Further reading:

Productivity Commission 2011, [Planning, Zoning and Development Assessments](#).

3. GOVERNMENT-PROVIDED GOODS AND SERVICES AND COMPETITIVE NEUTRALITY

The Terms of Reference

Part 5 of the Terms of Reference requires the Panel to examine whether government business activities and service providers serve the public interest by promoting competition and productivity. The Terms of Reference includes the following principle:

‘Government should not be a substitute for the private sector where markets are, or can, function effectively or where contestability can be realised’.

- 3.1 Historically, governments in Australia have funded, regulated and owned providers of a number of goods and services, often through vertically integrated public monopolies. Even when regulation and funding were separated, key infrastructure industries such as electricity, telecommunications, postal services, gas, water, aviation and ports were dominated by government businesses.
- 3.2 The Australian Government still owns a number of businesses. Australia Post and Medibank Private are well-known examples, and others include the Australian Rail Track Corporation, the Australian Government Solicitor, Defence Housing Australia, NBN Co, and ASC Pty Ltd. Some state and territory governments retain significant interests in infrastructure, including the utilities sector, public lotteries, forestry and public trustees. The States and Territories are also major providers and funders of public transport and health and education goods and services.⁹
- 3.3 Substantial government ownership of businesses and service provision was not unique to Australia, and reflected the historical view that key industries required heavy government involvement both for national development and to ensure adequate and affordable service provision. However, by the 1980s it was becoming clear that many government-dominated sectors were suffering from poor productivity and service provision due to lack of competitive pressure, in much the same way that other industries had become uncompetitive as a consequence of tariffs and other forms of industry protection.
- 3.4 The National Competition Policy (NCP) had as a central objective improving government services through exposing government businesses as far as possible to greater market discipline. This was done through a variety of reforms such as restructuring to develop competitive markets where possible and providing commercial incentives to government businesses.

⁹ The Heads of Treasuries [2012-13 Competitive Neutrality Matrix Report](#) contains the list of government-owned businesses at the Australian Government, State and Territory levels.

Key question:

Are government-provided goods and services delivered in a manner conducive to competition, while meeting other policy objectives?

REFORM OF GOVERNMENT SERVICES UNDER THE NATIONAL COMPETITION POLICY

3.5 Reforms to government businesses under the NCP included the separation of regulatory and commercial functions, structural separation of contestable from non-contestable activity, the application of cost-reflective pricing, and the commercialisation, corporatisation and in some cases privatisation of government businesses. Where governments retain ownership of businesses, they have been subject to competitive neutrality policy.

- Commercialisation of government functions is generally used to achieve value for money in the delivery and consumption of services by applying commercial management principles within an agency. Commercialisation is generally built around several principles including: clear and non-conflicting objectives for the agency; provision for management responsibility, authority and autonomy; and management accountability for performance.
- Corporatisation involves the conversion of a government department or agency into a publicly owned company, typically with a commercial board of directors interposed between the company and the shareholding minister/s.
- Privatisation is the process of transforming a publicly owned company into a privately owned company typically through a share float or trade sale. Privatisation was extensively pursued under the NCP, where it was deemed unnecessary for governments to continue to own corporatised businesses.
- Cost-reflective pricing aims to ensure government businesses are covering their capital and operating costs in the same way private businesses must do to survive. This removes the call on government budgets and also sends price signals to users that reflect the full costs of the service being provided. The principle of competitive neutrality seeks to ensure that a government service provider competes with alternative providers on equal terms.
- Structural reform of government businesses under the NCP also involved the separation of regulatory responsibilities from commercial activities, and the separation of different functions, particularly contestable elements, into separate business activities to operate in the market.

GOVERNMENT PARTICIPATION IN KEY SECTORS

The Terms of Reference

Parts 4.1 and 5 of the Terms of Reference direct the Review towards the key sectors where there may have been, or still is, some government involvement in markets.

- 3.6 A number of key sectors that historically had significant government participation have been at least partially reformed in line with the NCP. A number of these sectors are specified in the Terms of Reference for examination in this review (for example, utilities). The table on the following page outlines progress in these sectors since the NCP.
- 3.7 Despite progress in most of these sectors, potentially more remains to be done. One of the National Competition Council's tasks included assessment of jurisdictions' compliance with the NCP. The Council concluded in its final report that, while much has been achieved, 'more is required than finalising an agenda conceived a decade ago. New challenges have emerged and in a globally competitive environment reform inertia means declining living standards'.¹⁰

Key question:

Is there a need for further competition-related reform in infrastructure sectors with a history of heavy government involvement (such as the water, energy and transport sectors)?

- 3.8 In the energy sector, previously agreed reforms are yet to be fully realised. For example, retail price regulation, which can impede development of further competition, has so far been phased out only in Victoria and South Australia, and the New South Wales Government has announced an intention to do so from 1 July 2014. In announcing the decision to deregulate prices, the New South Wales Government noted the Australian Energy Market Commission's finding that retail price regulation may be inhibiting competition.¹¹
- 3.9 There appears to be scope for further reform in the transport, water and telecommunications sectors among others, in addition to finalising reforms in the energy sector.

10 National Competition Council 2005, [Assessment of governments' progress in implementing the National Competition Policy and related reforms: 2005](#).

11 Australian Energy Market Commission 2013, [Review of Competition in the Retail Electricity and Natural Gas Markets in NSW](#).

Sector	Progress to date	Possible future reform
Water	There have been significant efficiency gains following the 1994 Council of Australian Governments (COAG) water reform framework and 2004 National Water Initiative.	Further promote competition and private sector involvement through enhancements to pricing (potentially through consistent application of the COAG pricing principles and through cost-reflective pricing) and through widening choice of offerings to consumers. ¹²
Energy	National gas, electricity and retail frameworks developed and underpinned by a solid institutional framework—regulator, rule maker and market operator established with policy oversight by the COAG Energy Council.	Improved management of peak demand through cost-reflective pricing and the further roll-out of smart meters. Further efficiency sought through privatising energy infrastructure. ¹³
Transport	The extensions of the <i>Competition and Consumer Act 2010</i> (CCA) to government business enterprises (GBEs), the structural reform of GBEs, the implementation of competitive neutrality, third-party access arrangements for infrastructure services and legislation review program—all have extensively influenced reforms in rail, ports and aviation industries. Road transport was encompassed under the NCP as a separate sector-specific reform package which has seen the creation of a National Heavy Vehicle Law.	Increase competition in international air services, reforms to cabotage arrangements in aviation and shipping to encourage competition, removal of separate competition exemptions under Part X for international shipping, improve road agency institutional arrangements to support productivity growth for road transport, streamlining of rail access and regulatory regimes, reforms to public transport to increase efficiency, contestability and encourage greater private sector provision, greater investment neutrality between transport modes. The Panel also notes that the Productivity Commission sent its final report on Tasmanian Shipping and Freight to the Australian Government on 7 March 2014.

12 Infrastructure Australia 2010, [Review of Urban Water Security Strategies](#).

13 Productivity Commission 2012, [Report on Electricity Network Regulation](#).

Sector	Progress to date	Possible future reform
Telecommunications	There have been significant changes in the telecommunications sector since the development of the NCP, which may have either addressed or heightened competition concerns.	Competition issues in the regulation of fixed line broadband are currently being considered as part of the cost-benefit analysis of the National Broadband Network.

Question:

What are the competition policy reform priorities in sectors such as utilities, transport and telecommunications?

COMPETITIVE NEUTRALITY

- 3.10 Government business activities may enjoy potential competitive advantages in competing with other firms, such as exemptions from taxes, not being required to achieve a commercial rate of return or not being required to comply with regulations. Government business activities may also face disadvantages, such as greater accountability obligations, higher superannuation costs and reduced managerial autonomy.
- 3.11 A key principle of the NCP is that, where markets have been opened up to competition, any business that remains in government ownership should not enjoy a net competitive advantage by virtue of its ownership.
- 3.12 Without competitive neutrality, government-owned businesses could undercut private sector competitors and act as a barrier to entry for potential competitors.
- 3.13 Competitive neutrality does not imply that government business activities cannot be successful in competition with private businesses; however, they should achieve success on their own merits and intrinsic strengths rather than as a consequence of unfair advantages flowing from government ownership.
- 3.14 Competitive neutrality has been implemented by way of agreement among the federal, state and territory governments, rather than through legislation.
- 3.15 Each party to the Competition Principles Agreement¹⁴ was free to determine its own agenda for implementing competitive neutrality principles.
- 3.16 The Australian Government and the States and Territories agreed that competitive neutrality should apply to the significant business activities of publicly owned entities, including GBEs and their subsidiaries, share-limited trading companies and also government business units.

14 Council of Australian Governments 1995, [Competition Principles Agreement](#).

- 3.17 Competitive neutrality only applies where a significant business activity charges for goods and services, has an actual or potential competitor, and a degree of independence in relation to production, supply and price.
- 3.18 Competitive neutrality does not require governments to remove community service obligations (CSOs) from their businesses. Where they exist, CSOs should be transparent, appropriately costed, and directly funded by government.
- 3.19 All governments have established their own competitive neutrality complaints offices. The Productivity Commission, in its report on the National Access Regime¹⁵, noted that many of the competitive neutrality policies had not been reviewed for at least a decade and recommended all governments review their policies to ensure they are relevant and reflect contemporary practice. Specific matters raised by the Productivity Commission include:
- clearer guidelines on the application of competitive neutrality during the start-up stages of newly established GBEs that are or will be engaged in significant business activities;
 - whether processes for handling competitive neutrality complaints are identifiable, independent and accessible; and
 - how governments respond to the findings of competitive neutrality complaint investigations.

Questions:

Does competitive neutrality policy function effectively, and does it apply to the appropriate government business activities?

Has the method of implementing competitive neutrality principles improved competition and productivity?

What are the disadvantages that private businesses face when competing with government business activities?

Could the mechanism for dealing with competitive neutrality complaints be improved?

15 Productivity Commission 2013, [National Access Regime](#).

Further reading:

Council of Australian Governments 1995, [Competition Principles Agreement 1995](#).

Council of Australian Governments 2006, [Competition and Infrastructure Reform Agreement 2006](#).

Australian Government 2004, [Competitive Neutrality Guidelines for Managers](#).

Australian Government Competitive Neutrality Complaints Office 2011, [Investigation no. 14, NBN Co](#).

Australian Government 1996, [Commonwealth Competitive Neutrality Policy Statement](#).

Heads of Treasuries 2012-13 [Heads of Treasuries Competitive Neutrality Matrix Report](#).

OECD 2012, [Competitive Neutrality National Practices](#).

Productivity Commission 2005, [Review of National Competition Policy Reforms](#).

Productivity Commission 2008, [Financial Performance of Government Trading Enterprises, 2004-05 to 2006-07](#).

Productivity Commission 2010, [Contribution of the Not-For-Profit Sector](#).

Productivity Commission 2013, [National Access Regime](#).

4. POTENTIAL REFORMS IN OTHER SECTORS

The Terms of Reference

Parts 4.3, 4.5 and 6 of the Terms of Reference ask the Review to identify opportunities to promote free markets and effective competition.

- 4.1 Historically, in circumstances where competitive markets were not seen as feasible, more administered market arrangements developed. Examples of these include health and education services, where governments have traditionally determined what is produced, how much (via budget allocations) is produced and who (government agency, private business, or not-for-profit organisation) is the producer. This reflected governments' desire to meet important policy objectives such as equity in both access to and the quality of the service provided.
- 4.2 With this in mind, the Review seeks views on the relevance and importance of applying competition principles to the more administered sectors of the economy. While some sectors are discussed below and other sectors are mentioned elsewhere in this Issues Paper, submissions need not be limited to these sectors.
- 4.3 The Panel welcomes views on any sector or issue where enhancements to competition would improve the welfare of Australians.

Key question:

Would there be a net public benefit in encouraging greater competition and choice in sectors with substantial government participation (including education, health and disability care and support)?

SECTORS WITH SIGNIFICANT GOVERNMENT PARTICIPATION

- 4.4 Over recent years, governments have examined reforms in human services such as health, education and disability care and support. Though not formally linked to the National Competition Policy (NCP), in 2006 the National Reform Agenda encompassed a 'human capital' stream covering health, education and training, and work incentives as well as a competition and a regulatory reform stream.
- 4.5 Human services include education and training, health care, aged care, child care and public housing. Together these services are a large and growing part of the Australian economy. Total government expenditure on health care was \$98 billion in 2011-12 (or 6.5 per cent of GDP),¹⁶

16 Productivity Commission 2014, [Report on Government Services 2014, Volume E: Health](#).

and total government expenditure on education was \$76 billion (or 5.2 per cent of GDP).¹⁷ Owing to the impacts of ageing and new health care technologies, health expenditure is projected to be the main source of pressure on government budgets over the next 50 years, with the Productivity Commission projecting that government health care expenditure will grow to 10.8 per cent of GDP by 2059-60.¹⁸

- 4.6 The importance of these sectors goes beyond their size. Better human services enable healthier, safer and better educated citizens who can aspire to higher welfare and living standards.
- 4.7 These crucial social outcomes emphasise the importance of achieving value—namely, high quality and access in a cost-effective fashion—from the resources devoted to human services.
- 4.8 Some have suggested that the potential for productivity improvement is large. In his report for the NSW Business Chamber, Professor Gary Sturgess surveys the evidence and suggests that:

‘There are ... a number of studies which suggest that the productivity gap is substantial and that competition and contestability have the potential to deliver significant value-for-money gains if well implemented’.

‘The limited evidence that is available suggests that the potential for productivity improvement is considerable—perhaps as much as 20-25 per cent where services have not been previously exposed to competition.’¹⁹

Question:

Can more competitive outcomes in the human services sector enhance both Australia’s productivity and the quality of human services delivered to Australian citizens?

- 4.9 While the delivery of human services is widely seen as a responsibility of state and territory governments, in practice few public services are delivered exclusively by government. For instance:
- private hospitals serviced around 40 per cent of hospital inpatients in 2007-08;²⁰
 - thirty-five percent of Australian children attended non-government schools in 2011;²¹ and
 - around 60 per cent of residential aged care and 84 per cent of community care is delivered by the not-for-profit sector, with a further 30 per cent of residential aged care and 7 per cent of community care provided by the for-profit sector.²²

17 Productivity Commission 2014, [Report on Government Services 2014, Volume B: Child care, education and training](#).

18 Productivity Commission 2013, [An Ageing Australia: Preparing for the Future](#).

19 Sturgess, G L 2012, [Diversity and Contestability in the Public Service Economy](#).

20 Productivity Commission 2009, [Public and Private Hospitals](#).

21 Australian Bureau of Statistics Cat. No. 4221.0.

22 Aged Care Financing Authority 2013, [Inaugural report on the funding and financing of the aged care sector](#).

- 4.10 Increasingly services are being delivered outside the government sector. The significant changes in the disability services sector are a recent example of this development.
- 4.11 Under the National Disability Insurance Scheme (NDIS), Australians with significant and permanent disability will have an individualised plan which sets out their care and support needs and their goals. Providers will be engaged by each individual NDIS participant to deliver support in accordance with the person’s plan. Organisations and individuals can apply to be a registered provider and then enter into a written agreement that clearly sets out the support they will provide to an individual. In effect, much of what has been provided by state and territory governments could in future be provided by individuals, non-for-profit organisations and the private sector.
- 4.12 According to the Productivity Commission, there are two strategies to ensure quality of services provided to people with disability:
- the government could set rules that service providers must obey, such as through legislation, standards or funding agreements; and
 - assist individual Australians with disability to make informed choices and purchases which both discipline and reward service providers through their consumption decisions—this, in turn, facilitates greater competition among service providers and responsiveness to consumers as they seek to deliver better quality services.
- 4.13 The Productivity Commission went on to say that state- and territory-owned service providers should be subject to the same regulatory oversight and monitoring as other for-profit and not-for-profit providers.²³

Questions:

Will more competition among providers serve the interests of consumers of health, education and other services?

What issues arise when government agencies, private businesses and not-for-profit organisations simultaneously seek to provide human services?

- 4.14 Governments maintain and operate other services that could potentially be exposed to more intense competition. A better known example is Australia Post, though there are others, such as the Adelaide Cemeteries Authority. As discussed in Chapter 3, many of these businesses are subject to competitive neutrality policy and currently operate as statutory monopolies. There may be scope to expose these services to greater competition, as was the case with the electricity and gas sectors in the wake of the NCP.

Questions:

Can competition be increased in other markets currently served by government-operated providers?

Is current policy conducive to competition with government-operated services?

²³ Productivity Commission 2011, [Disability Care and Support](#), 31 July 2011.

5. COMPETITION LAWS

The Terms of Reference

Part 3 of the Terms of Reference requires an examination of competition laws to ensure they are working effectively and fostering a competitive and innovative Australian marketplace.

Part 4.2 also requires an examination of how competition laws are working in key markets.

OBJECTIVES, STRUCTURE AND THE LEGAL FRAMEWORK

- 5.1 The stated object of the *Competition and Consumer Act 2010* (CCA) is to enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection.²⁴ The CCA operates as a single set of laws applying to most markets and businesses within Australia. However, the application of the laws across the Australian economy can be limited in circumstances where anti-competitive conduct results in an overall public benefit.
- 5.2 In most cases, the relevant test determining the applicability of the CCA will be whether the alleged conduct has the purpose and/or effect of lessening competition in a market, or of preventing or deterring competitive conduct.²⁵ In some cases, the law provides that particular conduct is illegal per se—that is, the conduct is prohibited without needing to analyse the impact on competition because the impact is presumed to be negative.²⁶
- 5.3 The CCA (formerly called the *Trade Practices Act 1974*) has been the subject of numerous reviews, reports and inquiries. As a result, broad prohibitions against anti-competitive conduct have been supplemented by provisions dealing with specific behaviour, or considerations to be taken into account in relation to particular conduct.

Key question:

Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change?

²⁴ Section 2 of the CCA.

²⁵ Examples include: anti-competitive agreements (section 45) and exclusive dealing (section 47) with the *purpose or effect* of substantially lessening competition; price signalling conduct with the *purpose of substantially lessening competition* (section 44ZZX); conduct with *purpose* of eliminating a competitor or deterring competitive conduct (section 46); mergers or acquisitions that would have the *effect* of substantially lessening competition.

²⁶ Examples include: cartel conduct (Division 1, Part IV); private price disclosures to competitors (section 44ZZW); certain secondary boycotts (section 45D); third line forcing (sections 47(6) and (7)); resale price maintenance (section 48).

Box 3: Reviews of the competition laws

- In 1976, the Swanson Committee made a number of recommendations regarding the provisions in Part IV of the CCA, including examining the fundamental meaning of a 'market', reaffirming the need for a law on anti-competitive mergers, and clarifying the role of authorisation.
- The Hilmer Committee in 1993 recommended the creation of a national competition policy, resulting in the establishment of the National Competition Council and the Australian Competition and Consumer Commission (ACCC), extension of the competition laws to unincorporated businesses, and amendments to Part IV of the CCA.
- The 2003 Dawson Committee inquired into Part IV (and associated penalty provisions) and Part VII of the then *Trade Practices Act 1974*. The key reforms arising from this inquiry were the introduction of criminal sanctions for cartel conduct, the creation of a formal mergers process and changes to small business collective bargaining provisions.
- A number of other smaller or more targeted reviews have focused on particular aspects of competition law (for example, parliamentary inquiries into banking competition, particular industries such as dairy, or to consider Bills introduced by private members to amend the CCA).

Defining markets

- 5.4 Markets are the central concept in the CCA and competition is assessed by reference to its level in a particular market. In broad terms, a market is the space in which rivalry and competition take place. Generally, for the purposes of the CCA, a 'market' means a market in Australia and includes the goods or services under analysis (for example, the relevant goods or services supplied by the firm engaging in the conduct) and other goods or services that are substitutable for, or otherwise competitive with, those goods or services (section 4E). Competition is defined to include competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia (section 4).
- 5.5 There is a separate definition of 'market' for the purpose of the merger provisions, as '... a market for goods or services in (a) Australia; or (b) a State; or (c) a Territory; or (d) a region of Australia' (subsection 50(6)).
- 5.6 The definitions of 'market' and 'competition' in the CCA reflect the historical focus of the Act on the competitiveness of Australian markets, while recognising that Australian produced goods and services often compete with imported goods and services.

Question:

Given structural changes in the economy over time, do the definitions of 'market' in the CCA operate effectively, and do they work to further the objectives of the CCA?

UNILATERAL CONDUCT

5.7 The Organisation for Economic Cooperation and Development (OECD) has noted that determining when a firm's independent behaviour is (or should be) illegal, as opposed to a legitimate competitive action, is one of the most complex and controversial areas in competition policy.²⁷ A range of provisions in Part IV of the CCA and the Australian Consumer Law (ACL, Schedule 2 to the CCA) are directed at limiting the behaviour of a firm that enjoys such a strong position in a market that its behaviour may significantly affect other participants.

Misuse of market power

5.8 Section 46 of the CCA prohibits a corporation with a substantial degree of power in a market from taking advantage of that power for one or more prohibited anti-competitive purposes. This provision deals with unilateral anti-competitive conduct and is focused on how a firm uses its position in a market.²⁸

5.9 There has been a longstanding debate in Australia as to whether the focus on the 'purpose' of the conduct in the misuse of market power provisions sufficiently captures conduct considered to adversely affect competition and the competitive process, and whether there should not also be a focus on prohibiting the anti-competitive 'effect' of the conduct.

5.10 Past reviews of the CCA have considered whether to adopt an effects test.²⁹ In the most recent independent inquiry, the Dawson Committee recommended that no amendment be made to section 46, and this was accepted by the then Australian Government.

Question:

Given structural changes in the economy over time, how should misuse of market power be dealt with under the CCA?

Unfair and unconscionable conduct in business transactions

5.11 The Terms of Reference ask the Review to examine the ACL reforms introduced in 2010 that deal with unfair and unconscionable conduct, but only insofar as they relate to small business. The CCA, through the ACL, recognises that not all parties in a transaction have equal bargaining power, particularly through the unconscionable conduct and unfair contract terms provisions.

27 See www.oecd.org/competition/abuse/.

28 In addition to this general provision, there is a specific prohibition on predatory pricing ([subsection 46\(1AA\)](#)) which prohibits a corporation, having substantial market share, to supply goods or services below cost for a sustained period for one of the three anti-competitive purposes.

29 Trade Practices Act Review Committee 'Swanson Committee' 1976, [Report to the Minister for Business and Consumer Affairs](#); Trade Practices Consultative Committee 'Blunt Committee' 1979, [Small business and the Trade Practices Act](#) Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs 'Griffiths Committee' 1989, [Mergers, Takeovers and Monopolies: Profiting from Competition?](#); Senate Standing Committee on Legal and Constitutional Affairs 'Cooney Committee' 1991, *Adequacy of the existing legislative controls in the Trade Practices Act over mergers and acquisitions* (not available online, available in State/national libraries); Report by the Independent Committee of Inquiry 1993, [National Competition Policy](#); 'Baird Committee' 1999, *Fair Market or Market Failure? A Review of Australia's Retailing Sector* (not available online); Trade Practices Act Review ('Dawson Review') 2003, [Review of the Competition Provisions of the Trade Practices Act — Final Report](#).

- 5.12 While there is no precise definition, unconscionable conduct is generally taken to mean conduct that does not conform to the dictates of good conscience. Statutory protection against unconscionable conduct, which recognised the disparity in bargaining power between buyers and sellers,³⁰ was introduced into the law in 1986 as a consumer protection measure.³¹
- 5.13 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,³² the unification of consumer and business unconscionable conduct provisions,³³ and the introduction of interpretive guidance for the provisions.³⁴ The introduction of the business unconscionable conduct provision was intended to ‘improve business conduct in the Australian economy and provide a more efficient and equitable basis upon which the forces of competition can operate’.³⁵
- 5.14 Prohibitions against unfair contract terms are also aimed at addressing unequal bargaining power. These provisions were introduced as part of the ACL reforms in 2010³⁶ 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.³⁷ Noting that small businesses can face many of the same issues as individual consumers do when negotiating contracts, the extension of these provisions to standard form small business contracts is currently being considered by Australian governments.³⁸

Questions:

Are existing unfair and unconscionable conduct provisions working effectively to support small and medium sized business participation in markets?

Are there other measures that would support small and medium sized business participation in markets?

Infrastructure access — National Access Regime

- 5.15 A National Access Regime was introduced in 1995 as part of the NCP reforms, to give firms access to certain ‘essential’ infrastructure services owned and operated by others, when commercial negotiations on access are unsuccessful. The Regime is intended 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.

30 Trade Practices Act Review Committee ‘Swanson Committee’ 1976, [Report to the Minister for Business and Consumer Affairs](#), at 9.56-9.62.

31 [Trade Practices Revision Act 1986](#).

32 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](#).

33 [Competition and Consumer Legislation Amendment Act 2011](#).

34 Ibid. See [section 22 of the ACL](#) and [Part 2-2 of the ACL](#) more generally.

35 [Minister’s second reading speech](#) to the Trade Practices Amendment (Fair Trading) Bill 1997.

36 [Trade Practices Amendment \(Australian Consumer Law\) Act 2009](#).

37 [Minister’s second reading speech](#) to the Trade Practices Amendment (Australian Consumer Law) Bill 2010.

38 Following the [meeting of Ministers for Consumer Affairs on 7 November 2013](#), the joint communique noted that Ministers affirmed their agreement to consider this extension.

- 5.16 The regulatory provisions of the regime are contained in Part IIIA of the CCA and clause 6 of the Competition Principles Agreement.³⁹ As part of a National Reform Agenda in February 2006, the Council of Australian Governments (COAG) agreed to review the operation of Part IIIA, after five years of operation. The review was conducted by the Productivity Commission, commencing in October 2012.
- 5.17 The Productivity Commission provided its report on the National Access Regime to the Australian Government in December 2013, and it was released publicly on 11 February 2014. The report recommended that the National Access Regime be retained; noting that access regulation is a means of addressing a lack of effective competition in the market for an infrastructure service, due to natural monopoly, where access is required for third parties to compete effectively in a dependent market.
- 5.18 The Productivity Commission made a number of recommendations to improve the regime, including:
- amending the ‘competition test’, the ‘uneconomical to develop another facility test’ and the ‘public interest test’ under the regime, to ensure declaration occurs where the benefits arising from increased competition in a dependent market are likely to outweigh the costs of regulated access;
 - improving the interaction between certification and declaration to improve investment certainty; and
 - confirming that the ACCC’s power to direct extensions of an infrastructure facility also encompasses capacity expansions, and that the ACCC develop guidelines on how it might exercise its power in this area.
- 5.19 On release of the Productivity Commission’s report, the Australian Government noted that this Review would look at all aspects of competition law and policy, including Part IIIA of the CCA, and that the Australian Government would respond to the report following the outcomes of this Review.⁴⁰

Questions:

Should the recommendations in the Productivity Commission’s report on the National Access Regime be adopted? Are there other changes that could be made to improve competition in the relevant markets?

Further reading:

Productivity Commission 2013, [Inquiry into the National Access Regime](#).

39 Council of Australian Governments 1995, [Competition Principles Agreement](#).

40 Media release, the Hon Bruce Billson MP, Minister for Small Business, [Productivity Commission’s final report on National Access Regime released](#), 11 February 2014.

ANTI-COMPETITIVE AGREEMENTS

5.20 The prohibitions against anti-competitive agreements operate through a range of provisions of the CCA to maintain competitive tension, which is key to promoting competitive prices and a wider range of choices for consumers.

Agreements between competitors

5.21 The CCA prohibits agreements among competitors (horizontal agreements) that substantially lessen competition (section 45). It also prohibits contracts, arrangements or understandings containing a cartel provision, or an exclusionary provision (known as a primary boycott, where competitors agree not to supply or acquire from particular persons or classes of persons).

Question:

Do the provisions of the CCA on cartels, horizontal agreements and primary boycotts operate effectively and do they work to further the objectives of the CCA?

5.22 Since June 2012, the CCA has also prohibited both the private disclosure of pricing or other information to a competitor, and the general disclosure of information where the purpose of the disclosure is to substantially lessen competition in a market (price signalling and other disclosures, under Division 1A of Part IV of the CCA). This conduct may not amount to an 'understanding', but may nonetheless have an impact on the level of competition in a market. At present, the provisions only apply to banking services.⁴¹

Question:

Should the price signalling provisions of the CCA be retained, repealed, amended or extended to cover other sectors?

5.23 Under the CCA, joint venture arrangements are exempted from the cartel provisions and the exclusionary provisions. Joint ventures are attractive to firms in highly dynamic industries, such as energy, health, information technology and financial services. Australian experience also points to a wide use of collaborative arrangements, such as tolling and co-production agreements in many traditional sectors such as in food processing, cement, quarrying and building materials.⁴²

Question:

Do the joint venture provisions of the CCA operate effectively, and do they work to further the objectives of the CCA?

⁴¹ Regulation 48, *Competition and Consumer Regulations 2010*.

⁴² OECD 2001, *Competition Issues in Joint Ventures*.

Agreements between suppliers and customers

- 5.24 The CCA also prohibits certain agreements between suppliers and their customers. Supply arrangements involving exclusive dealing that substantially lessen competition may raise concerns when one person trading with a second person imposes some restrictions on their freedom in dealing with others.
- 5.25 Some forms of supply agreements are prohibited *per se*, without having to demonstrate that they have an adverse effect on competition. Third-line forcing involves the supply of goods or services on condition that the purchaser acquires goods or services from a particular third party, or a refusal to supply because the purchaser will not agree to that condition. Third-line forcing is prohibited *per se*, that is, without the need to demonstrate any adverse effect on competition.

Question:

Do the provisions of the CCA on third line forcing operate effectively and do they work to further the objectives of the CCA?

- 5.26 Also prohibited *per se* is resale price maintenance (RPM), where suppliers set a minimum price below which retailers cannot sell their goods (section 48). There are different approaches to RPM around the world; some follow the Australian approach of prohibiting RPM regardless of its impact on competition, while others only prohibit it where it substantially lessens competition.⁴³

Question:

Do the provisions of the CCA on resale price maintenance operate effectively, and do they work to further the objectives of the CCA?

Secondary boycotts

- 5.27 The CCA also prohibits secondary boycotts, which involve action by two or more parties acting in concert, which hinder or prevent a third party such as a potential customer or supplier, from dealing or doing business with a target (sections 45D-45DB). In some circumstances, an employee organisation will fall within the secondary boycott provisions, where two or more of its members engage in conduct with each other (section 45DC).
- 5.28 However, the CCA exempts certain conduct from the prohibitions against secondary boycotts; for example, where the dominant purpose of the conduct relates to remuneration or conditions of employment (subsection 51(2)), or environmental or consumer protection (section 45DD).

43 See generally OECD 2008, [Policy Roundtable on Resale Price Maintenance](#); and, in relation to online sales, Baye, M 2013, [Vertical Restraints in Relation to Online Sales](#), Directorate for Financial and Enterprise Affairs Competition Committee, Organisation for Economic Cooperation and Development (OECD), DAF/COMP/WD(2013)17, 2013, pages 1-12.

Question:

Do the provisions of the CCA on secondary boycotts operate effectively, and do they work to further the objectives of the CCA?

Mergers and acquisitions

- 5.29 Mergers and acquisitions that have the effect or likely effect of substantially lessening competition in a market are prohibited (section 50). Under Australia’s merger law, it is not mandatory for merger parties to seek clearance prior to proceeding with a merger or acquisition, although for most significant mergers parties choose to do so. This approach can be contrasted with other major jurisdictions where there are mandatory merger clearance requirements.
- 5.30 Significant developments in merger control in Australia arising from the Dawson review include the introduction of an optional formal process for merger clearance (which to date has not been used) and a new process under which the Australian Competition Tribunal may authorise a merger on public benefit grounds (which has only been initiated twice).
- 5.31 The mergers and acquisitions provision was also amended in 2010 so that it now applies to a substantial lessening of competition in ‘any’ market, with no requirement that it be a ‘substantial’ market. In addition, there have been changes to the ACCC’s informal review process, and one merger (Metcash/Franklins) decided by the Federal Court (in favour of the merger parties).

Question:

Do the mergers provisions of the CCA operate effectively, and are they being applied effectively by regulators and the courts?

EXEMPTIONS, EXCEPTIONS AND DEFENCES UNDER THE CCA

- 5.32 The CCA provides a number of exceptions, exemptions and defences which mean that in some circumstances the CCA either does not apply to the conduct or it applies in a modified way. This is because there may be a public benefit from the conduct that outweighs any anti-competitive detriment in net terms, such that the conduct benefits the community overall.

Statutory exemptions and exceptions

- 5.33 In general terms, the exceptions apply to conduct regulated outside the CCA, or because there has been an assessment that some net public benefit flows from the conduct.⁴⁴ While there is a range of exceptions in section 51 (including for legislated exemptions, employment contracts

⁴⁴ Subsections 51(2) and (3) of the CCA (then known as s. 51(2) and (3) of the *Trade Practices Act 1974* (Cth)) were the subject of a comprehensive review in 1999. See National Competition Council 1999, [Review of Sections 51\(2\) and 51\(3\) of the Trade Practices Act 1974 — Final Report](#).

and intellectual property), questions have been raised about their appropriateness, including those relating to export contracts⁴⁵ and licensing of intellectual property rights.⁴⁶

Box 4: Liner shipping

Part X of the CCA provides a degree of immunity from competition laws for liner shipping services. This exemption for registered agreements (which may otherwise amount to cartel behaviour such as price fixing) was put in place due to concerns regarding cost, capacity and scheduling.

The Productivity Commission reviewed Part X in 1999, finding at the time that, on balance, it served Australia's national interest. However, in 2005 the Productivity Commission formed a different view, recommending that 'Part X be repealed, thus making the liner cargo shipping industry subject to the general provisions of the Trade Practices Act'.

In December 2013, a joint study by the Australian and New Zealand Productivity Commissions recommended that '[t]he Australian and New Zealand Governments should remove—preferably on a coordinated basis—the exemption for international shipping ratemaking agreements from legislation governing restrictive trade practices', with the result of increased competition and potentially lower costs for businesses. A Bill is currently before the New Zealand parliament that proposes to remove similar exemptions in New Zealand.

If the exemption were removed, these liner shipping arrangements would be subject to the general competition laws in Part IV of the CCA. As is the case for other sectors currently, authorisation from the ACCC would remain available if the benefits of such arrangements were found to outweigh their costs.

Question:

Do the statutory exemptions, exceptions and defences, including liner shipping, operate effectively, and do they work to further the objectives of the CCA?

45 See Sokol, D 2008, [What do we really know about export cartels and what is the appropriate solution?](#) *Journal of Competition Law & Economics* 4 (4) pages 967-982; and Jenny, F 2012, [Export Cartels in Primary Products: The Potash Case in Perspective](#), Trade, Competition, and the Pricing of Commodities page 99.

46 ALRC 2014, [Copyright and the Digital Economy](#), at 3.98.

Further reading:

Sokol, D 2008, [What do we really know about export cartels and what is the appropriate solution?](#), *Journal of Competition Law & Economics* 4 (4), pages 967-982.

Jenny, F 2012, [Export Cartels in Primary Products: The Potash Case in Perspective](#), *Trade, Competition, and the Pricing of Commodities*, page 99.

Australian Law Reform Commission 2013, [Copyright and the Digital Economy](#), at 3.98 and 8.67.

Standing Committee on Infrastructure and Communications 2013, [Inquiry into IT pricing At what cost? IT pricing and the Australia tax.](#)

Australian & NZ Productivity Commissions 2013, [Strengthening trans-Tasman economic relations.](#)

Productivity Commission 2005, [Review of Part X of the Trade Practices Act 1974: International Liner Cargo Shipping.](#)

Productivity Commission 1999, [International Liner Cargo Shipping: A Review of Part X of the Trade Practices Act 1974.](#)

Authorisations and notifications, including collective bargaining

- 5.34 The authorisation and notification procedures under the CCA provide for statutory immunity from ACCC and third-party action, subject to meeting the relevant requirements. In general terms, the ACCC may grant an authorisation if it is satisfied that there would be a benefit to the public from the conduct that outweighs the detriment to the public likely to result from any lessening of competition.⁴⁷ Where appropriate, the ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.⁴⁸
- 5.35 A more streamlined notification process is available for parties considering exclusive dealing arrangements,⁴⁹ small business collective bargaining (but not collective boycotts) and certain forms of price signalling, if the ACCC considers they are in the public interest.⁵⁰

47 Note that mergers may be formally cleared (s. 95AC) or informally reviewed (s. 50) by the ACCC, or authorised by the Australian Competition Tribunal (s. 95AT).

48 See for example [Victorian Association of Newsagents \(VANA Ltd\) — Authorisation — A91399](#).

49 See www.accc.gov.au/publications/guide-to-exclusive-dealing-notifications.

50 See www.accc.gov.au/publications/guide-to-collective-bargaining-notifications-2011.

Authorisation and notification for conduct that may raise competition concerns

Process available	Authorisation	<p>Price signalling — general disclosure</p> <p>Mergers</p> <p>Secondary boycotts for the purpose of causing substantial loss or damage</p> <p>Contracts, arrangements or understandings that restrict dealings or affect competition</p>	<p>Price signalling — private disclosure</p> <p>Exclusionary provisions</p> <p>Resale price maintenance</p> <p>Collective bargaining — more complex</p> <p>Cartel provisions — civil and criminal: price fixing, bid rigging, market sharing, output restrictions</p>
	Notification	<p>Exclusive dealing — non third line forcing</p>	<p>Price signalling — private disclosure</p> <p>Collective bargaining — small business focus</p> <p>Exclusive dealing — third line forcing</p>
		Substantial lessening of competition	Per se
Basis of prohibition			

Question:

Do the authorisation and notification provisions of the CCA operate effectively, and do they work to further the objectives of the CCA?

- 5.36 Under the CCA, collective bargaining is an arrangement where two or more competitors come together to negotiate with a supplier or a customer over terms, conditions and prices. The CCA facilitates this by allowing businesses to notify the ACCC of their intention to enter into an arrangement which might otherwise be caught by other provisions of the CCA.
- 5.37 Collective bargaining can occur in a range of different circumstances and recent examples include farmers in relation to raw milk supply and furniture removalists in relation to rail service agreements.⁵¹

⁵¹ See [Manning Valley Dairy Farmers Collective Bargaining Notification CB00282](#) and [RJ Nuss Pty Ltd and others Collective Bargaining Notification CB 00283](#).

Question:

How accessible is the collective bargaining process for small businesses, and can they use it without requiring substantial legal assistance or advice?

CODES OF CONDUCT—SETTING BEHAVIOURAL STANDARDS AND PROVIDING FOR DISPUTE RESOLUTION

- 5.38 Under the CCA, an industry code is defined as ‘a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry’.⁵²
- 5.39 The ACCC has noted effective codes potentially deliver increased consumer protection and reduced regulatory burdens for business.⁵³ To achieve this they must be well designed, effectively implemented and properly enforced.
- 5.40 However, codes can be prescriptive and are a form of industry-specific regulation. Additionally, some businesses may need to comply not just with the general law under the CCA but also multiple codes.
- 5.41 This raises broader questions as to whether codes under the CCA are, in practice, creating a regulatory cost which is out of proportion to the benefits sought.
- 5.42 The range and form of industry codes is explained in the table below:

Form of Code	Under the CCA?	Participants	Who enforces	Examples
Mandatory prescribed code	Yes, by regulation as an industry code	All parties who wish to participate in the industry are bound by the code	ACCC—can enforce provisions and audit compliance with the code	Franchising Code of Conduct Oil Code of Conduct Horticulture Code of Conduct Unit Pricing Code

52 See [subsection 51ACA\(1\) of the CCA](#). There are also other non-CCA industry codes with dispute resolution provisions such as the [Wine Industry Code of Conduct](#).

53 ACCC, [Voluntary Codes](#).

Form of Code	Under the CCA?	Participants	Who enforces	Examples
Voluntary (opt-in) prescribed code	Yes, by regulation as an industry code	Participants can opt in to the code; they can also opt out dependent on the provisions of the code itself	ACCC—can enforce provisions and audit compliance with the code	None declared to date but the proposed Food and Grocery Code may take this form. ⁵⁴
Voluntary between parties	May be authorised by the ACCC as an agreement among parties where it is satisfied that the public benefit from the arrangements or conduct outweighs any detriment	Participants can opt in or out dependent on the terms of the code itself	Depends on the provisions of the code but the ACCC doesn't enforce the code provisions ACCC unable to use its audit powers	Homeworker Code of Practice Clean Energy Code

Questions:

Is the code framework leading to a better marketplace, having regard both to the aims of the rules and the regulatory burden they could create?

What has been the experience of businesses in the use and implementation of codes of conduct?

Further reading:

ACCC 2011, [Guidelines for developing effective voluntary industry codes of conduct](#).

Australian Government 2011, [Policy Guidelines on prescribed industry codes under Part IV of the Competition and Consumer Act 2010](#).

REMEDIES, POWERS AND PECUNIARY PENALTIES

5.43 The CCA provides for a range of remedies, which are designed in various ways to punish and deter wrongdoing, and compensate those who have suffered as a result of contraventions.

⁵⁴ Australian Food and Grocery Council (AFGC) media release, [Food and Grocery Code agreed by supermarkets and food industry](#), 18 November 2013.

- 5.44 The CCA enables individuals to take their own private action; aggrieved parties can seek remedies, most commonly compensation by way of damages and/or injunctions to prevent and restrain conduct. As the regulator, the ACCC can seek a range of orders under the CCA against individuals and corporations, including declarations, injunctions, pecuniary penalties, adverse publicity orders, community service, compliance programs and probationary orders, and divestiture in the case of mergers.
- 5.45 There is also the ability for collective redress action by affected parties. In certain circumstances, the ACCC is also able to seek non-party redress orders such as having contracts cancelled or compensating affected parties.⁵⁵ Criminal fines and terms of imprisonment may also be sought against parties found to have engaged in cartel conduct.
- 5.46 Previous reviews have 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. The Hilmer Review noted that there was no demonstrated need for such a remedy and the Dawson review subsequently recommended that no such power be introduced. In March 2014, a private members Bill was introduced into the Australian Parliament to provide for a specific CCA divestiture remedy as a mechanism to address market power concerns.⁵⁶
- 5.47 The ACCC has a range of powers available as part of its competition enforcement toolkit, including audit powers for codes, statutory notices requiring the production of information, documents and for witnesses to give evidence, and search warrant powers. Telephone interception powers are also available for the investigation of criminal cartel conduct.
- 5.48 In relation to price monitoring, Part VIIA of the CCA provides for the ACCC or another nominated body to hold price inquiries in relation to the supply of goods and services at the direction of the Minister. These powers have their history in the prices surveillance role of the former Prices Surveillance Authority and were used to initiate and conduct inquiries into unleaded petrol in 2007 and groceries in 2008.

Box 5: Market studies

In the United Kingdom, the competition authorities can investigate markets where particular features of the market may give rise to anti-competitive effects which might not be captured by other competition law rules (in particular, the prohibition-based rules on anti-competitive agreements and abuse of dominance).

UK authorities have recently used this power to inquire into the supply of aggregates, cement and ready mix concrete, supply or acquisition of private health insurance and the supply of statutory audit services.

55 Under [section 239 of the Australian Consumer Law](#) (previously s. 87AAA of the TPA). See for example [Australian Competition and Consumer Commission v Yellow Pages Marketing BV \(No 2\) \[2011\] FCA 352](#) where the ACCC also sought and obtained successful non-party redress by having over 4,000 contracts declared void, preventing the collection of over \$6 million from a business directory scam. In [Australian Competition and Consumer Commission v Hewlett-Packard Australia Pty Ltd \[2013\] FCA 653 \(5 July 2013\)](#) the respondents were ordered by consent to compensate affected parties.

56 [Competition and Consumer Amendment \(Misuse of Market Power\) Bill 2014](#) (not yet debated at the time of publication).

Questions:

Are the enforcement powers, penalties and remedies, including for private enforcement, effective in furthering the objectives of the CCA?

The Panel is interested in whether there are other remedies or powers (for example, in overseas jurisdictions) that should be considered in the Australian context.

DISPUTE RESOLUTION AND PRIVATE ENFORCEMENT

- 5.49 While enforcing rights is a cost for all businesses, the Office of the Australian Small Business Commissioner, in its submission to the Productivity Commission's Access to Justice Arrangements inquiry, makes a range of points about small business disputes and dispute resolution involving small businesses.⁵⁷ These include issues such as the time taken for concerns to be raised, considered and resolved and that the costs associated with enforcing legal rights may be prohibitive and outweigh the claim being made.
- 5.50 Small businesses' ability to enforce their rights is also affected by the role of the ACCC.⁵⁸ The ACCC's compliance and enforcement focus is on addressing systemic issues with a particular trader, or in an industry or market and in most cases disputes will need to be resolved between the parties.
- 5.51 Small businesses may seek to enforce their rights through a range of options, such as negotiations with the other party, private dispute resolution, or a more formal resolution such as by way of a small business commissioner.
- 5.52 As noted previously, the law already recognises that consumers have unequal bargaining power. Aligned with that recognition is the ability of consumers to pursue more low-cost actions to enforce their rights. For example, the provisions in relation to unfair contract terms or unconscionable conduct allow for enforcement in the magistrates' courts.
- 5.53 Currently, the Federal Circuit Court of Australia (previously known as the Federal Magistrates Court) is limited in the matters it can hear under the competition provisions to section 46 or misuse of market power cases.⁵⁹ Other matters must be brought in the Federal Court of Australia.

Questions:

What are the experiences of small businesses in dealing with the ACCC?

Are there any factors that make it difficult for small businesses to enforce their rights or otherwise take action in relation to competition issues?

57 Productivity Commission 2013, [Inquiry into Access to Justice Arrangements](#).

58 ACCC 2014, [Compliance and Enforcement Policy](#).

59 [Section 86 of the CCA](#).

COMPETITION ISSUES IN KEY MARKETS

- 5.54 While competition laws are designed to restrain anti-competitive behaviour across the economy, there are some markets where competition-related concerns are frequently raised that may not amount to a breach of the existing laws. These markets are usually characterised by features such as a relatively high degree of concentration and/or vertical integration of large businesses through a supply chain. Competition laws are not designed to prevent firms from having a strong position in a market or from pursuing efficiencies.
- 5.55 The most oft-cited markets where stakeholders have raised concerns in recent times include the grocery and petrol markets. The Terms of Reference make it clear that an important issue for the Review is to consider the impact of concentration and vertical integration in key Australian markets on the welfare of Australians.
- 5.56 Recently, there has been considerable public discussion about the concentration and high degree of vertical integration in the supermarket sector, despite some large-scale new entrants to the market in recent years.⁶⁰ Much of the public debate has focused on whether the activities of the major supermarket chains are harming suppliers, including some primary producers, and potentially leading to outcomes that are not in the long-term interests of consumers.
- 5.57 In 2008, the ACCC conducted an inquiry into the competitiveness of retail prices for standard groceries, which found that the groceries market was workably competitive, but that there were relatively high barriers to entry (including due to planning restrictions) and limited incentives for broad ranging price competition. Similarly, the UK Competition Commission's 2008 market investigation into the supply of groceries in the UK found that, in many respects, competition in that market is effective and delivering good outcomes for consumers, but with concerns about barriers to entry and excessive transferral of risks to suppliers.
- 5.58 The major supermarket chains have been heavily involved in the development of a draft code of conduct for supermarket/supplier relationships.
- 5.59 Petrol retailing is often at the forefront of consumers' minds, as it is subject to frequent price fluctuations.
- 5.60 This sector has been under substantial scrutiny in recent years, with the ACCC conducting an inquiry into the price of unleaded petrol in 2007 and formally monitoring the petrol market since 2008. The major supermarket chains have agreed to limit 'shopper docket' discount promotions following concerns raised by other industry players and the ACCC.⁶¹ Proceedings have subsequently been commenced regarding the terms of the Undertakings and whether they have been fully complied with.⁶²

60 Aldi first entered the Australian market in 2001 and Costco in 2009.

61 ACCC media release [Coles and Woolworths undertake to cease supermarket subsidised fuel discounts](#).

62 Woolworths Limited media release [Woolworths seeks clarification on petrol discounts](#) and ACCC media release [ACCC takes action against Coles and Woolworths for allegedly breaching fuel shopper docket undertakings](#).

Questions:

Are there issues in key markets that raise competition concerns not addressed by existing anti-competitive conduct laws? If so, in which ways might they be addressed through competition-related policies?

Further reading:

Productivity Commission 2002, [Review of the Prices Surveillance Act 1983](#).

ACCC 2007, [Petrol prices and Australian Consumers: Report of the ACCC inquiry into the price of unleaded petrol](#).

ACCC 2008, [Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries](#).

ACCC 2013, [Monitoring of the Australian petroleum industry 2013 — Report of the ACCC into the prices, costs and profits of unleaded petrol in Australia](#).

6. ADMINISTRATION OF COMPETITION POLICY

The Terms of Reference

Parts 3 and 4 of the Terms of Reference ask the Review to consider whether the institutional framework that supports competition law and policy in Australia is working effectively.

- 6.1 In 1995, the Council of Australian Governments (COAG) agreed to the National Competition Policy (NCP) institutional framework, namely:
- competition principles supported by payments from the Australian Government to States and Territories when competition reform milestones were met—the National Competition Council (NCC) was established to oversee this; and
 - the establishment of the Australian Competition and Consumer Commission (ACCC) as the principal competition regulator under the *Competition and Consumer Act 2010* (CCA).
- 6.2 In addition, other regulators and regulatory bodies interface with the competition law and competition-related issues, for example, other Federal bodies (other than the ACCC) that can exert an impact on competition issues, and bodies within States and Territories dealing with competition issues.

Key question:

Are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?

INSTITUTIONAL STRUCTURE FOR COMPETITION POLICY

- 6.3 Box 2 in Chapter 1 outlines the elements of the NCP framework as set out in agreements between the Australian Government and the States and Territories.
- 6.4 States and Territories generally met their obligations and received competition policy payments. These payments came to an end in 2006. The future institutional structure will be as important as the policy itself in creating a self-sustaining process of continual reform and reassessment.

Key question:

What institutional arrangements would best support a self-sustaining process for continual competition policy reform and review?

Question:

Was the Council of Australian Governments competition agenda, with reform payments overseen by the National Competition Council, effective?

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

- 6.5 The ACCC is an independent statutory authority whose role is to enforce the CCA and a range of additional legislation, promote competition and fair trading, and regulate national infrastructure—for the benefit of all Australians. The ACCC’s Compliance and Enforcement Policy⁶³ sets out the principles it adopts to achieve compliance with the law.
- 6.6 The ACCC also has an administrative decision-making role, having the power to permit certain conduct that would otherwise contravene Part IV. The ACCC also has a role in relation to the national access regime (discussed above); in particular, it is involved in the arbitration of access disputes, the registration of access contracts and may assess and accept undertakings from providers of declared services. Separately, the ACCC is responsible for the economic regulation of the communications sector, including telecommunications and the National Broadband Network, broadcasting and content sectors.
- 6.7 The ACCC also has general functions of disseminating information about the CCA, law reform and research.⁶⁴

AUSTRALIAN COMPETITION TRIBUNAL

- 6.8 The Australian Competition Tribunal (ACT) is established under Part III of the CCA and is given jurisdiction to review various decisions of the ACCC, the NCC and other state agencies that have powers under state access regimes.
- 6.9 The ACT is constituted by a Federal Court judge and two members who have experience in industry, commerce, economics, law or public administration.⁶⁵

OTHER FEDERAL REGULATORY AGENCIES AND BODIES

- 6.10 In undertaking its general role, the ACCC, incorporating the Australian Energy Regulator (AER) as a constituent part, interacts with other Federal agencies or bodies such as the Australian Securities and Investments Commission (ASIC) in relation to financial services and the Foreign Investment Review Board (FIRB) in relation to approval of a foreign investment which also raises competition issues.
- 6.11 While not a regulatory body, the majority of cases initiated by the ACCC are heard in the Federal Court of Australia. The Federal Court also hears appeals from the Australian Competition Tribunal.

63 ACCC 2014, [Compliance and Enforcement Policy](#).

64 Section 28 of the CCA.

65 Section 31 of the CCA.

Question:

What is the experience of businesses in dealing with the ACCC, the Australian Competition Tribunal and other Federal regulatory bodies?

STATE AND TERRITORY REGULATORS

6.12 Each state and territory jurisdiction has its own competition regulator that performs various specific jurisdictional functions, such as determining regulated prices for retail energy, water and transport services and access to essential services or infrastructure not regulated by the ACCC or AER.

State or Territory	Regulator
New South Wales	Independent Pricing and Regulatory Tribunal
Victoria	Essential Services Commission
Queensland	Queensland Competition Authority
Western Australia	Essential Services Commission
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

Question:

What is the experience of businesses in dealing with state and territory regulators?

APPENDIX A — CONSOLIDATED LIST OF QUESTIONS

- 1. COMPETITION POLICY8**
 - What should be the priorities for a competition policy reform agenda to ensure that efficient businesses, large or small, can compete effectively and drive growth in productivity and living standards?11

- 2. REGULATORY IMPEDIMENTS TO COMPETITION12**
 - Are there unwarranted regulatory impediments to competition in any sector in Australia that should be removed or altered?12
 - Are there import restrictions, bans, tariffs or similar measures that, on balance, are adversely affecting Australians?13
 - Is there a case to regulate international price discrimination? If so, how could it be regulated effectively while not limiting choice for consumers or introducing other adverse consequences?13
 - Should any current restrictions on parallel importation be removed or altered in order to increase competition?14
 - Are there regulations governing the sale of goods for health and safety or environmental reasons whose purpose could be achieved in a manner more conducive to competition?14
 - Are there any restrictions on the export of goods from Australia which should be removed or altered in order to increase competition for exporters and producers, and choice for consumers?15
 - Are there occupational-based restrictions, or restrictions on when and how services can be provided, that have an unduly adverse impact on competition? Can the objectives of these restrictions be achieved in a manner more conducive to competition?.....15
 - Are there restrictions arising from IP laws that have an unduly adverse impact on competition? Can the objectives of these IP laws be achieved in a manner more conducive to competition?16
 - Are there planning, zoning or other land development regulatory restrictions that exert an adverse impact on competition? Can the objectives of these restrictions be achieved in a manner more conducive to competition?16

- 3. GOVERNMENT-PROVIDED GOODS AND SERVICES AND COMPETITIVE NEUTRALITY.....17**
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 - Is there a need for further competition-related reform in infrastructure sectors with a history of heavy government involvement (such as the water, energy and transport sectors)?.....19
 - What are the competition policy reform priorities in sectors such as utilities, transport and telecommunications?21
 - Does competitive neutrality policy function effectively, and does it apply to the appropriate government business activities?22
 - Has the method of implementing competitive neutrality principles improved competition and productivity?22
 - What are the disadvantages that private businesses face when competing with government business activities?22
 - Could the mechanism for dealing with competitive neutrality complaints be improved?22

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 - Would there be a net public benefit in encouraging greater competition and choice in sectors with substantial government participation (including education, health and disability care and support)?24
 - Can more competitive outcomes in the human services sector enhance both Australia’s productivity and the quality of human services delivered to Australian citizens?.....25

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APPENDIX B — 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.